Court of Appeal
Supreme Court
New South Wales

Summary

Medium Neutral Citation:	**Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd [2017] NSWCA 53**
Hearing dates:	3 March 2017
Decision date:	23 March 2017
Before:	Beazley ACJ at [1]; Basten JA at [4]; Leeming JA at [88]
Decision:	(1) Grant the applicant leave to appeal from the judgment in the Equity Division refusing relief on the notice of motion filed in the Division on 6 February 2017. (2) Direct that the applicant file within 7 days a notice of appeal in the form of the draft notice of appeal contained in the white folder. (3) Dismiss the appeal. (4) Order that the applicant pay the respondent's costs in this Court.
Catchwords:	BUILDING AND CONSTRUCTION – where builder filed payment claim under Building and Construction Industry Security of Payment Act 1999 (NSW) – where resulting adjudication determination filed as judgment debt – whether requirement to notify affected party of judgment debt before commencing proceedings to enforce it – whether s 25(4) creates right to such notice BUILDING AND CONSTRUCTION – ex parte garnishee order obtained – whether duty of candour to inform court that affected party had commenced proceedings challenging validity of underlying adjudication determination under Supreme Court Act 1970 (NSW), s 69
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13, 14, 17, 19, 20, 22, 23, 24, 25, 32; Pt 3 Common Law Procedure Act 1854 (17 & 18 Vict c 125), ss 60-67 Common Law Procedure Act 1857 (20 Vic No 31), ss 27-

33
Civil Procedure Act 2005 (NSW), ss 9, 106, 117, 118, 124, 133, 134, 135; Pt 8, Div 3
General Rules of Court 1952 (NSW), Order XIX
Interpretation Act 1987 (NSW), s 33
Legal Profession Uniform Law Application Act 2014 (NSW), ss 86, 90
Supreme Court Act 1970 (NSW), ss 69, 75
Supreme Court Rules 1970 (NSW), Pt 46
Uniform Civil Procedure Rules 2005 (NSW), rr 36.14, 36.15, 36.16, 39.34, 39.35, 39.38, 39.39; Pt 39, Div 4

Cases Cited:

Aristocrat Technologies Australia Pty Ltd v Allam [2016] HCA 3; 90 ALJR 370
Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350
Bruton Holdings Pty Limited (in liq) v Commissioner of Taxation (2009) 239 CLR 346; [2009] HCA 32
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543; [2002] HCA 49
Garrard (T/as Arthur Andersen & Co) v Email Furniture Pty Ltd (1993) 32 NSWLR 662
House v The King (1936) 55 CLR 499
International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319; [2009] HCA 49
J Aron Corporation v Newmont Yandal Operations Pty Ltd [2004] NSWSC 533; 183 FLR 90
ML Ubase Holdings Co Ltd v Trigem Computer Inc (2007) 69 NSWLR 577; [2007] NSWSC 859
Parisienne Basket Shoes Pty Ltd v Whyte (1937-1938) 59 CLR 369
Prichard v Westminister Bank Ltd [1969] 1 WLR 547
Re Price (1869) LR 4 CP 155
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397
Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) [2016] NSWCA 379
The Mayor and Aldermen of the City of London v Cox (1867) LR 2 HL 239
The Mayor and Aldermen of the City of London v London Joint Stock Bank (1881) 6 App Cas 393
Thomas A Edison Ltd v Bullock (1913) 15 CLR 679
Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd (1988) 20 FCR 540
Walter Rau Neusser Oel Fett AG v Cross Pacific Trading

Ltd [2005] FCA 955
Young v Cooke [2017] NSWCA 33

Texts Cited: A G Saddington, “Orders of Court and Garnishee Process” (1948) 21 Australian Law Journal 346

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Category: Principal judgment

Parties: Fitz Jersey Pty Ltd (Applicant)
Atlas Construction Group Pty Ltd (Respondent)

Representation: Counsel:
Mr M Christie SC/Mr B Kremer (Applicant)
Mr I Roberts SC/Ms J Wright (Respondent)

Solicitors:
Gillis Delaney Lawyers (Applicant)
Bradbury Legal (Respondent)

File Number(s): 2017/41629

Decision under appeal

Court or tribunal: Supreme Court

Jurisdiction: Equity Division

Citation: [2017] NSWSC 72

Date of Decision: 06 February 2017

Before: McDougall J

File Number(s): 2017/15773

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In December 2010 the applicant, Fitz Jersey Pty Ltd ("the developer"), engaged the respondent, Atlas Construction Group Pty Ltd ("the builder"), to design and construct a major development project at Mascot in Sydney. On 15 November 2016, the builder served a final payment claim on the developer pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("Security of Payment Act") for an amount in excess of $10.5 million plus interest. On 29 November 2016, the developer served a payment schedule asserting that no money was owing to the builder.

An adjudicator determined that the payment claim was payable in full. As the developer did not make payment within the five business days specified under the Act, the builder obtained an adjudication certificate, which it filed in the Supreme Court. The result was a judgment debt, on the basis of which the builder then obtained a garnishee order. On 27 January 2017, the garnishee order was served on the developer's bank, which duly paid the amount owing from the developer's account.

Prior to the adjudication certificate being filed, the developer had commenced proceedings under s 69 of the *Supreme Court Act 1970* (NSW) challenging the validity of the adjudication determination. The developer did not, however, seek interlocutory relief, or an undertaking from the builder not to take steps to enforce the determination. On learning of the payment from its bank account, it sought orders that the garnishee order be set aside and the money repaid. That application was dismissed by McDougall J in the Equity Division.

The questions before this Court were whether:

(1) the builder was required to notify the developer that an order for judgment debt had been obtained before taking steps to enforce it;

(2) in applying ex parte for a garnishee order with respect to the judgment debt, the builder was required to notify the court that the developer had commenced proceedings to review the underlying adjudication determination; and

(3) the primary judge erred in refusing to set aside the garnishee order and order repayment of the amount paid by the garnishee.

