JUDGMENT Campbell J : New South Wales Supreme Court **:** 16th September 2005

1 This is an application for costs of two interlocutory proceedings.

2 Proceedings 55043/04 were brought by Barclay Mowlem Construction Limited ("**Barclay Mowlem**") against Tesrol Walsh Bay Pty Limited ("**Tesrol Walsh Bay**"). Barclay Mowlem was carrying out building work for Tesrol Walsh Bay, and in those proceedings sought payment under the provisions of the ***Building and Construction Industry Security of Payment Act 1999*** of the amount an adjudicator had held was owing in relation to a payment claim which it had made. Judgment was given by McDougall J in those proceedings on 13 December 2004, in favour of Barclay Mowlem, in a sum of the order of $1.16 million plus costs. The order of McDougall J was not appealed from.

3 Proceedings number 55080/04 are proceedings in which Tesrol Walsh Bay sues Barclay Mowlem seeking a final hearing of matters related to the amounts which are payable on a final basis by Tesrol to Barclay Mowlem in connection with the same building project.

4 The amount of McDougall J's judgment was not paid by Tesrol Walsh Bay for some time. There were indications, in communications between the solicitors for the two parties, that the judgment debt would be paid fairly soon, but *"fairly soon"* did not arrive until late May 2005.

5 There were steps taken by Barclay Mowlem to seek to enforce the judgment debt. One of them was the issuing of a garnishment notice to the Commonwealth Bank. Another was the issue of a subpoena to the Commonwealth Bank, on 19 April 2005.

6 The Court had, on 8 April 2005, ordered that certain examinations of officers of Tesrol Walsh Bay take place. Those examinations occurred, on 29 April 2005.

7 Tesrol Walsh Bay does not dispute that a judgment creditor is entitled to recover costs properly incurred in steps properly taken to enforce a judgment in its favour. Its contention before me is that the steps which were taken were not proper ones, at least so far as the subpoena to the Commonwealth Bank is concerned.

8 Mr Gray, for Tesrol Walsh Bay, submitted to me that there was no power in the Court to issue a subpoena in aid of enforcement, in circumstances such as occurred in the present case. I simply do not accept that that is so. Part 37 rule 2 ***Supreme Court Rules 1970*** (which then applied) allowed the issue of a subpoena only *"in any proceeding"*. At the time the subpoena was issued there was on foot an extant application to the Court, namely for examination of officers under Part 43 rules 1 and 2 ***Supreme Court Rules 1970***. That counted as a *"proceeding"* for the purposes of Part 37 ***Supreme Court Rules 1970***. There has been no attempt today to demonstrate that the subpoena actually issued was not one which served a legitimate forensic purpose in connection with that examination. At no time has the Court set the subpoena aside. That examination was one which, in the ordinary course of things, would investigate the financial affairs of the judgment debtor, and what assets it had which might be available to pay the judgment debt. There is nothing about the bare fact of issue of a subpoena to the Commonwealth Bank (which I infer was a banker of Tesrol Walsh Bay) which suggests that the issue of the subpoena was outside the scope of that legitimate forensic purpose.

9 The next item which is contested is the costs of a notice of motion taken out on 3 May 2005 by Barclay Mowlem in proceedings 55080/04. That notice of motion sought an order that the proceedings be stayed until further order of the Court, and an order that the plaintiff provide the defendant with security for costs.

10 The basis of the application for stay was intended, it appears, to be that Tesrol Walsh Bay was in contempt of the Court in consequence of not having paid the judgment debt in proceedings 55043/04, and consequently should not be heard in proceedings 55080/04. As things eventuated, that question did not need to be argued, as Tesrol Walsh Bay entered an agreement to pay the amount of the judgment debt. That agreement required the amount of the judgment debt to be paid, with interest, on or before 26 May 2005, and orders in accordance with that agreement were duly made.

11 Mr Gray puts to me that there was a legitimate reason for the initial opposition to payment, namely that his client had some concerns about the ability of Barclay Mowlem to repay the amount of the judgment, if Tesrol Walsh Bay were to succeed in the proceedings for final relief. Mr Gray says that those concerns were able to be satisfied, and hence there was no need to maintain any opposition to paying the judgment debt.

12 The same notice of motion also sought an order for security for costs. Initially, the claim for security was resisted, but, on 9 June 2005, Tesrol Walsh Bay agreed to provide security. The orders granting that security made provision for Barclay Mowlem to seek further security if it wished. It indicated, some months later, that it did wish to obtain further security. By letter of 8 September 2005, Tesrol Walsh Bay's solicitors stated that any application for further security would be opposed.

13 Yet notwithstanding that statement, on 9 September Tesrol Walsh Bay consented to a payment of a further sum of $70,000 as security.

14 The question of the costs of the notice of motion have been reserved, and come before me today.

15 Mr Sibtain, for Barclay Mowlem, seeks costs under Part 42 Rule 10 ***Uniform Civil Procedure Rules 2005***, which enables the Court to order a party to pay such of the other parties' costs as are occasioned by that party's failure to comply with a judgment or order of the Court.

16 In my view, the costs of the examination summons, the garnishment notice, the subpoena, and the motion insofar as it sought a stay, were all costs which fall within that head of power.

17 When the steps which were taken were ones which proved successful, in that the judgment amount was ordered to be paid on 26 May 2005, those costs are ones which fall within the scope of the Rule. They should be paid by Tesrol Walsh Bay.

18 The application for stay is one which was rendered unnecessary by the agreement to pay the judgment sum. When an application is made to the Court for an order for costs, in connection with an application which for one reason or another has not proceeded, the Court does not usually engage in an exercise of prediction of how that application would have fared had it been run: ***Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin*** (1997) 186 CLR 622 at 624-5. If the application is one which has been settled, frequently the Court orders each party to bear their own costs, unless one party has behaved unreasonably, so that there is a justification for departing from that default position. However, the overall discretion of the Court remains.

19 In my view, the costs of seeking the stay were a legitimate part of the attempt to obtain payment of the judgment sum. Further, they were totally successful, as, faced with the motion, Tesrol Walsh Bay capitulated. For that reason, they should be paid by Tesrol Walsh Bay. I do not regard Mr Gray telling me from the Bar table that that occurred for a reason not connected with the merits of the application, as a reason for deciding otherwise.

20 The costs of the security for costs application are, it seems to me, in a different situation. They ought be made the costs of Barclay Mowlem in the proceedings.

21 I make orders in accordance with short minutes of order which I initial date today's date and shall place with the papers.

D Sibtain - Barclay Mowlem Construction instructed by Gadens Lawyers - Barclay Mowlem Construction
V Gray - Tesrol Walsh Bay instructed by Malcolm Johns & Company - Tesrol Walsh Bay