SUPREME COURT OF QUEENSLAND

CITATION:	*Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QCA 322
PARTIES:	**COOK'S CONSTRUCTION PROPRIETARY LIMITED** ACN 004 782 558 (plaintiff/applicant/appellant) **v** **SFS 007.298.633 PTY LIMITED (formerly trading as STORK FOOD SYSTEMS AUSTRALASIA PTY LTD)** ACN 007 298 633 (defendant/respondent)
FILE NO/S:	Appeal No 9325 of 2008 Appeal No 9301 of 2008 SC No 10993 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2008
JUDGES:	McMurdo P, Keane JA and White AJA Separate reasons for judgment of each member of the Court, Keane JA and White AJA concurring as to the orders made, McMurdo P dissenting in part
ORDER:	**1. In Appeal No 9325 of 2008: Appeal dismissed** **2. In Appeal No 9325 of 2008: Appellant to pay respondent's costs of the appeal on the indemnity basis** **3. In Appeal No 9301 of 2008: Application refused** **4. In Appeal No 9301 of 2008: Applicant to pay respondent's costs of the application to be assessed on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the plaintiff applies for a stay of execution of the judgment below pending the outcome of an appeal to this Court – where the plaintiff also seeks to appeal the decision of the learned primary judge to refuse a stay of execution pending appeal – where the defendant concedes that the substantive

appeal is arguable – where the plaintiff claims that if it were required to satisfy the judgment below immediately, it would be forced into liquidation or receivership, rendering any subsequent appeal nugatory – where the plaintiff claims that the stay of execution is necessary to avoid irremediable harm to it pending the outcome of the appeal – whether the learned primary judge erred in refusing to grant the stay – whether in the circumstances the Court should exercise its discretion and order that the execution of the judgment below be stayed pending the outcome of the appeal

Queensland Building Services Authority Act 1991 (Qld), s 42(3)
Uniform Civil Procedure Rules 1999 (Qld), r 761(2)

Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685, applied
Berry v Green [1999] QCA 213, applied
Cellante v G Kallis Industries Pty Ltd [1991] 2 VR 653, not followed
Challenge Charter Pty Ltd v Curtain Brothers (Qld) Pty Ltd (2004) 9 VR 382; [2004] VSCA 66, considered
Cook's Constructions P/L v Stork Food Systems Aust P/L [2008] QSC 179, related
Cook's Constructions P/L v Stork Food Systems Aust P/L [2008] QSC 220, affirmed
Gino D'Alessandro Constructions Pty Ltd v Powis [1987] 2 Qd R 40, distinguished
Marshall v Marshall [1999] 1 Qd R 173; [1997] QCA 382, applied
McBride v Sandland [No 2] (1918) 25 CLR 369; [1918] HCA 59, applied
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221; [1987] HCA 5, distinguished
Powerflex Services Pty Ltd v Data Access Corporation (1996) 67 FCR 65, applied

COUNSEL: G J Digby QC, with S R Grahame, for the appellant
K E Downes, with S B Hooper, for the respondent

SOLICITORS: Clarke & Kann acting as Town Agent for Macpherson & Kelley for the appellant
McCullough Robertson for the respondent

[1] **McMURDO P:** Ms Downes, who appeared with Mr Hooper for the respondent, has persuaded me that the balance of convenience on the material before this Court favours the refusal of the application for a stay, even though the substantive appeal will be heard within a relatively short time on 20 and 21 November 2008.

[2] I agree with Keane JA's reasons for refusing the stay application and for dismissing the appeal from the trial judge's refusal of the stay, save that I do not consider that this is an appropriate case in which to order that the appellant pay the costs of that appeal on the indemnity basis.

[3] I would refuse the application for the stay and dismiss the appeal from the trial judge's refusal of the stay with costs to be assessed on the standard basis.