The Court (Beazley ACJ, Basten JA and Leeming JA), **granting leave to appeal but dismissing the appeal,** held:

In relation to question (1):

1. A judgment can be enforced without serving it on the party affected: [38]. The Security of Payment Act s 25(4) provides an entitlement to seek relief which, if made good on appropriate grounds, might result in a judgment being set aside. However, s 25(4) does not put a respondent in a better position than any other unsuccessful respondent against whom a judgment debt has been obtained in civil proceedings: [40].

Garrard (T/as Arthur Andersen & Co) v Email Furniture Pty Ltd (1993) 32 NSWLR 662 discussed.

In relation to question (2):

2. An applicant for ex parte relief must inform the judicial officer of circumstances which would disentitle it from the relief sought: [55]. Even if some interlocutory relief in the nature of a stay is not in place, the fact that it has been sought and the motion not determined should be disclosed: [56]. Further, it is generally necessary to disclose circumstances where there have been discussions between the parties; at least where an undertaking not to enforce has been sought and, though not given, an application for a stay has been foreshadowed: [57]. This case involved no such circumstances.

Aristocrat Technologies Australia Pty Ltd v Allam [2016] HCA 3; 90 ALJR 370; *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 350; *Garrard (T/as Arthur Andersen & Co) v Email Furniture Pty Ltd* (1993) 32 NSWLR 662; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49; *Thomas A Edison Ltd v Bullock* (1913) 15 CLR 679; *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 discussed.

3. There are circumstances in which a garnishee order should not issue for reasons which are not expressly identified in the rules: [70]. Although there is a discretion to issue a garnishee order, this discretion is not equitable [112]-[114]. Further, the statutory evolution of garnishee orders may not engage a duty of candour: [116]-[126].

ML Ubase Holdings Co Ltd v Trigem Computer Inc (2007) 69 NSWLR 577; [2007] NSWSC 859 discussed.

In relation to question (3):

4. No error of principle was identified warranting interference with the judge's refusal to exercise a discretionary power sought on equitable grounds: [3], [86], [106].

JUDGMENT

1 **BEAZLEY ACJ**: I have had the advantage of reading in draft the reasons of Basten JA and the reasons of Leeming JA.

2 I agree with the dispositive reasoning of both of their Honours. There was no obligation in this case for the respondent to disclose, in making an application for a garnishee order, that the appellant had commenced proceedings in the Supreme Court's supervisory jurisdiction challenging the determination of the adjudicator. In this regard, I agree in particular with the reasons of Basten JA at [46]-[47] and [70]-[86], although I have not found it necessary to form a view as to whether the refusal of discretionary relief for non-disclosure carries with it a penal purpose: see Basten JA's second point at [72].

3 In respect of grounds 1, and 2(a), (b) and (c), as explained by Leeming JA, the appellant failed at a fundamental level to demonstrate that the discretion of the primary judge miscarried. Had the matter not been fully argued, I would have favoured a refusal of leave. In the circumstances, I agree that leave should be granted, but the appeal must be dismissed.

4 **BASTEN JA**: This appeal gave rise to three questions as to the enforcement of a determination by an adjudicator of a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("Security of Payment Act"). The questions were whether:

(a) the claimant was required to notify the respondent that a judgment had been obtained before taking steps to enforce it (ground 2 (d) and (e)); and

(b) in applying ex parte for a garnishee order with respect to the judgment debt, the claimant was required to notify the court that the respondent had commenced proceedings to review the underlying adjudication determination (ground 2 (a), (b) and (c)), and

(c) the primary judge erred in refusing equitable relief (ground 1).

5

In December 2010 the applicant, a property developer, Fitz Jersey Pty Ltd (hereinafter "the developer"), engaged the respondent builder, Atlas Construction Group Pty Ltd ("the builder") to design and construct a major development project at Mascot, Sydney. In November 2016 the builder served a final payment claim on the developer for an amount in excess of $10.5 million plus interest, pursuant to the Security of Payment Act. The claim was disputed, but, on 6 January 2017, an adjudicator determined that the developer should pay the whole of the claim. When the money was not paid within the time allowed under the Act, the builder registered the determination and obtained a garnishee order directed to the developer's bank which duly paid the full amount of the judgment debt, being $11 million.

6 Prior to the registration of the adjudicator's determination as a judgment, the developer had commenced proceedings in the Equity Division (Technology and Construction List) seeking to set aside the adjudicator's determination on the ground that it was "void". It did not seek interlocutory relief, nor an undertaking from the builder not to take steps to enforce the determination. However, on learning of the payment from its bank account, in satisfaction of the whole of the amount due under the determination, it filed a notice of motion in the proceedings pursuant to which the garnishee order was obtained by the builder seeking, as the primary relief, orders that the garnishee order be set aside and that the builder repay the amount paid to it by the garnishee.

7 That motion came before McDougall J on 6 February 2017. The judge dismissed the motion, primarily on the basis that the requirement to repay the money involved a mandatory injunction and thus equitable relief. That relief was refused, on the basis that (a) the developer had not taken timely steps to protect its position and (b) there was no evidence that the builder would not, if called upon, be able to repay the $11 million. [1]

8 The grounds identified in the draft notice of appeal filed with the summons seeking leave were as follows:

> "1. The primary judge erred in refusing to set aside the garnishee order obtained by the respondent on 27 January 2017 and to order repayment of the garnisheed amount to the appellant.
>
> 2. The primary judge ought to have held that:
>
> (a) the respondent was under a duty of candour when applying for the garnishee order;
>
> (b) the respondent did not comply with that duty and did not make full and fair disclosure to the Court when obtaining the garnishee order;
>
> (c) the garnishee order be set aside;
>
> (d) the respondent was not entitled to enforce the judgment obtained pursuant to s 25(1) *Building and Construction Industry Security of Payment Act 1999* (NSW) without giving reasonable notice to the appellant that the respondent had filed an adjudication certificate pursuant to s 25(1), so as to enable the appellant to:
>
> (i) apply to set aside the judgment;
>
> (ii) pay the adjudicated amount into court as security pursuant to s 25(4)(b) of the Act; and
>
> (iii) obtain a statutory stay by reason of s 25(4)(b); and

(e) the respondent failed to do the things required to in (d)."

