Procorp Civil P/L v Napoli Excavations and Contracting P/L, Anthony Veghelyi & Mediate Today P.L t/a Adjudicate Today

JUDGMENT : **Einstein J :** Equity Div. T&C List : New South Wales Supreme Court : 21st April 2006

The applications before the Court

1 The applications before the Court follow unsuccessful proceedings 55016 of 2006 ["the second proceedings"] brought by Procorp to have:

i. the Court declare void, a determination made under the *Building and Construction Industry Security of Payment Act 1999*;

ii. orders that Napoli be permanently restrained from taking any steps to enforce the judgment which it obtained in the District Court following its having filed an adjudication certificate based on the determination;

iii. declarations made to the effect that the adjudication certificate was void and that Napoli had no grounds to resist the District Court judgment being set aside.

2 Judgment in the second proceedings was handed down on 29 March 2006 [2006] NSWSC 205. It is inappropriate to repeat the record. The content of the judgment is taken as necessary background to these reasons.

3 The applications presently before the Court deal with the question of whether or not moneys paid into the Court should now be ordered to be paid out to Napoli.

The scheme of the Act

4 The scheme of the Act is reasonably well understood by now. As between a claimant and a respondent, a determination in favour of a claimant and the subsequent entry of judgment against a respondent, does not determine the final legal rights of the parties. The scheme involves an interim approach aimed at ensuring a fast track determination of the rights of a claimant, in situations where quite commonly the claimant will be in particular need to receive progress payments. Once the Court has rejected claims to set aside a determination or to prevent the claimant being entitled to either obtain or to enforce a judgment, it is particularly important for the Court, sensitive to the statutory scheme, to ensure that the claimant be not held out from its success pursuant to the scheme.

5 There is however no doubt but that where a respondent is able to satisfy the Court that on the evidence, payment by it of moneys which a determination requires be paid to the claimant, would mean that the claimant will not be in a position to repay those moneys should it ultimately fail when the parties legal rights inter se are finally adjudicated or that the risk is very high, the Court will intervene cf ***Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico*** [2004] NSWSC 344 and ***Herscho v Expile Pty Ltd*** [2004] NSWCA 468 at [3], [7]. In short the statutory scheme is not intended to denude an unsuccessful respondent in the determination process, from losing as a matter of the "real world", its chances of having moneys repaid to it in the event that it was to succeed on a final hearing of the party's rights.

The two parameters

6 One parameter of the applications presently before the Court involves precisely this issue. Procorp has sought to establish that if the moneys which have been paid into Court are now ordered to be paid out to Napoli, there is a sufficiently high prospect that should Napoli ultimately fail when the parties legal rights are finally determined, Napoli will not be able to repay the moneys which it will have received.

7 There is another parameter of the applications presently before the Court which falls outside what would usually be likely to occur. This concerns the company Hopeshore Pty Ltd, which carried on business in providing excavation and formwork for major building companies. By a deed of charge dated 3 September 2004 Hopeshore granted a fixed and floating charge over all of its undertaking, property rights, present and future, to Procorp as security for past, present and future advances and other financial accommodation provided by Procorp, to a maximum prospective liability of $1.9 million.

8 The sole director of Hopeshore at the time of creation of the Charge was Mr Del Ben. The sole director of Procorp at the time of creation of the Charge was Mrs Michelle Bechini [whose maiden name was Michelle Del Ben], the daughter of Mr Del Ben.

9 Hopeshore will receive careful attention in the reasons below. Mr Guerrera, a director of Napoli, has given evidence that he is concerned that particular sales [also to be referred to in the reasons below] are part of an asset stripping exercise by Procorp in favour of Mrs Bechini or other entities under her control.

10 The evidence before the Court is that the Bank of Queensland Limited has filed an application for a winding up order against Procorp claiming a debt due of $83,035.75 for hearing on 15 May 2006.

The context

11 It will be necessary to follow the context in which the second proceedings followed hard on the heels of the commencement of earlier proceedings ["the first proceedings"] and importantly, to understand the proper inferences to be drawn from the payment into court by the receivers of Hopeshore of the sum of $202,254.36.

