

JUDGMENT : HHJ Bergin : Supreme Court of New South Wales. 14th March 2006.

- 1 These are urgent applications brought by way of Notices of Motion for orders that I made on 8 March 2005 in matters numbered 55005/06 and 55007/06 be revoked.
- 2 In matter 55005/06, between Shell Refining (Australia) Pty Ltd (Shell), as plaintiff, and A J Mayr Engineering Pty Limited as defendant (Mayr), to which I will refer as the administrative law proceedings, I handed down judgment on 6 March 2006 dismissing Shell's Summons challenging the determination issued by the adjudicator pursuant to the *Building and Construction Industry Security of Payments Act 1999* (NSW) (the Act) ordering Shell to pay Mayr \$11,228,898.63: **Shell Refining (Australia) Pty Ltd v A J Mayr Engineering Pty Limited** NSWSC 94. The administrative law proceedings were listed on 8 March 2006 for the entry of orders at which time Mr M Christie, of counsel, on behalf of Shell, made an application for a stay.
- 3 At the same time, proceedings 55007/06 in which Mayr, as claimant and Shell as respondent, were listed for the entry of orders. Those proceedings were commenced by Mayr filing an Adjudication Certificate issued by the authorised nominating authority together with a minute of judgment against Shell for the adjudicated amount.
- 4 The orders that I made are contained in the record of proceedings conveniently in matter number 55007/06. Those orders are as follows:
 1. By consent I make the orders in the short minutes of order initialled by me and dated today.
 2. In respect of the costs of the motion to stay the proceedings each party is to pay its own costs.
- 5 During the debate in respect of the stay application I indicated to the parties and, in particular to counsel for Shell, Mr M Christie, that I was minded to condition any stay, as short as it might be to give Shell the opportunity to approach the Court of Appeal, upon the basis that the part of the total amount of \$11.2 million that was not the subject of the challenge be paid out, and that the balance be paid, or remain, in court. Mr Christie indicated he would need to take some instructions. I then adjourned and the parties returned later with some Short Minutes of Order.
- 6 In those circumstances it was not necessary for me to give any reasons or to set out the basis upon which I proceeded to make the order which is contained in the Short Minutes of Order in the following terms:
 1. That the orders entered in proceedings 55005/06 and 55007/06 be stayed until 5pm on Monday 13 March 2006.
 2. That the sum of \$4,942,716.00 provided as part of a total security for \$11,228,898.63 in proceedings 55007/06 by Shell be paid out of court to Mayr forthwith.
- 7 The Short Minutes of Order in matter 55007/06 included the following order: *The sum of \$11,228,898.63 paid into court by the defendant be paid out of court to the plaintiff.*
- 8 The money was paid into Court by Shell and the amount of \$4.9 million odd was paid out to Mayr. I accept Mr Christie's recollection that he did not oppose, as distinct from consented to, the making of the orders. That is a little different from the way the orders appear in the record of proceedings with the words "by consent", but that is clearly an error. In any event the difference between those two terms in this instance, in my view, does not have an impact on the outcome of this application.
- 9 That transcript of what occurred on 8 March 2006 includes the following:

COUNSEL ADDRESSED.
(Mr Christie confirmed money was paid into court and the defendant/ applicant was willing to continue that. He handed up prepared figures in relation to the balance of the money. Discussion ensued.)
- 10 I should say that what occurred at this time was that the figures handed up by Mr Christie related to a figure of some \$5 million, which was the amount that was contained in the 8 August 2005 claim prior to it being adjusted by the two letters later in the year in September and December referred to in my judgment. I indicated that to Mr Christie and the transcript then continues:

(Her Honour indicated the relevant figure was \$4,942,716 being the figure obtained when \$6,286,182 was deducted from \$11,228,898. Mr Christie indicated he wished to obtain instructions on that final figure by telephone. Her Honour indicated to Mr Rudge she would grant a stay of three days on the condition the balance of \$4,942,716 was paid immediately and the balance remained in court. Her Honour indicated the stay would be granted up to and including Monday next week at 5pm.)

(Mr Rudge indicated, if her Honour was minded to make such an order, that would not be opposed. He added there should be some obligation on the defendant to prosecute any further application with diligence.)

(Following her Honour's pronouncement of the order she intended to make, Mr Christie confirmed he still needed to obtain instructions by telephone and sought a short adjournment for that purpose.)
- 11 The transcript then notes that the matter stood in the list, it being the case that I was sitting as duty judge in the general list of the Equity Division The next entry in the transcript is important. It is:

(Mr Rudge handed up agreed short minutes of order.)
HER HONOUR: They are not consent orders but they are orders that the parties do not oppose. Is that right?
CHRISTIE: In light of your Honour's decisions, that is correct.
"In both matters I make the orders in the short minutes of order initialled by me and dated today."