9 For the reasons set out below, there should be a grant of leave to appeal, limited to the first question identified above, but the appeal should be dismissed.

Statutory scheme

10 The oft-recounted purpose of the Security of Payment Act (and equivalent legislation in other jurisdictions) is to provide "a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract". [2] Further, the Act "seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate." [3] The Act thus "operates to alter, in a fundamental way, the incidence of the risk of insolvency during the life of a construction contract." [4]

11 The means by which the Act achieves this objective is to provide for a builder to make claims for progress payments ("payment claims") for work done and goods delivered, which the principal must either pay or resist by serving a "payment schedule". In the event of a dispute the builder may apply "for adjudication of a payment claim", [5] which is undertaken according to a tight schedule. In the present case, the claim was for the last payment due under the contract. Although the term "progress payment" is used in the Act, s 13, which deals with payment claims, provides that a claim may be served within "the period of 12 months after the construction work to which the claim relates was last carried out". [6] Part of the dispute in this case was whether the relevant claim was served within that period.

12 Where an adjudicator is appointed, he or she is required to determine "the amount of the progress payment (if any) to be paid by the respondent". [7] The determination is to be in writing and is to include reasons. [8]

13 Three sections of the Security of Payment Act are of critical importance in the present case. First, s 23 requires that a respondent must pay the amount determined by the adjudicator no later than the fifth business day after the determination is served on the respondent. If the respondent fails to pay the whole or any part of the adjudicated amount, the claimant may request "an adjudication certificate" under s 24(1)(a). Section 25 then provides the next step, by which a judgment debt is created:

> **25 Filing of adjudication certificate as judgment debt**
>
> (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
>
> (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
>
> (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
>
> (4) If the respondent commences proceedings to have the judgment set aside, the respondent:
>
> (a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

14 Certain other statutory provisions, not found in the Security of Payment Act but relevant to the applicant's submissions in this Court, should also be noted. First, the applicant contended that it should have received notice of the registration of the adjudication certificate as a judgment before it could be enforced. That was necessary, it submitted, because s 25(4) recognised that there might be a procedure available to a respondent to the adjudication to have the judgment set aside. It is clear that s 25(4) does not create or confer a power to have a judgment set aside; rather, the judgment having been obtained without notice to the respondent, any power to set it aside may be found either in the inherent powers of the Court or in the following provisions of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR"):

36.15 General power to set aside judgment or order

(1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.

…

36.16 Further power to set aside or vary judgment or order

(1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.

(2) The court may set aside or vary a judgment or order after it has been entered if:

(a) it is a default judgment (other than a default judgment given in open court), or

(b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order

…

15 So far as service of a copy of a judgment is concerned, the UCPR provides:

36.14 Service of judgment or order not required

A sealed copy of a judgment or order need not be served unless these rules expressly so require or the court so directs.

16 The applicant did not submit that there was any express requirement for service of the judgment in the Security of Payment Act; accordingly, there was an issue as to whether there was an implied requirement for service and, if so, how any inconsistency between such an implied requirement and r 36.14 should be resolved.

17 It may be noted that, as at the date of the proceedings before the primary judge and, subject to one possible qualification referred to below, as at the date of the hearing of the appeal, the respondent had not sought to have the judgment set aside. Rather, it had taken two steps of which the first, chronologically, was the filing of a summons in separate proceedings in the Equity Division challenging the legal validity of the adjudicator's determination. That proceeding was commenced in the Court's supervisory jurisdiction under s 69 of the *Supreme Court Act 1970* (NSW). As has long

been the understanding of the scope of the Security of Payment Act in this State, and as was recently affirmed by this Court in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)*, [9] the jurisdiction of the Court in relation to such determinations is limited to the grant of relief where an applicant has established jurisdictional error on the part of the adjudicator. Although the proceedings also sought a declaration of invalidity of the determination pursuant to s 75 of the *Supreme Court Act*, it was not suggested that such relief could be available if jurisdictional error were not established.

18 The qualification to the statement that no proceedings had been commenced to have the judgment set aside was the assertion from the bar table that the respondent had in fact sought leave to amend its proceedings under s 69 challenging the validity of the determination to seek to have the judgment set aside if the determination were held to be invalid. That may be accepted, but will not affect the construction of the statutory provisions.

19 The second step taken by the developer was to seek an order in these proceedings that the garnishee order be set aside. That order was sought on two bases. First, it was said to follow as a consequence of an order setting aside the judgment on which the garnishee was based; secondly, a separate entitlement to have the garnishee order set aside was said to arise from a failure by the builder, in seeking the order, to disclose to the Registrar that the developer had commenced proceedings under s 69 challenging the validity of the underlying adjudication. [10]

20 There were a number of provisions relevant to the making of the garnishee order. First, s 106(1) of the *Civil Procedure Act 2005* (NSW) provides:

> **106 Judgments for payment of money**
>
> (1) A judgment debt may be enforced by means of any one or more of the following:
>
> (a) a writ for the levy of property,
>
> (b) a garnishee order,
>
> (c) in the case of a judgment of the Supreme Court or the District Court, a charging order.

21 There are further provisions in Pt 8, Div 3, of which only two are indirectly relevant in the present case. First, s 117(1) provides that a garnishee order "operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order." Secondly, s 118 requires that the garnishee must pay the amount within 14 days after the date on which the order is served on the garnishee.

22 There is an express restraint on enforcement of judgments, requiring that they first be entered:

> **133 Judgments and orders unenforceable until entered**
>
> (1) A judgment or order of the court may not be enforced until it has been entered in accordance with the uniform rules.
>
> (2) This section extends to:

(a) any judgment, order, determination or decree of a court, and

(b) any adjudication or award of a person having authority to make an adjudication or award,

that may be filed or registered in the court, or of which a certificate may be filed or registered in the court, under any other Act or law.