[4] **KEANE JA:** On 22 August 2008 the learned primary judge gave judgment for the plaintiff, Cook's Construction Pty Ltd ("Cook"), for $132,657.70 on its claim. On the same day his Honour gave judgment for the defendant, Stork Food Systems Australasia Pty Ltd ("Stork"), for $9,983.796.54 on its counterclaim. In each case, the interest payable as part of the judgment sum remained to be determined.[1]

[5] The claim and counterclaim arose out of an agreement (described in the judgment as "the Subcontract") whereby Cook agreed to undertake building work in the construction of earthworks and concrete works for Stork's predecessor in title in relation to the construction of an ammonium nitrate plant at Moura in Central Queensland. The basis of Stork's counterclaim was s 42(3) of the *Queensland Building Services Authority Act* 1991 (Qld) ("the QBSA") whereby Cook was "not entitled to any monetary or other consideration for" carrying out the building work under the Subcontract because it was not licensed under the QBSA.

[6] On 18 September 2008 the learned primary judge made further orders, including the determination of interest and the consolidation of the judgments referred to above, in a single judgment for Stork in the sum of $15,216,484.16. Most relevantly for present purposes, his Honour refused Cook's application for an order staying the judgment in favour of Stork pending the determination of the appeal which Cook then foreshadowed.

[7] His Honour refused Cook's application for a stay on Stork's undertaking "not to transfer any money paid to it pursuant to the judgment, or as interest, or as costs out of Australia until further order, agreement of the parties, or the resolution of [Cook's] proposed appeal".

[8] Cook duly commenced its foreshadowed appeal against the learned primary judge's judgment against it, and also appealed to this Court against the learned primary judge's refusal of the stay application.

[9] Cook's substantive appeal is due to be heard on 20 and 21 November 2008. It is the appeal against the learned primary judge's refusal of the stay with which this Court is presently concerned.

[10] Cook has also filed an application to this Court pursuant to r 761(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR") seeking an order for a stay of the judgment in the action.

[11] It was common ground between the parties that attention should be given first to whether this Court should, in the exercise of its discretion under r 761(2) of the UCPR, order a stay pending the determination of the appeal. Considerations of efficiency in the administration of justice confirm that this is the appropriate course: unless this Court can be persuaded to exercise its discretion in Cook's favour, little purpose would be served in considering whether the discretion of the learned primary judge miscarried. A conclusion in favour of Cook in that regard would only mean that this Court would then need to exercise the discretion afresh.

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1 *Cook's Constructions Pty Ltd v Stork Food Systems Australia Pty Ltd* [2008] QSC 179.

Relevant considerations

[12] The decision of this Court in *Berry v Green*[2] suggests that it is not necessary for an applicant for a stay pending appeal to show "special or exceptional circumstances" which warrant the grant of the stay.[3] Nevertheless, it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment.[4] Generally speaking, courts should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending appeal is to ensure that the orders which might ultimately be made by the courts are fully effective: the power to grant a stay should not be exercised merely because immediate compliance with orders of the court is inconvenient for the party which has been unsuccessful in the litigation.

Prospects of success

[13] In cases where this Court is able to come to a preliminary assessment of the strength of the appellant's case, the prospects of success on appeal may weigh significantly in the balance of relevant considerations. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen to be very poor.[5] That is because, if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion than might otherwise be the case.

[14] The extent to which a preliminary assessment of prospects of success, which suggests that the prospects of success are good, should dispose the Court towards granting a stay may be somewhat less clear. It was, however, accepted by Stork that Cook's appeal is arguable, and Cook did not seek to argue that its prospects of success on the appeal are so strong as to overwhelm the importance of the consideration that the courts should impede the enforcement of their orders only so far as is necessary to ensure that the orders which might ultimately be made by the court can be given effect without leaving a residue of injustice.

[15] Accordingly, the focus of this Court's attention must be upon whether Cook's appeal might be rendered nugatory by a refusal of the stay and whether Cook would be irremediably prejudiced if the stay were not granted and its appeal were ultimately to be upheld.