12 In this regard it is important to note that as a general rule [and in similar fashion to the approach taken where a mortgagor seeking to restrain a mortgagee sale, will be required to pay moneys into Court], the Court will require a respondent in proceedings under the Act seeking to have a judgment set aside [or impugned by collateral claims to declaratory relief or similar], to pay the unpaid portion of the adjudicated amount into Court

as security pending the final determination of the proceedings. Indeed s 25 (4) of the Act provides inter alia as follows: *"If the respondent commences proceedings to have the judgment set aside, the respondent… is required to pay into the Court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings."*

13 Napoli contends that the resistance by the receivers of Hopeshore, to the Court now ordering that moneys paid into Court by the receivers be paid out to Napoli, quite simply constitutes Procorp, by a second route, endeavouring to outflank Napoli's legitimate present entitlement, it having succeeded in having its determination relevantly upheld, from obtaining the fruits of that success, contemplated by the fast track procedures set up by the statutory scheme.

Returning to the facts

14 It is important to travel slowly and carefully through the background history. I proceed accordingly.

The first set of proceedings

15 The first set of proceedings were commenced in this Court on 16 February 2006. Napoli was the plaintiff. Procorp was the first defendant. Pickles Auctions Pty Ltd was the second defendant.

16 Ex parte relief was granted by the Equity Duty Judge restraining Procorp from receiving from Pickles Auctions, moneys received by it as proceeds of an auction of goods owned by Procorp.

17 Pickles Auctions was ordered to retain for a period, all of the moneys which it received from the proceeds of that auction. Those orders were slightly varied on 17 February 2006, when the description of the subject goods was extended to include "goods owned by or charged in favour of Procorp".

18 The affidavit in support of the application for urgent interlocutory relief, which is also presently before the Court on the instant applications, proved that the charge over Hopeshore had been called up. A liquidator had been appointed of Hopeshore on 25 August 2005.

19 The affidavit read in support of the claim to injunctive relief included evidence of a number of creditors who were owed monies by Procorp. It included evidence that the deponent Mr Guerrera had learned that Procorp intended to auction its principal working equipment, and that following the service of a garnishee order for debts on the Commonwealth Bank of Australia in relation to known bank accounts of Procorp, the deponent had been informed that the company had less than $1000 in a relevant account. The injunctive relief was sought by reason of Pickles Auctions [having been appointed as agents of the then receivers of Hopeshore] to sell equipment belonging to Procorp. The deponent deposed that other than the equipment to be auctioned, Procorp had minimal assets and that the deponent was concerned that the remaining assets were insufficient to satisfy Napoli's judgment, nor even sufficient for Procorp to continue to operate effectively. He deposed to having a real fear that if the proceeds of the auction were to be paid to Procorp or directly to Ms Bechini, the proceeds would be disgorged and dissipated without Napoli's judgment being satisfied and that it would suffer irreparable harm.

The appointment of the receivers

20 It is common ground that by Deed of Appointment dated 20 July 2005, Procorp exercised its power under the Charge to appoint Mr Richard Porter and Mr David Mansfield as receivers of the mortgaged property and to exercise all the powers, authorities and discretions of Procorp contained in the Charge.

21 Pursuant to the terms of the Charge, the Receivers are empowered, *inter alia*, to:-

(a) take possession, collect and get in the whole or any part of the Mortgaged Property (subclause 25(b)(i));
(b) carry on or concur in carrying on Hopeshore's business (subclause 25(b)(iii));
(c) sell or otherwise dispose of or concur in selling or otherwise disposing of either Hopeshore's business and assets as a going concern, or all or any part of its Mortgaged Property (subclause 25(b)(vi));
(d) make any arrangement or compromise which such Receiver shall think expedient in the interest of Procorp (subclause 25(b)(vii); and
(e) do all such other acts and things without limitation as such Receiver shall think expedient in the interest of Procorp (subclause 25(b)(xviii).

22 On 27 February 2006 the first proceedings were before the Court and on that occasion Napoli was represented, Procorp was represented, and Mr Brown is noted as having appeared for the receiver of Hopeshore.

23 The consent orders made on 13 March 2006 were in the following terms:

BY CONSENT and upon the plaintiff by its counsel giving to the Court the usual undertaking as to damages orders:

1. That Richard James Porter and David Ian Mansfield as receivers for Hopeshore Pty Limited [ACN 002 380 305] be joined as second defendant to these proceedings.
2. That the orders made on 16 February 2006 and continued on 17 February 2006 and on 27 February 2006 be dismissed.
3. That the second defendant (Richard James Porter and David Ian Mansfield as receivers for Hopeshore Pty Limited [ACN 002 380 305]) receive from Pickles Auctions Pty Ltd forthwith $441,000.00 and all other monies and properties from the proceeds of the auction of goods owned by or charged in favour of the first defendant.
4. That the second defendant (Richard James Porter and David Ian Mansfield as receivers for Hopeshore Pty Limited [ACN 002 380 305]) pay $202,254.36 into Court within 24 hours of its receipt from Pickles Auctions Pty Ltd pending further order of the Court.