There is also a prohibition on obtaining orders, including a garnishee order, "except by leave of the court" after 12 years since the judgment was given or registered. [11] There is otherwise power to stay execution. [12]

23 Of more direct relevance to the submissions in the present case are rules under the UCPR relating to garnishee orders, which appear in Pt 39, Div 4. Relevantly, these rules provide:

39.34 Application for garnishee order

(1) An application for a garnishee order in respect of a judgment is to be made by way of notice of motion.

(2) Unless the court orders otherwise, a notice of motion under this rule:

(a) may be dealt with in the absence of the parties, and

(b) need not be served on the judgment debtor or the proposed garnishee.

(3) The application must indicate the extent (if any) to which the judgment debt has been satisfied under any writ of execution, garnishee order or charging order issued by the court.

39.35 Affidavit in support of application for garnishee order

(1) Unless the court orders otherwise, an applicant for a garnishee order must file an affidavit in support of the application, being an affidavit sworn not more than 14 days before the date of filing.

(2) The affidavit in support:

(a) must identify the garnishee, and any debts that appear to be owed by the garnishee to the judgment debtor, and

(b) must state the amount payable under the judgment, together with any costs and interest payable in relation to the judgment, as at the date of swearing of the affidavit …

39.38 Court may refuse to make garnishee order

(1) The court may refuse to make a garnishee order if of the opinion that such an order is inappropriate.

(2) Without limiting subrule (1), the reasons that may lead the court into forming such an opinion may include:

(a) the smallness of the amount recoverable under the judgment debt, and

(b) the smallness of the debt, wage or salary to be attached.

Chronology of relevant events

24 Because the primary judge dealt with the motion before him by refusing relief on discretionary grounds, it is necessary to set out the chronology of the events which have been referred to above.

25 The builder's payment claim was made on 15 November 2016. On 29 November the developer served a payment schedule asserting that no money was owing to the builder. On 13 December 2016 the builder lodged an adjudication application, to which, on 21 December, the developer lodged an adjudication response. A major issue,

correctly identified by the adjudicator, was whether any construction work had been undertaken pursuant to the contract within the 12 months before the claim was lodged. Otherwise the schedule noted that the full amount owing under the contract, with variations, being a figure of approximately $233 million, had been paid in full. The adjudicator determined that work had been done in the 12 months prior to the lodgement of the payment claim, for which the builder was entitled to payment, and that the claim was payable in full.

26 It was common ground that the adjudication determination was provided to the parties on 6 January 2017 and that the period of five workings days within which to make payment expired on 13 January 2017. While the developer did not make the payment on that day, it commenced proceedings on that day under s 69 of the *Supreme Court Act*, challenging the validity of the determination. A copy of the summons was sent electronically to the builder on the day it was filed, namely Friday, 13 January 2017.

27 On Monday, 16 January 2017 the builder requested an adjudication certificate, which was provided by the relevant authority on the same day. The following day the builder filed the adjudication certificate and an affidavit affirming that no payment had been received. The result was a judgment for the full amount specified in the certificate. Also on 17 January, a notice of motion seeking a garnishee order was filed, supported by an affidavit sworn by a director of the builder and recording that the judgment "is not stayed by an order of the court, by an instalment order or by a suspension under sections 86 or 90 of the *Legal Profession Uniform Law Application Act 2014* that has not been ended." The garnishee order was issued on 27 January 2017, over the name of an assistant deputy registrar, noting the capacity in which it was signed as "Principal Registrar". According to the chronology, the garnishee order was served on the National Australia Bank on the same day, namely Friday, January 27.

28 The s 69 summons filed by the developer on 13 January had a return date at 12 noon on Friday, 3 February 2017. That morning, the solicitors for the developer provided a copy of proposed consent orders dealing with pleadings and the filing of evidence. Unbeknownst to the developer, NAB had paid the money due under the garnishee order to the builder the previous day. The developer became aware of that event in the course of a conversation with the builder's solicitor immediately prior to the directions hearing. At the directions hearing, the matter was stood over for seven days until Friday, 10 February 2017.

29 On Monday, 6 February 2017 the developer filed an urgent motion seeking that the garnishee order be set aside and that the money be repaid forthwith. That matter was disposed of by McDougall J, as the duty judge, by judgment delivered on the same afternoon.

Reasoning of primary judge

30

Despite the broad terms of ground 1 on the appeal set out above, there was no challenge to the exercise of the discretionary power to grant or refuse relief, except by reference to the failure to make certain findings relevant to the exercise of that power, as identified in ground 2.

31 The reasoning of the primary judge commenced by identifying the nature of the dispute as to whether the payment claim had been made within time, noting that the developer had filed a payment schedule and that the matter had been resolved in favour of the builder by the adjudicator. After referring to the separate proceedings commenced by the developer under s 69 of the *Supreme Court Act*, the judge continued: [13]

> "The [developer] did not at any time seek an undertaking from the [builder], an undertaking that it would not seek to enforce its rights under the determination, either until the dispute could be resolved or without giving notice, or some equivalent form of de facto stay. Nor did the [developer] move in this court for an order restraining the [builder] from recovering judgment or enforcing its rights under any such judgment."

32 The judge then recounted that the developer's solicitors, in serving the initiating summons, had forwarded a letter noting that the directions hearing was listed for 3 February 2017 and stating:

> "We are instructed that if your client seeks an order at that directions hearing that our client lodge the amount of the adjudication determination with the Supreme Court until a judgment is issued on our client's summons, our client will not object to that order being made."

33 The judge set out the chronology of developments recounted above and noted the developer's claim that it had a "right" to make an application under s 25(4) seeking to set aside the judgment based on the adjudication certificate. [14] The primary judge said that, as had been recognised "over the last 12 years and more, a respondent to an adjudication determination who claims that the determination is infected by what I will call 'reviewable error' may obtain interlocutory injunctive relief restraining the applicant from acting on the determination in its favour by filing an adjudication certificate as a judgment for a debt." [15] The judge also noted "[n]umerous cases" recognising that if the certificate had been filed, enforcement of the resulting judgment might be restrained. Referring to the builder's case, which he described as "simple", the judge continued: [16]

> "The judgment has been given. It has been satisfied by payment. Whatever rights the [developer] has left are those rights, recognised in particular by s 32 of the [Security of Payment Act], to litigate on a final basis the question of who owes what to whom under the construction contract. As was submitted in reply for the [developer], that argument appears to assume that the [developer's] rights or entitlement under s 25(4) have become spent."