A nugatory appeal?

[16] I should say immediately that I do not consider that the refusal of a stay will render Cook's appeal to this Court nugatory. Even if the refusal of the stay were to lead to the receivership or liquidation of Cook, Cook's substantive rights, if any, against Stork could be pursued on the appeal by the receiver or liquidator of Cook. This would occur if the appeal were assessed by the receiver or liquidator as having worthwhile prospects of success; and no-one here suggests that a receiver or liquidator would not make such an assessment in this case. In these circumstances,

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2 [1999] QCA 213.

3 Cf *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653 at 657; *Challenge Charter Pty Ltd v Curtain Brothers (Qld) Pty Ltd* (2004) 9 VR 382.

4 *Berry v Green* [1999] QCA 213; *McBride v Sandland [No 2]* (1918) 25 CLR 369 at 373 – 374; *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 67 FCR 65.

5 *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685.

the benefit of the successful outcome of any such appeal would enure for the benefit of creditors and contributories of Cook. In this regard, in *Challenge Charter Pty Ltd v Curtain Bros (Qld) Pty Ltd*,[6] Callaway JA, with whom Chernov JA agreed, said:

> "In my opinion, the relevance of a threat of liquidation and the weight to be given to it vary from case to case (Compare *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* (1997) 145 ALR 121 at 123–4 ; 71 ALJR 814 at 816 …). Sometimes it is significant that a winding-up order will bring a company's business to an end or diminish the value of its assets or both or that the company, regarded as a legal person, will cease to exist when the winding up is completed … it is not irrelevant that the liquidator may still pursue the appeal if he or she considers that to be worthwhile. The liquidator would take into account the director's views and the director would be well placed to assist the liquidator if the appeal proceeded. It is quite wrong to regard it as the director's appeal (Compare *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* at 742 [22].) It is the company's appeal. Mr Sifris submitted that it was unfair to the director to displace him, but that is not the test. I am not persuaded that it would be unfair to Challenge Charter for a liquidator to evaluate the prospects of its appeal. An unpaid creditor is prima facie entitled to use the processes of company law to recover a debt owing to it and there is a public interest in insolvent companies being wound up (In some cases it may be relevant to the grant or refusal of a stay that a pending appeal may be taken into account on an application for winding up.)."

[17] It may be noted here that the undertaking given by Stork to which I have referred is apt to ensure that if Cook's appeal is successful, the funds in question will remain subject to the processes of the Court. In this way, if Cook's appeal is successful, that success will not be rendered nugatory by reason of the removal of the funds from the jurisdiction of the Court. It was not suggested by Cook that there was any other reason to suppose that Stork might not be able to refund the moneys received by it pursuant to the judgment in its favour if that judgment were to be reversed on appeal.

Irremediable harm

[18] I turn then to consider the prospect of irremediable harm to the appellant if the stay is refused and the appeal is ultimately successful. One may say immediately that the prospect of harm to no-one other than a corporate entity – a legal fiction – as opposed to its creditors and contributories or employees is hardly likely to warrant treating the judgment of the Trial Division as provisional or denying Stork the immediate benefit of the payment to which it has been found to be entitled. The prospect that the legal fiction of Cook's corporate personality may be harmed by the refusal of a stay affords little reason to impede a judgment creditor in the enforcement of its judgment: in the nature of things, the longer the judgment creditor is held out of the fruits of its judgment, the longer does the judgment debtor remain under the exclusive control of persons who have an obvious financial interest in reducing the impact of the judgment upon them as contributories or

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6 (2004) 9 VR 382 at 387 [17] (citations footnoted in original).

creditors of the company. The courts should not be sanguine about exposing a judgment creditor to the risks involved in such a situation.

