

COURT OF APPEAL

CHESTERMAN JA

**Appeal No 92 of 2010
DC No 4664 of 2004**

MAKITA (AUSTRALIA) PTY LTD

v

PAUL DREW

BRISBANE

DATE 02/02/2010

JUDGMENT

CHESTERMAN JA: On 10 December last, Judge O'Sullivan in the District Court awarded the plaintiff, the respondent to this application, the sum of \$194,454.86 for damages for negligence and contravention of the *Trade Practices Act*.

The respondent was injured in 2001, when his left hand came in contact with a circular saw manufactured by the applicant.

There is an appeal against the judgment, and the applicant seeks a stay of execution of the judgment pending the appeal.

The matter has a history which is rather unfortunate. An earlier trial before Judge Tutt in late 2007 resulted in a judgment for the same amount for the respondent in August 2008. An appeal against that judgment was successful and a retrial was ordered. It was the retrial that Judge O'Sullivan heard last year.

The respondent seeks to appeal, has appealed against Judge O'Sullivan's judgment on the

basis that her Honour has failed in effect to give adequate reasons for the critical finding of fact necessary for the respondent to prove negligence.

Mr Lee, who appeared for the respondent, concedes that there is an arguable case on appeal, although he goes no further. That being so, the only question I have to determine on the application for a stay is whether if there is no stay and the appeal succeeds, the applicant may be deprived of the benefit of the judgment and the appeal judgment be rendered nugatory by the fact that the money may not be recoverable from the respondent.

Similar considerations led Justice Keane on a similar application following the first judgment to order a stay. His Honour said, and I quote:

"The fundamental concern which informs the application of Rule 761 subrule 2, the Court should strive to ensure that orders which finally resolve litigation should be efficacious, should not leave a residue of avoidable injustice to the party which is ultimately successful. This consideration means that where an appeal with arguable prospects is on foot, a stay should be granted where that appears to be necessary to ensure that orders ultimately made on appeal would not be nugatory."

His Honour having reviewed the facts which are identical in this application, thought that there was a risk that the judgment on appeal might be rendered nugatory should the stay not be granted.

Mr Lee accepts the force of that and his solicitors have undertaken to hold the judgment sum in their trust account pending the outcome of the appeal. That seems to me to be a perfectly safe solution to the problem, but it might work to the respondent's disadvantage in that as I understand the circumstances at present, the best interest rate that might be obtained on a deposit is about five or six percent, whereas under the Supreme Court Act the judgment will attract interest at 10 per cent between the giving of the judgment and its payment, so that a stay will work to the advantage of the respondent, at least in that particular.

The other point is that the appeal should be got on fairly quickly, and should the appeal succeed, the money in the trust account would be paid back to the applicant so it is talking about a deposit of only two or three months.

In the circumstances, it seems to me that the appropriate order is to grant the stay which I do.

As to costs, it seems to me that the application made is part of the appeal process and the costs of the application are costs in the appeal.

...

CHESTERMAN JA: I think the appropriate order is the costs of this should be caught up with the costs of the appeal.