34 The judge then returned to the failure of the developer to take any step, whether by way of interlocutory injunction or by seeking an undertaking, to stop the builder enforcing its rights under the determination, of which it had become aware on 6 January 2017. Even in the letter commencing proceedings on 13 January 2017, no such undertaking was sought. [17] After noting that "in the ordinary way parties should not rush into court unless there is some good reason to do so", [18] but also remarking that he had "some difficulty in seeing why this court should now interfere", [19] the judge concluded: [20]

> "There is a well recognised jurisdiction to restrain enforcement of adjudication determinations where, firstly, there is evidence of a substantial basis of challenge to the determination (on a ground that the courts recognise as being available) and, secondly, there is reason for thinking that if such a challenge is made and succeeds, the applicant may not enjoy the fruits of its success because the respondent will be unable to repay the adjudicated amount. I am prepared to accept that the cases establishing those propositions might justify the making of an application on that basis even where the adjudicator's determination has been enforced in the way it has been enforced in this case. But in the present case, there is no evidence to suggest that the [builder], if called upon, would not be able to repay the $11 million."

35 Understood in its context, it appears that the reason for refusing relief was in part because there was no evidence of lack of ability to repay, but also in part because of the opportunities to propose a regime which would maintain the status quo prior to the garnishee order having been issued, and, in the absence of agreement, to seek an interlocutory injunction. The judge made clear that he was refusing the application for injunctive relief "on discretionary grounds". [21]

36 Before reaching the final conclusion, the primary judge addressed the developer's submission that, in seeking the issue of a garnishee order on 17 January 2017, the builder ought to have notified the Court that the developer had commenced separate proceedings challenging the basis of the judgment. Although not ruling on the matter (saying "I am not sure that this is correct" [22]), the judge observed that the issue of the garnishee order was "essentially an administrative decision" and "not to be equated with an ex parte application to a judge seeking injunctive or equivalent relief." [23] He further pointed out that the material to be put before the court on an application for a garnishee order is "specified in the rules" and it is not incumbent on an applicant to do more. [24] The judge qualified that by an acceptance that there may be circumstances where, notwithstanding the requirements of the rules, an order might be procured in bad faith and therefore set aside. He said that "the circumstances of this case seem to me to fall well short of any such bad faith." [25]

Duty to give notice of registration of certificate – (grounds 2(d), (e))

37 As it arises first in the order of events, it is appropriate to deal first with the ground of challenge set out in pars 2(d) and (e) of the grounds of appeal. [26] That ground, it may be noted, did not suggest that there was any impropriety in filing the adjudication certificate and obtaining the judgment in this Court. Rather, the impropriety arose from the failure to give "reasonable notice" to the developer before seeking to enforce the judgment, so that the developer could apply to have it set aside and, for that purpose, pay the adjudicated amount into court pursuant to s 25(4)(b). The effect of that payment would be, the developer submitted, to obtain "a statutory stay" by reason of that provision.

38 The proposition that a judgment cannot properly be enforced by a successful party without serving a copy of the judgment on the party by whom payment must be made, or otherwise bringing it to the notice of that party and providing a reasonable opportunity for the party to take steps either to set the judgment aside or, if so advised, to seek a stay of execution, has no support in authority, or as a matter of general

principle. It would, on its face, be inconsistent with the proposition that service is not required, [27] and inconsistent with the principle that an appeal will not stay the entitlement of a successful plaintiff to recover the damages awarded. That entitlement will not usually be stayed, even pending an appeal challenging the basis on which the order was made, unless a failure to maintain the status quo may render the appeal futile and the grounds are reasonably arguable.

39 The developer, however, sought to obtain a different outcome in the present case on two bases. The first relied upon the statutory scheme of the Security of Payment Act, and in particular s 25. The second sought to derive assistance from the fact that the determination might be registered as a judgment in any court of competent jurisdiction, by contrast with the situation of a judgment being entered in the court in which it was given. In the latter case, entry might be seen as an expected formality whereas, in the former case, the unsuccessful party may not know in which particular court the judgment will be entered.

40 It is convenient to start with the argument based on s 25(4) of the Security of Payment Act. While it is not, and could not, be said that that provision confers any right to have a judgment set aside, the developer's claim was that it recognised an entitlement which otherwise existed to have the judgment set aside. If that assertion were reformulated as an entitlement to seek relief which, if made good on appropriate grounds, might result in a judgment being set aside, the point may be accepted. However, it would be incorrect to suggest that s 25(4) put the respondent to a claim in any better position than an unsuccessful respondent against whom a judgment debt has been obtained in civil proceedings in a court. On the contrary, the apparent purpose of s 25(4) is to restrict any ground that might otherwise be available to the respondent in such proceedings. Thus, where a default judgment had been obtained, or a judgment obtained ex parte, it might be open to a respondent to seek to have the judgment set aside in circumstances where it could demonstrate an arguable defence or a right to a set-off pursuant to a cross-claim; both of these opportunities are precluded by the terms of s 25(4)(a)(i) and (ii).

41 It is arguable that available grounds to set aside a judgment might include non-compliance with the procedure for obtaining the judgment, such as relying upon a certificate which did not reflect the determination, or where the certificate had issued prematurely, or where the money had been paid before the certificate issued, or where the court was not a court of competent jurisdiction. Some of these grounds may reflect the two-stage process of obtaining an adjudication determination and then registering it, but others, including grounds generally available under rr 36.15(1) and 36.16(2), would not support an additional implied constraint based on reasonable notice of the entry of judgment, which would be inconsistent with r 36.14.