[19] On Cook's behalf it is asserted that the harm which Cook might suffer is not merely theoretical or abstract. It is asserted that Cook presently lacks the cash to pay the judgment debt, that it is presently in default under its current financing arrangements, and that the sale of assets or borrowing to finance the payment of the judgment debt would be a further event of default which could lead to the appointment of a receiver or liquidator, with the consequent loss of valuable contracts with customers and suppliers and the termination of contracts of employment between Cook and its employees.

[20] It is convenient to note here that a similar argument was advanced to the learned primary judge. The learned primary judge was not satisfied by the evidence then adduced by Cook that it would suffer irremediable harm from the disruption of its business if it was required to satisfy the judgment before the determination of the foreshadowed appeal. It is necessary to set out at some length the reasons for his Honour's scepticism. His Honour said:

> "The effect that being required to satisfy the judgment debt would have on CCPL was the subject of a considerable amount of assertion and some evidence relating to its financial position. It was submitted that CCPL does not have the financial capacity to pay the judgment debt and, if forced to do so, would be placed in default of its loan agreement with its major financier. The argument went on that, should it be required to satisfy the debt, it would inevitably be placed into receivership by its financier and that would have the consequences of exposing CCPL to: damages claims in relation to the various projects it is presently undertaking, termination of all employees and subcontractors associated with those projects, irreparable damage to the relationship between CCPL and its providers, and termination of all other non-primary funding arrangements.
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> It would not be unusual, except in the case of very large companies, for a judgment debt of some $10 million to have a serious impact upon the business of a judgment debtor. But, as was pointed out by Stork, CCPL had no entitlement to that money and has not been entitled to it for the eight years that it has held it. It has during the period since it could have been required to repay the amount, had the advantage of possession of that amount which it has been able to use in pursuit of its business. Obviously, a party in the position of CCPL can make claims of financial difficulties but, in order for them to have any value, evidence of an appropriate nature must be produced.
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> It is said, on CCPL’s behalf, that it is unable to borrow against its assets to meet its liability and that it is not in a position to dispose of any assets in order to create a fund sufficient to pay the amount owing. Given the onus on an applicant in this situation one might have thought that there would be some detailed analysis of the borrowing capacity of CCPL. There was not. Mr Poutakidis gave some perfunctory evidence about having approached four major banks about financing. No detail of the proposal put to these banks

was given. It would appear that that was the extent of the research undertaken.

Mr Luckins provided two affidavits for the applicant. In his second affidavit he made the following, astute observation:

> "The capability of an entity to draw funds from its current financier or the ability and willingness of current and potential shareholders to fund the $10,000,000 immediately are the fundamental queries to be answered.'

The plaintiff produced no evidence of the 'ability and willingness of current and potential shareholders to fund the $10,000,000'. As to the plaintiff's current financier, there is, likewise, no evidence of any substance. There is no evidence of the terms upon which the plaintiff's current facility is based apart from some excerpts which do not assist in this regard.

There was evidence called by Stork which attempted to analyse the financial circumstances of CCPL. There was evidence that CCPL is part of a web of companies which are interdependent in the sense that there are financial arrangements entered into involving one or more of the companies within the group which are for the benefit of CCPL and other companies within that group. There is nothing unusual in that.

Where a party wishes to demonstrate that it should not be required to satisfy a judgment debt pending an appeal then the onus is on it to provide sufficient information to allow a conclusion in its favour to be drawn. Information was sought from CCPL by Stork on this application in order that an assessment might be made of the capacity of CCPL to deal with the amount owing. That material was not provided. There are a number of unanswered questions about the financial circumstances of CCPL such that I cannot find, on the material presented, that CCPL could not answer the debt now without suffering serious damage. The plaintiff has failed to provide 'sufficiently extensive' or 'specific' evidence as to the impact payment of the judgment would have (*Willemse Family Trust v Deputy Commissioner of Taxation* [2003] 2 Qd R 334 at [28]). In the absence of that information it is not possible to conclude that CCPL's contention on this point is valid and that the effect of having to pay the amount owing will be so serious as to justify a stay."[7]

[21] In light of the deficiencies in the evidence before the learned primary judge, his Honour was, I think, entitled to be sceptical of the assertion that Cook would not be able to raise the funds necessary to avoid disruption to its business consequent upon paying the judgment sum if it were disposed to make a real effort in that regard.