4A That the second defendant hold the amount of $40,000 from the proceeds of sale referred to in order 3 pending the application for security for costs to be made by Napoli Excavations in the proposed Technology and Construction List proceedings to be commenced by Procorp Civil Pty Ltd on 14 March 2006 until further order.

5. That costs be reserved.

6. These proceedings are transferred to the Technology and Construction List and are listed for hearing at 10am on15 March 2006.

7. The Court notes that Pickles Auctions Pty Ltd is not restrained in any way by these orders from paying to Michelle Rena Bechini the proceeds from the auctions of goods owned by her.

8. The proposed proceedings referred to in order 4a are listed for hearing on 15 March 2006.

9. These orders be entered forthwith.

The Court further orders:

10. Liberty be granted to apply on 1 hours' notice.

24 That order was taken out on 14 March 2006.

25 In the result it eventuates that on the very day prior to the commencement of the second set of proceedings by Procorp against Napoli, the receivers for Hopeshore were joined as second defendants to the first set of proceedings and consented to an order that they pay $202,254.36 into Court within 24 hours of their receipt of funds from Pickles Auctions pending further order of the Court. Importantly, order 4A expressly contemplated the commencement of the proceedings by Procorp "on 14 March 2006" [in the event those proceedings were commenced by the filing of a summons on 15 March 2006]".

26 Mr Porter, one of the receivers, in his affidavit of 7 March 2006, estimated total Receivers Expenses at $138, 699.00 which were adequately covered by the retention from the proceeds of sale of $198,745.64

27 On 23 March 2006 Mr Porter deposed to the receivers payments to date being $311,138.61 and expenses still to be paid being $339,512. This is $190,000 more than had been stated 13 days prior to the date of this affidavit. The additional $190,000 is made up of principally three provisions against legal costs if certain litigation which the receiver is apparently anticipating will be pursued to conclusion.

28 Mr Porter was cross-examined on the current applications. He described the other proceedings in which Hopeshore was involved as brought by Hopeshore against Concord Constructions which was the builder. Hopeshore apparently carried out the formwork. He accepted that it was possible for the receivers to disclaim on leases. Hopeshore had ceased trading presently and was in liquidation. No hearing had commenced in relation to the Concord proceedings.

29 He accepted that he was entitled to an indemnity from Procorp and that he has at no stage sought to protect himself by having an indemnity secured before proceeding in the litigation. He had been receiver for many years and had learnt how to protect himself in that capacity as and when appropriate.

The issues which arise as between the receivers and Napoli

30 The receivers have contended that there is no basis which would permit the Court in the proper exercise of its discretion, to order the payment out to Napoli of the funds paid into Court by the receivers. The central contention is that the payment into court of the subject funds was not made *for and on behalf of* Procorp, in compliance with the statutory requirement provided for in the Act [s 25 (4) (b)]: nor was it otherwise made for and on behalf of Procorp.

31 The receivers contend that there were very unusual circumstances which obtained following the commencement of the first proceedings involving Pickles Auctions. They contend that at very short notice the receivers had been brought into the matter and had acquiesced to a regime whereby the subject funds were paid into Court as an accommodation only and pending the ultimate resolution of the real issue as to whether or not as between:

· the receivers [acting in terms of their obligations to both Procorp as well as to Hopeshore under the Charge] and

· Napoli,

had any equity in or legal or other entitlement in the subject funds

32 The issue can only be determined by such evidence as there is before the Court, as to how it had come about that the funds were paid into Court. The matter is very largely one left to inference, there being precious little in terms of the express evidence as to any arrangement between the parties made at the time the orders were made.

33 The only real evidence is that given in the affidavit made by Mr Brown, solicitor for the receivers on 19 April 2006, where he deposes to some short conversations with Mr Doyle, the solicitor for Napoli, which took place on 13 March 2006.

34 Mr Doyle had said that his client needed an order that the moneys held by Pickles as proceeds from the auction be paid into Court and had said that Pickles Auctions were very anxious to get out of the proceedings and were desperate to get the auction proceeds out of their trust account.

35 Mr Brown had responded by stating that his client's position was that the money should be paid to them. He also said that it was clear to him that Napoli's claim to the auction proceeds would be the subject of a contested hearing and so he proposed that the moneys be paid to the receivers who would hold them pending a result of that hearing.