42 Further, the developer submitted that s 25(4) was premised on the fact that payment had not been made pursuant to the judgment, as otherwise par (b), requiring the party to pay into court "as security the unpaid portion of the adjudicated amount" would be a

false assumption.

43 There is a different and preferable reading of par (b), namely that it requires payment into court of the unpaid part of the judgment debt, *if any*, by way of security. By contrast, the developer's reasoning would make it a condition of an otherwise existing right to apply to have the judgment set aside that there be some unpaid portion. That reading could have quite extreme and potentially quite unfair consequences. It should not be adopted.

44 There is a further reason why the developer's reading would be inconsistent with the scheme of the legislation. It may be accepted that the exclusion of challenges to the adjudicator's determination [28] was not intended to preclude a challenge to the validity of a determination based on jurisdictional error. [29] Because such challenges may be brought (and usually are brought) before the entry of judgment, s 25(4) would have no application to them. In such cases in the supervisory jurisdiction, s 25(4)(b) would not apply. As noted in *Shade Systems*, there is no express provision requiring payment into court in circumstances where the existence of a valid determination is challenged, but no judgment has been obtained. [30]

45 That leaves the proposition that the scheme for such judgments differs from judgments in civil proceedings generally, because the party required to pay the amount under the determination does not know in what court the adjudication certificate may be filed. (Although the certificate in the present case could only be filed in the Supreme Court, that fact does not weaken the argument as relied on to construe the statute.) However, to impose some additional constraint, such as reasonable notice of the existence of the judgment, is to deny the language of s 25(1) ("and is enforceable accordingly") its full and ordinary meaning. There is no authority which seeks to adopt such a construction, nor does it fit with either the context in which s 25(1) appears, the objects of the Act, or anything in the legislative history.

46 The better view is that any such requirement for "notice" can only be located in the process for seeking enforcement by the exercise of a judicial or quasi-judicial power to issue a writ of levy or a garnishee order. That approach would gain some support from the decision of this Court in *Garrard (T/as Arthur Andersen & Co) v Email Furniture Pty Ltd*. [31] *Garrard* involved a dispute as to the payment of the costs of proceedings in which the appellant had been unsuccessful. The respondent served a bill of costs, which it sought to have assessed. When the appellant failed to serve a notice of objection within the specified time, the respondent obtained a certificate of taxation, which it presumably intended to file and enforce as a judgment of the court, although that stage was not reached. Rather, the question was whether there had been proper disclosure to the registrar who issued the certificate on an ex parte application. In considering that issue, the Court referred to the "high standard of candour and responsibility of those whose seek ex parte orders". [32] This was the approach adopted by the developer with respect to its complaints regarding the issue of the

garnishee order. The argument can usefully be addressed in that context. Subject to the conclusions reached in relation to the first ground, the grounds 2(d) and (e) should be rejected.

47 It should be noted that little in fact turned on the supposed obligation to give notice of the existence of a judgment. At all stages from the moment that it was served with a copy of the adjudicator's determination, the developer was aware of its legal obligation, within five working days, to pay the amount of the determination, failing which the builder would have a right to obtain a judgment merely by obtaining and filing a copy of the adjudication certificate and taking steps to enforce it. For present purposes it may be accepted that the developer was no worse off having an unenforced judgment against it than it was immediately it had failed to pay the determined amount by the end of the specified period. In other words, it may be assumed that, if its challenge in the supervisory jurisdiction to the validity of the determination were to be successful, effective relief would not be precluded by the existence of the judgment, which might itself be set aside. However, the same assumption cannot be made once the judgment has been enforced and there is no outstanding debt. That result could be avoided if, however, the developer were to be successful on its grounds 2(a)-(c), addressing the circumstances in which the garnishee order was obtained.

Duty of candour on ex parte application (grounds 2(a)-(c))

(1) alleged error

48 According to the developer's written submissions, confirmed in the course of oral submissions, the primary judge should have held, (a) that the builder was subject to a duty of candour absent satisfaction of which the garnishee order should be set aside and (b) that the content of the duty extended to the following four matters, none of which was in fact disclosed:

(a) the developer had on 13 January 2017 filed in the court an application to set aside the adjudication on which the judgment and the proposed garnishee order were based;

(b) the developer had proffered to pay into court the amount of the adjudication determination;

(c) the builder had not informed the developer of the filing of the certificate and its intention to obtain a garnishee order, and

(d) the builder did not intend to inform the developer of those matters.

49 It was in substance the first of these matters upon which success or failure turned. Indeed, it was this matter which was the element of non-disclosure initially relied upon by the solicitors for the developer in a letter of 5 February 2017, asserting that the builder should not have sought a garnishee order absent such disclosure.

50 The second matter was not strictly correct: when it commenced the proceedings in the supervisory jurisdiction of the court challenging the determination, the developer did not offer to pay any amount into court, but merely informed the builder that if it (the builder)

applied to have the amount paid into court, the developer would not oppose such an order. (Why the condition was formulated in these terms is unclear, but it presumably delayed the payment into court until there was direction to do so.)

51 The third matter, standing on its own, is not persuasive. It amounts to a general proposition, inconsistent with the reasoning set out above, that the beneficiary of a determination of an adjudicator cannot enforce the determination without giving notice that it had filed the certificate (thus obtaining judgment), or that it intended to file the certificate and intended to obtain a garnishee order. Although there was no evidence one way or the other in this case, there will obviously be cases in which the rights of the builder might be severely prejudiced if it were required to go through such a process and, accordingly, no such general requirement would be appropriate.

52 The fourth matter, that is, that it had not only not informed the developer, but did not intend to inform the developer, of those events, added nothing to the other matters.

53 To suggest, as the applicant did, that the trial judge found there was no obligation of disclosure to the Registrar, upon seeking a garnishee order ex parte, was to overstate the case. In the reasoning set out above, [33] the judge acknowledged that there will be circumstances in which, in effect, some form of disclosure would be required. The real issue was whether those circumstances did or did not include the present case.

