SUPREME COURT OF QUEENSLAND

CITATION:	*Aqwell P/L v BJC Drilling Services P/L* [2002] QCA 502
PARTIES:	**AQWELL PTY LTD** ACN 007 726 981 (applicant/respondent) v **BJC DRILLING SERVICES PTY LIMITED** ACN 086 032 742 (respondent/appellant)
FILE NO/S:	Appeal No 10209 of 2002 SC No 7523 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EXTEMPORE ON:	19 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2002
JUDGE:	Davies JA
ORDER:	**1. Dismiss the application by BJC Drilling Services Pty Limited for a stay, pending hearing and determination of this appeal, of that part of his Honour Mr Justice Mackenzie's order of 6 November 2002 wherein, in paragraph 1 thereof, he extended the orders of his Honour Mr Justice Muir of 28 August 2002 by the inclusion of the words "all moneys received in relation to the three drills described in Exs 'PDR3', 'PDR4' and 'PDR5' to the affidavit of Peter Davis filed on 26 August 2002 ('the drills'), be deposited into bank account 281310214788" and that part of paragraph 2 of his Honour's order wherein he included the words "or the drills" in the phrase "or otherwise incur any legally enforceable obligation to a third party exceeding $10,000".** **2. Order that BJC Drilling Services Pty Limited pay to Aqwell Pty Ltd the costs of this application excluding any costs of the preparation of two volumes of documents which Aqwell Pty Ltd put before this Court.** **3. Dismiss the application by Aqwell Pty Ltd for security in respect of the cost of this appeal.** **4. Order that Aqwell Pty Ltd pay to BJC Drilling Services Pty Limited the costs of this application**

excluding any costs of the preparation of two volumes of documents which BJC Drilling Services Pty Limited put before this Court.

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - STAY OF PROCEEDINGS - WHEN REFUSED - where parties in dispute as to interest in terminated joint venture agreement - where joint venture involved sale of three drills - where the appellant is appealing an order requiring monies received in relation to joint venture be deposited into joint bank account and an order that it not incur any legally enforceable obligation in respect of the three drills - whether the orders should be stayed pending the appeal

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - SECURITY FOR COSTS - where no evidence the appellant is insolvent - where the effect of the order below is to tie up the monies relevant to the cause of action - whether an application for security for costs should be granted

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - POWERS OF COURT - COSTS - where proceedings appear to be marked by the expenditure of an excessive amount of lawyers' time and legal costs - where both parties submitted books of documents for the application for a stay and the application for security for costs respectively each over 600 pages - where undertakings given to Judge of Appeal by both parties that their clients will not be charged for the preparation of those documents

COUNSEL: R A Allen (*sol*) for the appellant
C L Francis for the respondent

SOLICITORS: Whitman & Co for the appellant
Porter Davies for the respondent

DAVIES JA: There are two applications before me today, the first is one by the appellant in the appeal before this Court BJC Drilling Services Pty Ltd, which I will call BJC, for a stay of part of the order of the Supreme Court of 6 November 2002, pending the hearing and determination of the appeal which is also against that part of the order. The other is an application by the respondent Aqwell Pty Ltd, which I will call Aqwell, that BJC be ordered to provide security for the

costs of this appeal in the sum of $10,000 failing which the appeal be stayed.

The parties to these applications were, it seems, parties to a joint venture agreement involving the sale by Aqwell of an interest in each of three drills to BJC and a sharing of the profits earned by those three drills. There is a dispute by the parties as to the nature of the interests sold. Aqwell asserts that the sale was, in each case, of a half interest. BJC asserts that the whole of the interest was sold but that part of the consideration was that BJC would share the profits equally with Aqwell.

During the term of the joint venture agreement BJC was obliged to maintain a separate joint venture account with separate revenue and cost records. A joint venture agreement was executed by the parties on 30 April 2002 but this had been preceded by agreements as early as 2001 recognising the existence of some such arrangement from that time.

It does not appear to be seriously contested by BJC that it failed to maintain separate revenue and cost records and, as the agreement required, provide summary details of transactions to Aqwell every month. It is also common ground that Aqwell terminated the joint venture on 27 August 2002, the day before the hearing before Justice Muir. The action in the Supreme Court, which includes claims by Aqwell for accounts and an order for payment of monies owing, and a

counter claim by BJC for damages has reached the stage of pleadings only.

It should be said at the outset that the proceedings so far appear to have been marked by the expenditure of an excessive amount of lawyers' time and legal costs. To take two examples, a defence and counter claim from BJC occupies more than 100 pages of discursive and repetitive allegations; and notwithstanding that the action has not proceeded beyond the pleading stage, both parties submitted books of documents for these applications each of over 600 pages.