36 At a later stage in further discussions Mr Doyle had said to him that Napoli was insisting on payment into court of funds representing the amount of the adjudication determination and would not accept a situation where the moneys would be paid to the receivers, even if the receivers held them pending the outcome of the proceedings.

37 In a later discussion Mr Brown informed Mr Doyle that he would obtain instructions to agree to the payment of the adjudication determination amount into Court so that the matter could be dealt with quickly on that day by way of consent. However he would require that Napoli consented to the receivers being made a party to the proceedings "because it is clear that they will have to be involved in order to put their position to the Court"

38 The proper inference from the whole of the matrix of circumstance before the Court is that the moneys were paid into Court to abide the results of the proceedings proposed to be commenced by Procorp on the following day which would seek to
(1) impugn the determination,
(2) permanently restrain Napoli from taking any steps to enforce its judgment in the District Court and
(3) have the Supreme Court declare that Napoli had no grounds to resist the judgment being set aside.

39 My own view is that the relief claimed in the summons which was in fact filed on 15 March 2006, generally, but in particular by reason of the claim to have a declaration made that Napoli had no grounds to resist the judgment being set aside, is properly seen to satisfy the terms of s 25 of the Act: these were “proceedings commenced to have the judgment set aside".

40 Whether or not this be correct is in any event neither here nor there. The proper inference is that the relevant parties and interests well understood and accepted the obvious fact that the proceedings about to be commenced by Procorp would certainly be stopped in their tracks but for security for the unpaid portion of the adjudicated amount, being paid into Court immediately.

41 The receivers can only be regarded as having provided the funds as such security. They of course would ultimately always be bound by their obligations under the Charge. They were entitled to make interim distributions to Procorp. Ultimately, and whether or not they turned their mind to the precise reasons or justification for their payment of these funds into Court, once the moneys were paid into Court by consent, it is appropriate to regard the moneys as security paid pending the determination of the challenge by Procorp to the determination and judgment in favour of Napoli.

42 Were it necessary to do so if there were an interest in either the receivers or in Hopeshore said to rank ahead of the interests of Napoli, it would likely be appropriate to infer that the receivers have been guilty of postponing conduct. One can of course have an implicit waiver of priority.

43 The proper inference from all of the events is that the conduct of the receivers led Napoli to legitimately believe that the funds were paid into Court as security pending the determination of the proceedings. Whether or not the receivers acted by obtaining instructions or with the knowledge, consent and/or permission of either or both of the relevant officers of Procorp or Hopeshore is neither known nor relevant.

44 In the result, the receivers' application ultimately pursued in both set of proceedings to have orders that the sum of $202,254.36 paid into Court be paid immediately to the receivers is appropriate to be dismissed.

The applications for the Court to retain the moneys paid into Court

45 The next issue which is raised concerns Procorp's application for the Court to grant a stay of orders and to permit the status quo to remain. There are two bases put forward. The first is that the Court should hold on the evidence that the financial position of Napoli is shown to be such that it would *certainly* or at least *highly likely* be unable to repay the funds which are now held in court to Procorp, in the event that Procorp upon the final hearing of all issues would succeed in establishing that the determination had always been flawed and that Napoli had never been entitled to the funds now held in court.

46 The second basis is simply put as a necessary concomitant of Procorp's entitlement to appeal from the judgment delivered on 29 March 2006.

The first basis

47 Procorp elected not to read any affidavits in support of its application. Rather, it had approached the matter by cross-examining Mr Guerrera and by tendering a number of documents produced by Napoli on notice to produce and going to Napoli's financial position.

48 It is immediately necessary to observe that there are a number of difficulties in proceeding to make findings by reference to the documents which were produced. Likewise, the only witness called by Napoli in relation to the financial questions, Mr Guerrera, readily accepted under cross-examination that he was not familiar with the MYOB Accounting Software which was entered by Napoli's bookkeeper. He had however been able to print out a report in an endeavour to show the general ledger covering transactions from the commencement of 2005 up to 19 April 2006. On several occasions when taxed with accounting documents he observed that he was not an accountant. He made the point on more than one occasion that the bookkeeper was the person who knew where particular documents were kept in the office. His evidence was that the bookkeeper had been away for six weeks having some issues with his family. His evidence was that in the absence of access to the bookkeeper there had been great difficulty in obtaining documentation sought under the Notice to Produce served on Napoli. Arranging to have the accountant prepare formal accounts would take time and expense.