(2) legal principles

54 The principles relied upon by the developer have been expressed in a wide range of cases in which orders have been obtained ex parte. The critical question is how those principles should be applied in the present statutory circumstances. Before addressing that question, it is necessary to set out the principles and refer to the principal authorities in which statements of principle are discussed. This exercise is important because the label “duty of candour” is imprecise and because, particularly in cases where there has been a blatant and culpable breach, the principle is sometimes stated more emphatically and broadly than in other cases.

55 First, there can be no doubt that an ex parte applicant must inform the judicial officer of circumstances which would disentitle it from the relief sought. Examples include the fact that the applicant is a company which has been deregistered, and that there is a stay in place precluding enforcement of a judgment. Since no party could properly bring an application in such circumstances, even the reference to such cases as involving a “duty of candour” seems inapt; the making of the application would be improper, if the obstacle were known, or should have been known.

56 Secondly, even if some interlocutory relief in the nature of a stay is not in place, the fact that it has been sought and the motion not determined should be disclosed. This is an extrapolation, if a somewhat limited one, from the last example.

57

Thirdly, it is generally necessary to disclose circumstances where there have been discussions between the parties, albeit reaching no agreement, at least where an undertaking not to enforce has been sought, though not given, and an application to seek a stay has been foreshadowed.

58 Dealing with the key authorities chronologically, it is appropriate to start with *Thomas A Edison Ltd v Bullock*, [34] a case involving a motion to dissolve an interlocutory injunction restraining Mr Bullock from selling or offering for sale his entire stock of Edison phonographs and records, without the consent of Edison. What the judge had not been told at the time the order was made was that the parties had agreed as to the proposed sale and the circumstances in which it should occur. That not having been disclosed, Isaacs J concluded that the interlocutory injunction should be set aside, although without prejudice to the right of Thomas A Edison to seek a further injunction on the merits. (In fact, the parties agreed to treat the motion as a trial of the action and the matter was disposed of by way of final judgment.) In explaining the duty of a party seeking an ex parte injunction, Isaacs J stated: [35]

> "*Dalglish v Jarvie* [36] , a case of high authority, establishes that it is the duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance. *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall."

59 The second case relied upon by the developer was *Garrard*, in this Court, referred to above. As noted above, the order appealed from involved an ex parte application before a taxing officer for a certificate of taxation, without disclosing that the respondent had made an application for an extension of time within which to lodge objections and that the application was unresolved. Before the primary judge, the motion for extension of time, and a subsequently added motion for an order setting aside the certificate of taxation, were considered together. The latter was rejected, because, in the judge's view, the extension should not have been awarded. As Mahoney AP observed (with the agreement of Clarke JA), had the refusal of the extension of time been properly determined, the outcome would not have been challengeable. However, because an error had been made in that regard, the Court considered whether the certificate had been obtained in circumstances which required that it be set aside.

60 The facts which supported that conclusion were unambiguous. Although there had been unduly extended negotiations (over the best part of a year) which had come to nothing, the critical events occurred after the bill of costs was served. Before the expiration of the 21 day period, the party responding had stated that it needed further particulars, a request which had been rejected as "an absurdity". [37] There was an undertaking to provide a notice of objection within 21 days of receiving the particulars sought. Not only was the application for extension of time lodged before the certificate was issued, but the solicitor for the respondent had made significant unsuccessful

attempts over several days to contact the solicitor for the applicant, in circumstances where both were partners in large commercial law firms. None of the recent events was disclosed on the ex parte application.

61 The primary judge, Rolfe J, while conscious of the failures to disclose, had dealt with the matter on the basis that the extension should not be granted and the certificate, which resulted in a liability to pay the full amount of the costs claimed, had therefore been properly issued. Mahoney AP, in circumstances which were stronger as to the effect of the failure to disclose than in *Thomas A Edison*, held: [38]

> "There is, in my opinion, no distinction for this purpose between an order in the nature of an injunction and an order which otherwise creates or confirms rights which otherwise would not exist. The obligation of candour and diligence exists in such a case."

62 In other respects, the case takes the matters of principle no further.

63 The developer also referred to the judgment of the Full Court of the Federal Court in *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd*, [39] setting out the statement of principle from *Thomas A Edison* and continuing: [40]

> "The rationale behind the principle is clear; it is of the utmost importance in the due administration of law that the Courts and the public are able to have confidence that an ex parte order has been made only after the party obtaining it has complied with its duty to disclose all relevant facts."

64 In *Town & Country* a corporate debtor had asserted misleading and deceptive conduct on the part of its financier and, by way of interim relief, sought an order restraining the financier from appointing a receiver to the assets of the applicants. That relief was granted, but set aside on the basis that "the applicants had failed to disclose to the Court that arrangements were in train for the disposal of part of the secured property which disposal may have resulted in payment of some unsecured creditors at the expense of the secured creditor." [41]

65 The developer placed reliance upon the judgment of Gageler J in *Aristocrat Technologies Australia Pty Ltd v Allam*. [42] The respondents in that case, which included Mr Allam and Tonita Enterprise Pty Ltd, were successful in resisting a special leave application in the High Court. They obtained an order for the payment of their costs, which were subsequently taxed in an amount of some $100,000 and a certificate of taxation issued on 2 December 2015. Two weeks later, they applied ex parte for a writ for levy of property against Aristocrat, which was duly issued on 23 December 2015. On 21 January 2016 they sought, by a further ex parte application, a garnishee order. On 5 February 2016, Aristocrat applied to set aside or stay the execution of the writ for levy of its property and a stay of the enforcement of the certificate of taxation. The writ for levy of property was set aside, and the matter was then remitted to the Federal Court to deal with questions of enforcement.