[22] Not surprisingly, in Cook's application to this Court under r 761(2) of the UCPR, Cook sought to redress the evidentiary deficiencies noted by the learned primary judge. An affidavit on behalf of the current financier of the group of companies of

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[7] *Cook's Constructions Pty Ltd v Stork Food Systems Australia Pty Ltd* [2008] QSC 220 at [10] – [15] (citation footnoted in original).

which Cook is a member deposes to the fact that the financier regards Cook as currently in default by reason of the entry of the judgment, and that steps taken by Cook to borrow sums or to sell assets to raise funds to meet the judgment would be regarded by the lender as further acts of default which would entitle the financier to exercise its rights under its securities. Further, Cook's current financier is unwilling to lend Cook further moneys. An affidavit on behalf of Cook's ultimate shareholder deposes to the circumstance that it is unwilling to provide loan moneys or other financial assistance to Cook to enable it to meet the judgment.

[23] On Stork's behalf, it is said that the evidence relied upon by Cook is still deficient in material respects. The first point made in this regard is that it is apparent from the affidavit material relied on by Cook that Cook itself is not the borrower from the current financier of the group of companies of which Cook is a member. The borrower is Cook Finance Pty Ltd ("Cook Finance"). Cook Finance is the lender to Cook. The terms of the loan arrangements between Cook and Cook Finance are oral, and have not been disclosed by Cook to Stork or to the Court.

[24] Stork emphasises that the precise role of Cook Finance within the Cook group, and the reasons for its interposition between the group's financier and Cook in June 2008, are not explained in the material provided by Cook to this Court. A curious aspect of the refinancing arrangement which was effected in June 2008 – after the trial of the action was complete and judgment reserved – is that the amount of accommodation available to the Cook group of companies was reduced by approximately $10 million (and Cook Finance was inserted between Cook and the new financier) when, according to Cook's financial statements filed with ASIC at the end of 2007, Cook's finance agreement with its previous lender was not due to expire until January 2009.

[25] A further curiosity to which Stork points is the absence of evidence from the Cook group's current financier that, if the lender were disposed to enforce its rights under its securities, it would, in the period before the determination of the appeal, terminate Cook's contracts with third parties and its employees. On Cook's behalf, it is said that Cook cannot control what action its financier may be disposed to take or the extent to which the financier is disposed to reveal its thinking in this regard in an affidavit. There is, however, obvious force in the point that the financier was prepared to provide Cook with an affidavit, and that if it were truly the case that the lender is minded to exercise its rights so as to disrupt Cook's business if the judgment were to be enforced, it would have been easy for it to say so. That the financier has not said so is obviously important bearing in mind that Cook's latest financial statements show nett assets in excess of $38 million. This Court should be slow to infer that Cook's business will be irreparably damaged by action by the financier if the stay is not granted.

[26] A third curiosity which emerges from a consideration of the material now relied upon by Cook is that Cook, presumably prompted by the learned primary judge's observation as to the absence of evidence of "the ability and willingness of current and potential shareholders" to fund the judgment debt, has sought to cure the earlier deficiency by an affidavit of Mr Jon Trende, Cook's Chief Executive Officer. In this affidavit, Mr Trende deposed to the fact that he was informed:

> "by Bruce Cook a director of Caramar Investments Pty Ltd, the shareholder of Cook's Construction that Caramar can not and will not

> provide further funds into Cook's Construction or lend further money to Cook's Construction or otherwise support further borrowings."