On 28 August 2002 the day after termination of the joint venture, on an application by Aqwell, Mr Justice Muir made the following orders:

1. That BJC not contract for material or services in excess of $10,000 for a single item or a single contract so as to impose any obligation on Aqwell under the joint venture agreement or otherwise incur any legally enforceable obligation to a third party exceeding $10,000 without giving three days prior notice in writing to Aqwell's solicitors or unless the Court otherwise orders;
2. That all monies received by BJC on behalf of the joint venture be deposited into a bank account in joint names;
3. That the application before his Honour be adjourned to 10 September 2002.

By the time the matter came before Mr Justice Mackenzie who made the order appealed from, it was apparent that there was some difficulty in the working out of what was monies received by BJC on behalf of the joint venture after its termination. In view of the failure by BJC to account for profits earned during its currency there was, plainly in the mind of his

Honour, cause to doubt whether it would clearly distinguish between monies received thereafter, but on behalf of the joint venture, and monies received thereafter which were derived on its own behalf.

In what I have said so far and what I propose to say I am not purporting to express any final opinion on the ultimate outcome of this appeal and even less on the ultimate outcome of the action. I should mention in this respect that the counter allegations by BJC against Aqwell concern representations made as to the age and conditions of the drills sold which may well affect the way in which the monies in and coming into the joint account will ultimately be distributed. There is also an allegation made by Aqwell (though, not made, or I should put it more accurately, not clearly made in a statement of claim) that BJC continues to hold the drills on a constructive trust for the parties which may affect the distribution of the profits from those drills after 27 August 2002.

Returning then to the course of proceedings. The application adjourned by Mr Justice Muir on 28 August 2002 came before Mr Justice Mackenzie on 10 September 2002. His Honour delivered reasons on 19 September 2002 and invited the parties to agree on an appropriate form of order in light of his reasons or to make submissions as to the appropriate form of order after considering those reasons.

The parties were unable to agree upon a form of order and his Honour then made orders on 6 November 2002 after a hearing on 1 November 2002.

The application for the stay by BJC is in the following terms:

"That part of his Honour Justice Mackenzie's order of 6 November 2002 wherein, in paragraph 1 thereof, he extended the order of his Honour Justice Muir of 28 August 2002 by the inclusion of the words 'all moneys received in relation to the three drills described in Exs 'PDR3', 'PDR4' and 'PDR5' to the affidavit of Peter Davis Roger filed on 26 August 2002 ('the drills') be deposited' (into bank account 281310214788), and that part of paragraph 2 of his Honour's said order wherein he included the words, 'or the drills' in the phrase 'or otherwise incur any legal enforceable obligation to a third party exceeding $10,000' be stayed pending hearing and determination of the appeal herein."

As mentioned earlier the appeal is also only against that part of his Honour's order. The relief sought is in respect of paragraphs 1 and 2 of Mr Justice Mackenzie's order which are in the following terms:

> "1. All moneys received by the respondent, whether before, on or after 27 August 2002 on behalf of the joint venture conducted between the applicant and the respondent since 28 February 2001, and all moneys received in relation to the three drills described in Exs 'PDR3', 'PDR4' and 'PDR5' to the

affidavit of Peter Davis Rogers filed on 26 August 2002 ('the drills'), be deposited into the bank account 281310214788 at the Commonwealth Bank, Maitland in the state of New South Wales, in the name 'BJC Drilling Services Pty Ltd - Aqwell Pty Ltd'.

2. The respondent not contract from material or services in excess of $10,000 for a single item or single contractor so as to impose any obligation on the applicant under the Joint Venture Agreement exhibited to the affidavit of Peter Davis Rogers filed on 26 August 2002 or otherwise incur any legally enforceable obligation to a third party or third parties exceeding $10,000 in respect of the joint venture for the drills without giving 3 days prior notice in writing to the applicant's solicitors, or, unless the Court otherwise orders."

In the course of giving his reasons on 19 September 2002 his Honour said:

> "One thing that is certain is that it would be desirable to have a proper accounting analysis by someone independent of the parties of all transactions including any in which moneys were allegedly spent by the respondent in consequence of defaults on the part of the applicant, involving the three drills from the commencement of the first agreement until the termination of the joint venture agreement. In view of the issues concerning the status of contracts that were entered into prior to dissolution which involved use of the three drills and the issues relating to use of the three drills subsequently, it is also highly desirable that there should be proper records kept of all transactions involving the three drills until trial so that in the event that it is necessary to take into account such transactions in resolving the issues between the parties,

> there is a reliable independent analysis of them. There is no reason to assume, having regard to the history of the matter so far, that leaving the task to the parties will do any of those things effectively."