- 12 What occurred next is the reason the parties have come before me today on an urgent basis. On Monday 13 March 2005 the parties attended before the Court of Appeal so that Shell could seek a stay of the orders beyond 5pm that day. Although there is no transcript of what occurred before Tobias JA, who heard the application, Mr Christie's written submissions include paras 13-15 headed "First Basis for the Stay". After setting out the terms of s 25(4)(b) of the Act in paragraph 13, the submissions continue:
14. *The Act contains its own mechanism for preserving the rights of the parties in circumstances where a respondent to a claim contends that the purported adjudication determination is void.*
In essence, s 25(4), in a practical sense, confers a right to a stay pending determination of the validity of the (purported) adjudication determination.
Section 25(4) also confers a considerable benefit upon a claim in such circumstances.
The claimant obtains immediate access to the adjudicated amount in the event that the court finally determines that the adjudication determination is not void, without having to pursue recovery which could, in many cases, have practical difficulty.
15. *Shell respectively submits 'that the final determination' of the application to set aside the judgment pursuant to s 25(4)(b) will not occur until the Court of Appeal disposes of the appeal. There are two reasons why such construction of s 25(4)(b) ought to be adopted.*
(i) As a matter of statutory construction it reflects the most natural reading of s 25(4)(b).
(ii) It accords with the underlying s 25(4)(b)."
- 13 During the course of debate before Tobias JA, it is apparent that his Honour said something about s 25(4) going to jurisdiction of the court rather than being a basis for a stay. It is apparently that observation and a suggestion that if the matter went to jurisdiction the appropriate course may be to come to the trial judge who made the orders for the purpose of application for revocation of them, that caused Shell to make these applications.
- 14 The written submissions before Tobias JA also included the following:
Although Shell sought, before Bergin J, a stay with respect to the entire amount (\$11,228,898) it does not, in this application, oppose the approach adopted by her Honour. Though in all the circumstances such approach may be seen as striking a balance between the parties it fully protects the opponent as well as giving it immediate access to the sum of \$4,842,716 whilst protecting Shell from the risk its appeal would be rendered nugatory.
- 15 That is a little at odds with what is happening here today.
- 16 As can be seen from that transcript, albeit in a summary form, the parties did not oppose the orders being made. That seems to me to be a matter of importance. Once a party embraces the jurisdiction of the Court, which Shell did, by commencing the administrative law proceedings and Mayr did in the other proceedings it is subject to the powers of the Court under the *Civil Procedure Act 2005* he *Uniform Civil Procedure Rules 2005*.
- 17 Section 25 of the Act provides:
25 Filing of adjudication certificate as judgment debt
(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
(4) If the respondent commences proceedings to have the judgment set aside, the respondent:
(a) is not, in those proceedings, entitled:
(i) to bring any cross-claim against the claimant, or
(ii) to raise any defence in relation to matters arising under the construction contract, or
(iii) to challenge the adjudicator's determination, and
(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.
- 18 It was submitted by Shell that s 25(4)(b) requires that the adjudicated amount be paid into Court and that it must remain in Court until the proceedings are finally determined. Thus it was submitted the order I made was without jurisdiction
- 19 Firstly, I do not agree with that construction of s 25(4)(b) of the Act. I am of the view that the legislature would not have intended to fetter a judge's discretion generally in relation to security in the hands of the Court. It also seems to me, in particular, that the legislature would not have intended to fetter a judge's discretion to order that such part of the amount paid into Court that was not in issue could be paid out, if the dictates of justice required such order. If such was intended it would have to be by very clear provisions indeed. There are no such provisions.
- 20 I am not satisfied that I should grant the relief sought. The Motions are dismissed.
- 21 Mayr seeks costs of the Motions on an indemnity basis. It is submitted this application should never have been brought having regard to what occurred on 8 March 2006, the subject of the judgment that I have just delivered.
- 22 On this occasion I do not intend to exercise my discretion to grant indemnity costs. It appears, and I accept from Mr Christie, that his client was concerned to ensure that its position was protected in the Court of Appeal. It

appears that Tobias JA's observations set a hare running that was pursued in an application that was unsuccessful: **Goldsmith v Sandilands** (2002) 76 ALJR 1024. This is not a case that was hopeless from the outset. It was a case that ultimately failed, but there was at least a question as to whether the non-opposition of the orders I made on Wednesday 8 March amounted to what I regard as the end of the matter. Ultimately, the basis upon which I decided the matter was that I took the view that the legislature could not have intended s 25(4) (b) to fetter the discretion of a Supreme Court judge in dealing with security paid into the Court.

- 23 In all those circumstances I am not minded to award indemnity costs. However, I am of the view that the costs should be payable forthwith as agreed or assessed.
- 24 I order that Shell Refining (Australia) Pty Limited pay A J Mayr Engineering Pty Limited costs of the motions forthwith as agreed or assessed.

M Christie (Plaintiff in 55005/2006, Defendant in 55007/2006) instructed by Freehills

M Rudge SC; F Hicks (Defendant in 55005/2006, Defendant in 55007/2006) instructed by Mallesons Stephen Jacques