[27] But Cook also filed an affidavit by Bruce Cook on behalf of Caramar. Mr Cook deposes that "Caramar is unwilling to contribute further moneys to Cook's Construction to satisfy the judgment debt."

[28] There is an important difference between what Mr Trende swore that he believed Caramar's position to be and what Mr Cook swore that Caramar's position is. It is apparent that Caramar does not actually assert that it is unable to contribute funds, whether by way of share capital or loans, to enable the judgment debt to be paid pending the determination of the appeal. That is hardly surprising given that the shareholder's equity in Cook is in excess of $38 million: if Caramar believes that Cook's appeal has worthwhile prospects of success, there seems to be little commercial sense in Caramar's refusing to make funds available to Cook to enable it to pay the judgment debt pending the appeal if such temporary accommodation is necessary to enable Cook's business to continue without interruption in the meantime.

[29] On Stork's behalf, it was said that this concatenation of circumstances lends itself to the suggestion that Cook has been engaged in the deliberate creation of the appearance that Cook is in a financial straight-jacket which prevents it from paying the judgment debt while the reality of Cook's position remains undisclosed. While one hesitates to accept Stork's harsh view of Cook's conduct, it would, I think, be wrong for this Court to proceed on the basis that Cook is unable to raise the funds necessary to pay the judgment. That inability appears to be due only to its shareholder's unwillingness to make those funds available. That unwillingness may be understandable, but it cannot outweigh the legitimate interest of a judgment creditor in recovering the fruits of its judgment.

[30] On Cook's behalf, it is said that this Court, in striking the appropriate balance of convenience, should regard it as significant that the judgment in Stork's favour is a windfall, in that it results from the operation of s 42(3) of the QBSA to sterilise the entitlements of a person which has actually incurred the expense of carrying out valuable work at the request, and for the benefit, of another person. But the circumstance that a judgment debt represents a windfall to the judgment creditor does not mean that it is any less important that the judgment creditor be recognised as entitled to the fruits of the judgment in its favour. That is so for at least two related reasons: first, it is not for the Court to impede or undermine the legislative policy which has led to the imposition of the judgment; and, secondly, the principal concern of the Court must be to ensure the efficacy of the judgments and orders made by the courts, this concern being a fundamental responsibility of those charged with the administration of justice. It is desirable, I think, to say something more about the first of these points.

[31] At first blush it may seem surprising that a person who has done work for another should not be entitled to be paid or retain payment for the real value of work actually done by that person for the benefit of another even if the circumstances in which the work was done did not conform with statutory regulation of the carrying out of that work. The courts have historically resisted the suggestion that regulatory statutes have the effect of sterilising the entitlement to payment of a person who has

done work at the request, and for the benefit, of another.[8] But there can be no doubt that the legislature intended by the terms of s 42(3) of the QBSA to achieve that outcome, as this Court recognised in its decision in *Marshall v Marshall*.[9] In that case, McPherson JA explained why that is so by reference to the text and legislative history of s 42(3) of the QBSA:

> "It may be that on occasions courts have far too readily reached a conclusion that imposition of a statutory penalty impliedly entails contractual illegality and unenforceability even where the legislation does not expressly so provide. However that may be, s. 42(3) of the Act in the present instance expressly states the consequence of contravening the statutory prohibition to be that:
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> '(3) A person who carries out building work in contravention of this section is not entitled to any monetary consideration for doing so.'
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> In my opinion, the effect of s. 42(3) is to prevent an unlicensed builder, in proceedings of any kind, from recovering the price or any part of it payable under a contract for building work carried out in contravention of the section. Taken by itself, that might perhaps not prevent a builder from receiving money voluntarily paid by the other party. The terms of s. 42(3) are, however, very wide. A person who carries out work in contravention of s. 42 is 'not entitled' to any 'monetary consideration' for doing so. According to the ordinary meaning of those words, a person receives a 'monetary consideration' for carrying out work if he is paid for doing it. The sum of $51,000 paid by the plaintiff to the defendant satisfies that description. Counsel were unable to refer the Court to authority bearing in any relevant way on the meaning of 'entitled' in a context like this. But s. 42(3) expressly declares it to be money to which the recipient is 'not entitled', which can only mean that it is money to which he has in law no right or title. If that is so, there is no identifiable basis on which he can, as against the person who paid it, claim to keep or retain it or its equivalent.
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> There are several, and I consider, persuasive reasons for adopting such an interpretation of s. 42. First, there is the history of the legislation. The corresponding provision of the *Builders' Registration and Home-owners' Protection Act* 1979, which was repealed by the current Act of 1991, was s. 53(2)(d). It originally provided that a person who was not a registered builder should not be 'entitled to recover by action in a court a fee or charge under a contract to perform building construction for another…'. In *Gino D'Alessandro Constructions Pty Ltd v. Powis* [1987] 2 Qd.R. 54, it was held that, in that form, s. 53(2)(d) did not prevent recovery, as a debt due and owing, for money for work done, or, as the High Court preferred to regard it, as restitution for unjust enrichment. See *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 C.L.R. 221. After that

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8 Cf *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40.

9 [1999] 1 Qd R 173.

decision, s. 53(2)(d) was revised by amending it to provide that a person not a registered builder should not:

> '(d) be entitled to claim, sue for or otherwise recover … any fee, charge, damages or other reward of whatever nature in respect of the building construction performed or agreed to be performed.'

However, in *Mostia Constructions Pty Ltd v. Cox* [1994] 2 Qd.R. 55, White J. held that, even in that form, s. 53(2)(d) did not specifically preclude recovery of the amount of the builder's outlays on labour and materials the benefit of which had been accepted by the party who had requested them.

Section 42 is thus the third attempt by the legislature to make its meaning clear. On this occasion it may be credited with having intended to cast the net as widely as possible. An unlicensed builder is, as s. 42(3) now provides, not entitled to *any* monetary consideration for carrying out building work. A principal object of the legislation, both in its original and in its current form, is to prevent unlicensed builders from doing certain kinds of building work. Substandard workmanship and materials are, plainly enough, a principal target of the statutory prohibition: see s. 3(a)(i). Preventing incompetent and unlicensed builders from doing building work, and penalising them if they do so, is one method of achieving that object. On occasions, however, even competent builders make mistakes and, having done so, sometimes become insolvent or for other reasons are not worth suing for the loss sustained. One object of the legislation was, as I suggested in *Gino D'Alessandro Constructions v. Powis* [1987] 2 Qd.R. 40, 54–56, to establish and maintain the insurance scheme, which is now contained in Part 5 of the Act. It is funded by premiums paid by building contractors, from which claims by building owners or 'consumers' can be satisfied: cf. *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 C.L.R. 221, 229.

Under the statutory scheme, a building contractor must, before commencing residential construction work, pay to the Queensland Building Services Authority the appropriate insurance premium: s. 68(1). When an insurance premium is paid in respect of residential construction work, a certificate of insurance issues: s. 69(1). The insurance policy comes into force if a consumer (meaning a person for whom the building work is carried out) enters into a contract for the performance of residential construction work, in which event the contract is imprinted with a licensed contractor's licence card endorsed to show that the licensee may lawfully enter into contracts to carry out residential construction work: see s. 69(2). It is true that s. 69(2) applies whether or not an insurance premium has been paid or an insurance certificate has issued: s. 69(3). It would nevertheless go far to diminish the funding available for the statutory insurance scheme if unlicensed builders were able to receive and retain money for doing residential construction work without complying with these