In saying this, his Honour clearly envisaged not only the need for an independent accounting analysis of transactions conducted by BJC prior to 27 August 2002 but also the need for such accounts to be taken of monies received by BJC after that date in order to determine what part of those monies, if any, were in respect of transactions entered into on behalf of the joint venture before its termination. I think it also arguable, reading the statement of claim as a whole, that it could include a claim for a constructive trust. It does include a claim for a breach of fiduciary duty and it does claim an account in respect of the proceeds of the drills.

In those circumstances it can also be said that his Honour's order envisaged an accounting in order to determine what part of the monies, if any, were received from income earned from those drills in which Aqwell claimed to retain a one-half interest. The same may also be said of money expended by BJC. All of this was arguably necessary in order to establish what moneys, if any, to which Aqwell was entitled from the joint venture or upon a constructive trust claim in respect of profits earned from the drills. I repeat I do not express any view as to Aqwell's prospects of success in either of those respects. Moreover, it seems to me that his Honour's order may well have been necessary in order to establish a proper accounting in respect of the first of the matters referred to,

that is leaving out of account entirely the constructive trust claim.

As his Honour recognised, in the circumstances which I have mentioned, the second order made by Mr Justice Muir that all monies received by the respondent on behalf of the joint venture be deposited into a joint bank account, was, in retrospect, difficult to give effect to in respect of monies received from contracts entered into during the joint venture. That is plainly why his Honour extended and altered that order in the way in which he did and it is that extension and alteration which is the subject of the appeal and of the stay application before me.

I have already said that I do not wish to express any concluded view on this appeal and certainly not any view as to the likely outcome of the action. However, given the circumstances which I have outlined, I find it difficult to see how his Honour could have ensured preservation of monies in either of the categories I have mentioned, pending the outcome of the action, except by making an order of the kind which he did in paragraph 1 of his order. Neither party is prejudiced by this. No doubt, the money paid in will earn interest and its distribution in any event abides the result of the action.

BJC is arguably on stronger ground in its objection to the order made in paragraph 2 of Mr Justice Mackenzie's order; the order that it not incur any legally enforceable obligation to

a third party exceeding $10,000 in respect of the drills without giving three days prior notice in writing to the applicant's solicitors or unless the Court otherwise orders. It may be argued that, if BJC were to incur any obligation, it would not, without more, be enforceable against Aqwell. However the difficulty in formulating an order which would permit the incurring of only personal obligations but prevent the incurring of obligations which might be enforceable against the drills, for example a lien for repair, is obvious.

It may be that because of the argument I have mentioned, or for some other reason, this order will be altered on appeal. However I would not for that reason stay its operation pending the appeal; but I should add that I would not construe it as limiting the incurring of personal obligations by BJC where that would not affect any proprietary interest of Aqwell in any of the drills.

For the reasons I have given, I would refuse the application for the stay.

I turn then to the application for security for costs. There is nothing in my opinion to indicate that BJC is insolvent though there is some evidence that it has or has had financial difficulties. Moreover the effect of the stay order is to tie up, until the trial of the action, a proportion, perhaps a substantial proportion, of the monies which BJC would otherwise expect to receive from time to time in order to fund its continuing business, thus affecting its cash flow.

I do not think for those reasons that it is appropriate to order security for costs for this appeal and, consequently, I would refuse that application.

I mentioned earlier how these proceedings appear to be marked by expenditure of a substantial amount, perhaps an excessive amount, of time and money by lawyers. Only a small fraction of the 1,200 pages of documents put before me was relevant to either application. This tends to illustrate the point I have made. I indicated this to Mr Allen, the solicitor for BJC, and Mr Francis, counsel for Aqwell, and they both quite properly undertook, or I should say Mr Allen undertook and Mr Francis informed me that his solicitor undertook to the Court, not to charge their client for the preparation of those documents. Had those undertakings not been given, I may have made an order dealing with that matter.

In the circumstances, I make the following orders;

1. Dismiss the application by BJC for a stay, pending hearing and determination of this appeal, of that part of his Honour Mr Justice Mackenzie's order of 6 November 2002 wherein, in paragraph 1 thereof, he extended the orders of his Honour Mr Justice Muir of 28 August 2002 by the inclusion of the words "all moneys received in relation to the three drills described in Exs 'PDR3', 'PDR4' and 'PDR5' to the affidavit of Peter Davis filed on 26 August 2002 ('the drills'), be deposited into bank account 281310214788" and that part of paragraph 2 of his

Honour's order wherein he included the words "or the drills" in the phrase "or otherwise incur any legally enforceable obligation to a third party exceeding $10,000";

2. Order that BJC pay to Aqwell the costs of this application excluding any costs of the preparation of two volumes of documents which Aqwell put before this Court;
3. Dismiss the application by Aqwell for security in respect of the cost of this appeal;
4. Order that Aqwell pay to BJC the costs of this application excluding any costs of the preparation of two volumes of documents which BJC put before this Court.