49 In short it was clear that Mr Guerrera only had the most passing acquaintance with accounting documents of any real complexity. Notwithstanding that that was the case, the cross examiner pursued the witness in asking many questions about accounting documents. The weight which the Court can give to the cross-examination must plainly be tempered by these considerations.

50 Along the same parameters it is necessary to observe that it was never put to Mr Guerrera whilst under cross-examination that there are material differences between the approach conventionally taken by accountants when preparing, on the one hand, financial accounts for tax return purposes, and on the other hand, financial documents needed for general accrual accounting purposes. Nor did counsel for Procorp, in addressing final submissions in relation to the financial position of Napoli, advert to those very basic differences.

51 Again, and before turning to the particular documents subjected to such scrutiny during the cross examination of Mr Guerrera, it is pertinent to observe that:

- Mr Guerrera gave evidence that he personally had been in the industry for approximately 20 years, had paid his creditors during that period and intended to continue doing so.
- Very significant parameters to be borne in mind in assessing Napoli as a going concern, relate to work in progress, as well as works under negotiation.

52 Mr Corsaro of counsel appearing for Procorp closely cross-examined Mr Guerrera on annexures TG 1 and TG 2 to his affidavit of 19 April 2006. Whilst certainly that cross-examination exposed some real difficulties with, in particular, annexure TG1, on a number of occasions Mr Guerrera was able to explain his way out of the apparent inconsistencies in the document. The headings in the document were not strictly accurate or not always strictly accurate. Reference had been made in the schedule to "payments outstanding" when in fact some of those reflected situations not yet invoiced and others disclosed situations invoiced and not paid. Mr Guerrera gave evidence that in preparing the document he had only a rough idea of a pretty much what they are.. He accepted that some of the amounts had been invoiced were not shown on the document. His evidence was: *"whatever is here has been invoiced. Whatever isn't invoiced I know pretty much what they owe me"*

53 Mr Guerrera gave evidence that Napoli currently has works under negotiation of $734,700. This evidence is really incapable of being tested by reference to the accounting documents put to Mr Guerrera.. The Court approaches the evidence with care but even discounting the estimate somewhat, the fact is that the evidence of works under negotiation constitutes a reasonably important integer in the present exercise. It is appropriate to add that this is even more likely to be the case where Napoli has apparently traded in the industry for a very respectable period indeed.

54 There are a number of ways to look at the documents before the Court. To my mind a particularly interesting exercise involves the sales figures shown by the general ledger summary which covers the period 1 January 2005 up to 19 April 2006. The first line entry 1-1110 shows Cash at Bank as follows:

Beginning Balance [$1761.24 cr]
Total Debit [$2,401,471.42]
Total Credit [$$2,419,016.69]
Net Activity [$17,545.27 cr]
Ending Balance [$27,306.51 cr]

55 This appears to record that Napoli during the material period by reference to its sales had received A$2.4 million and had paid out A$2.4 million. Notwithstanding that counsel for Procorp suggested that there was A$27,000 increase in the amount owing to the Bank, to my mind the simple fact that a turnover of approximately $2.5 million appears to have been achieved, speaks to the inherent viability of Napoli as a going concern.

56 Mr Doyle, appearing for Napoli, submitted and I accept that the materials before the court do suggest that independent financiers [the hire purchase companies and the bank] had dealt with Napoli over a respectable period and had been prepared to extend finance to that company. That is a positive and independent indication of a reasonably properly managed going concern and likely not an approach to be taken by lenders to a company perceived as trading insolvently.

57 Mr Guerrera gave evidence in relation to the original bank overdraft of $50,000 to the effect that it had been granted a year and a half ago but no longer existed. The witness was not cross-examined to suggest that his evidence in this regard was inaccurate or incorrect and he was not taken to any document to suggest any such thing.

58 Mr Doyle also made the submission that the relevant context involved a non payment by Procorp of approximately $200,000 prior to Christmas which circumstance should be taken into account where Napoli had and continues to trade, had and continues to carry out further work, and has no material debts outstanding. Mr Guerrera gave evidence that Procorp's failure to pay Napoli had caused a reduction in Napoli's working capital and that there had been a delay in paying some creditors in full during that period of time.

59 Mr Corsaro addressed a number of submissions going to the proposition that the earthmoving machines, the subject of the hire purchase arrangements, were in the accounts at book value and not market value. The submission was that this meant that non-current assets were significantly less than the $501,000 amount recorded in the balance sheet. The submission was that if Napoli were to go into liquidation immediately those earthmoving machines were not available.