> provisions and with the licensing requirements of the Act. The insurance fund would be progressively depleted without receiving many of the premiums that were intended to form its source.
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> Another reason for concluding that an unlicensed builder is by s. 42(3) not entitled to receive or retain money paid for doing building work is to be found in analogy with other legislation of a comparable kind. The Act obviously has a regulatory function of which the main object is to protect building owners or 'consumers' from incompetent or dishonest builders: cf. the statutory objects stated in s. 3(b). In *Cornelius v. Phillips* [1918] A.C. 199, a statutory prohibition against money lending otherwise than at the lender's registered address was held to render the contract unenforceable. In *Mayfair Trading Co. Pty Ltd v. Dreyer* (1958) 101 C.L.R. 428, 449–450, Dixon C.J., with whom McTiernan J. agreed, held that a money lender, who, in contravention of the statutory prohibition rendering the loan unenforceable, had succeeded having it repaid, was liable to disgorge the payment received. The money, said the learned Chief Justice, was 'obtained, paid over and retained without lawful authority, and there could be no answer on the facts to a simple claim on the part of the plaintiffs in a common money count. This is true of a count for money had and received …'. The prohibition being intended to protect the class of borrowing consumers, a person belonging to that class was entitled to recover moneys or securities transferred in pursuance of the illegal transaction: *Bonnard v. Dott* [1906] 1 Ch. 740. As an exception to the general rule of law, the fact that a transaction is illegal does not disbar a person whom the legislation is intended to protect from recovering money paid over in pursuance of the transaction. See *Kiriri Cotton Co. v. Dewani* [1960] A.C. 192, on which Mr Logan for the respondent plaintiff relied in this appeal."[10]

[32] To the considerations referred to by McPherson JA, one may now add the circumstance that, in the many years since this Court's decision in *Marshall v Marshall*, the legislature has not been disposed to indicate its dissatisfaction with the outcome in that case.

[33] In summary, I am not persuaded that it is appropriate to grant a stay on the ground that it is necessary to avoid irremediable harm to Cook. Any harm to Cook which might arise from payment of its judgment debt pending the determination of the appeal might well be avoided by action by Cook's shareholder. Cook's shareholder is, of course, not obliged to provide the necessary funds, but one cannot be confident that it is unable to do so or that it would not do so if that were necessary to protect its shareholder's equity of $40 million. In these circumstances, this Court should, I think, decline to delay a judgment creditor in the execution of its rights when that delay may ultimately enure to its disadvantage by the diminution of the judgment debtor's ability to meet its obligations under the judgment over the period of that delay.

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10 [1999] 1 Qd R 173 at 176 – 178.

Conclusion and orders

[34] I do not consider that Cook has made out a sufficient case for the grant of a stay in the exercise of this Court's discretion under r 761(2) of the UCPR.

[35] So far as the appeal from the learned primary judge's refusal of a stay is concerned, this Court cannot say that the learned primary judge should have reached an outcome more favourable to Cook on the material before him. Accordingly, the appeal against the refusal of the stay should be dismissed.

[36] The application to this Court pursuant to r 761(2) of the UCPR for the grant of a stay should be refused.

[37] Cook should pay Stork's costs of the application to this Court to be assessed on the standard basis.

[38] Cook should pay Stork's costs of the appeal from the refusal of the stay on the indemnity basis: in light of the application to this Court under r 761(2) of the UCPR, the appeal lacked all utility and its prosecution was quite unreasonable.

[39] **WHITE AJA:** I have read Keane JA's reasons for judgment and agree with his Honour for the reasons that he gives that the application for a stay ought to be refused.

[40] I also agree with his Honour that indemnity costs are appropriate with respect to the costs of the appeal from the primary judge's refusal of a stay of his judgment pending appeal. The material before the primary judge, as his Honour pointed out, was deficient. In order to address the deficiency further material was produced which, as Keane JA reveals, demonstrated some lack of frankness below.

[41] An application under r 761(2) to introduce the fresh evidence meant that the appeal from the primary judge lacked utility, as Keane JA has noted, and was prosecuted unreasonably. It is those factors which support an order for indemnity costs of the appeal from the refusal of the stay.