60 It is always difficult to postulate what may lie in the future. However there is substance in Mr Doyle's proposition that the 30 June 2005 balance sheet does record many occasions on which interest had been prepaid. One can accept that this may represent a legitimate tax effective approach to major equipment hire purchase arrangements.

61 In truth the submission put by Mr Corsaro emphasising the excess of liabilities over assets represents only one circumstance to be closely scrutinised in terms of the ultimate question before the Court: is the financial position of Napoli shown to be such that it would *certainly* or at least *highly likely* be unable to repay the funds which are now held in court to Procorp, in the event that Procorp upon the final hearing of all issues, would succeed in establishing that the determination had always been flawed and that Napoli had never been entitled to the funds now held in Court.

62 Treating with the matter as one of principle it does seem to me that one should approach the vital issue in this particular case by regarding the amount paid into Court as the property of Napoli. Napoli has succeeded in fending off the attacks upon the judgment in so far as it is permitted to be enforced. It would be curious if in those circumstances any other approach should be taken.

63 Standing back from whole of the evidence, my own view is that Procorp has not discharged its onus of establishing that the above-described critical question should be answered in the affirmative.

Outstanding matters

64 In those circumstances it remains for the court to make the orders which are appropriate. There are a few outstanding matters not yet addressed by the judgment, to which I will now turn.

65 The first concerns the proper exercise of the court's discretion where notwithstanding what has been said in the above reasons, Procorp having indicated its intent to seek to appeal from the judgment of 29 March 2006, it is appropriate for Procorp to be given a *very short* indulgence for the purpose of approaching the Court of Appeal in terms of the interlocutory position which should obtain pending appellate procedures being furthered. My usual practice in a situation such as this is to make whatever orders the court at first instance has determined are appropriate and to stay those orders until midnight on a Monday approximately one [or one and a half] weeks following the making of orders at first instance. The purpose of that exercise is to permit the unsuccessful party at first instance to approach the Court of Appeal on its Monday applications day.

66 In terms of the present situation and timetable the appropriate orders when they are made should be stayed until midnight on Monday 1 May.

67 There is a further issue which has been raised by Napoli and this concerns the proposition that no stay, even pending an appeal or even for a short period of time, should be granted, in the absence of the court taking in an undertaking as to damages from Procorp. To my mind that matter requires some further consideration. For one thing I am not entirely certain as to whether or not an undertaking as to damages was given by Procorp in relation to the ***Procorp v Napoli*** proceedings and if given would still continue.

68 Again, and on a separate parameter, there is a possibility that questions such as what form of undertaking as to damages and/or security for such should, if any, be ordered should really be matters for the Court of Appeal to be dealt with on 1 May.

69 For those reasons it does seem to me that the parties should be given an opportunity to consider the position. I do not understand there to be any dramatically urgent need for an undertaking as to damages or security to support such undertaking to be furnished by Procorp before 1 May. 1 May is only 12 or 13 days away now and it seems to me to be unfortunate if the parties should really require very much more court time in a matter which has taken so much court time in the reason past.

70 The other matter which does need to be mentioned and has not yet been treated with in the reasons concerns the fate of the $40,000, which by orders of this court some time ago repose in the receiver's trust account, the receiver having been restrained from or having undertaken not to deal with those moneys.

71 The position in relation to those funds is that the existing interlocutory injunctive regime was to continue until further order. Mr Doyle originally pursued that injunction as tangential to the possibility that his client would be making an application for security for costs and the documents before the court made clear that the injunction was granted on the basis that the rationale for it involved that possibility.

72 As history informs us, no such application for security for costs was ever advanced by Napoli. In those circumstances the receivers have sought to have the existing injunction regime vacated. Mr Doyle has sought to now have the existing injunction regime in relation to that $40,000 amount treated with on an entirely different basis, or on a different basis to the original. His now submission is that the continuance of that injunction should be regarded as providing some form of security to his client for costs generally incurred in or in relation to the proceedings and possibly in or in relation to the Court of Appeal proceedings.

73 In my view the proper exercise of the court's discretion pending the matter going before the Court of Appeal is simply to leave in place the existing injunctive regime and not to tamper in any which way with it, reserving leave to the parties to if necessary, reagitate the matter at an appropriate time, following any interlocutory regime ordered by the Court of Appeal.

Mr Frank Corsaro SC, Ms Chan (Plaintiff) instructed by McManus Lawyers
Mr Doyle (First Defendant) instructed by Doyles Construction Lawyers