66 The writ of levy was set aside on the basis that the deputy registrar who issued the writ had not been informed that there was outstanding an order that Mr Allam pay certain costs of the proceedings in the Federal Court, which, as the solicitors for Mr Allam and Tonita knew, Aristocrat was finalising in order to file a bill which might be taxed. That

exercise was expected to result in a set-off with a balance payable to Aristocrat, not by Aristocrat, by a considerable margin. Secondly, Tonita had been deregistered some two weeks before making its application for the writ for levy of property. Gageler J set aside the writ, referring to the principles stated in *Thomas A Edison*, *Garrard* and *Town & Country*. He also drew attention to statements with respect to ex parte applications in *International Finance Trust Co Ltd v New South Wales Crime Commission*. [43] In that case, Hayne, Crennan and Kiefel JJ stated at [133]:

> "In the Supreme Court of New South Wales, the obligation might be seen as rooted in the requirement of s 56 of the *Civil Procedure Act 2005* (NSW) that the overriding purpose of that Act and the UCPR is 'to facilitate the just, quick and cheap resolution of the real issues' in proceedings. That statement of overriding purpose is certainly not inconsistent with the existence of an obligation to make proper disclosure when moving the Court ex parte, but the source of the obligation is better understood as lying in the very nature of the adversarial system administered in Australian courts, coupled with the emphasis given [44] to the desirability of finality in litigation. Unless a party moving a court to make orders in the absence of parties having an interest to oppose their making is obliged to make proper disclosure of all relevant materials, hearings will be needlessly multiplied and prolonged. Courts should not be asked to make orders in the absence of opposing interests on material that is or should be known to be deficient. If an order is made in those circumstances, the consequences identified by Isaacs J in *Edison* [45] should follow: 'the order so obtained must almost invariably fall'."

67 Finally, in terms of general principle, it is convenient to refer to the discussion in the English Court of Appeal in *Brink's Mat Ltd v Elcombe*, [46] dealing with questions of non-disclosure in obtaining a *Mareva* injunction. The principles were set out by Ralph Gibson LJ, [47] and were the subject of further observations by Balcombe LJ and Slade LJ. With respect to the duty of candour imposed on a party seeking an ex parte order, Slade LJ stated: [48]

> "The principle is, I think, a thoroughly healthy one. It serves the important purposes of encouraging persons who are making ex parte applications to the court diligently to observe their duty to make full disclosure of all material facts and to deter them from any failure to observe this duty, whether through deliberate lack of candour or innocent lack of due care.
>
> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. … In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v Kensington Income Tax Commissioners* [49] principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

68 To similar effect, Balcombe LJ stated: [50]

> "The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained …. But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained …."

69

The statements in relation to injunctive relief are not apposite in the present case; however, the need to measure the penal or deterrent effect of setting aside an ex parte order against the possible injustice in the circumstances of the particular case is relevant to the garnishee order obtained by the builder.

70 With respect to garnishee orders, the rules are now quite detailed. [51] Nevertheless, there are circumstances in which a garnishee order should not issue for reasons which are not expressly identified in the rules and do not necessarily depend upon questions of disclosure. For example, as discussed by Brereton J in *ML Ubase Holdings Co Ltd v Trigem Computer Inc*, [52] (albeit with respect to a significantly different procedural regime) a garnishee order will not be made where the effect would be to confer a preference on a creditor in circumstances where a winding up order has already been made or a petition presented. However, that principle may operate differentially as between local and foreign bankruptcies in circumstances where the question of relation back in a local bankruptcy only applies within the jurisdiction and that jurisdiction does not recognise the rules of relation back governing the foreign bankruptcy. Despite that, as Brereton J noted, "the pendency of a foreign administration proceeding, even if no order has been made in it at the date of attachment, remains a relevant consideration in informing the discretion whether or not to make [an] order … absolute for payment, although because of the different impact in the local forum of the foreign relation-back provisions, it may be less compelling a consideration than a local administration proceeding." [53] A further factor relied upon in *ML Ubase* was that the judgment creditor had participated in a foreign corporate reorganisation and was seeking to prove its debt in the reorganisation. [54]

71 To accept that there were requirements extending beyond the rules is not necessarily inconsistent with the view of the primary judge at [26]. Although he referred only to the procuring of a garnishee order in bad faith, such cases must involve circumstances where the order should not have been made and may or would not have been made had the full facts been disclosed. At least implicitly, the judge appeared to accept that there might be an obligation to disclose those circumstances.

72 The relevance of these considerations is that they may form a basis for a discretionary refusal to make a garnishee order or, if not known to the court at the time the order is made, may engage the power to set aside the order. Arguably, the order is set aside primarily because it should not have been made in the circumstances then revealed in the evidence and should not now be confirmed; it is a secondary purpose to punish the party which should have disclosed information known to it, but did not. Of course, the fact that there was no non-disclosure of known material facts will be an important, and often decisive, consideration in determining whether to set aside the garnishee order. That was how the knowledge of the judgment creditor was relied upon in *ML Ubase*. [55] Where the factual circumstances are complex, as in *Walter Rau Neusser Oel Fett AG v Cross Pacific Trading Ltd*, [56] even the manner of presentation may obscure significant circumstances, which, if better understood, would have resulted in a

garnishee order not being made. How the material was presented may also be a relevant discretionary factor in determining whether to set aside the order. Again, the order may be set aside because the circumstances did not warrant it being made, whether or not there has been a failure of some aspect of a duty of disclosure.

73 As explained in *Brink's Mat*, these considerations require that relief be moulded to the circumstances of the particular case. In *Garrard*, the primary judge, Rolfe J, was aware of the failure to disclose the pending application for an extension of time, but declined to set aside the certificate because he concluded that no extension of time would have been warranted in any event. A majority in the Court of Appeal would not have intervened in that case, but for an error in the judge's treatment of the motion seeking an extension of time. [57]

74 If, contrary to this approach, material non-disclosure is a sufficient reason in itself to set aside any order obtained ex parte, a more nuanced approach is required with respect to the principal relief, namely an order for repayment of the money obtained pursuant to the executed order. That approach is consistent with the lesson from unwarranted attempts to expand the principle of non-disclosure beyond ex parte applications, that there may well be circumstances in which wilfully misleading a court may lead to subsequent intervention in any event. [58]

(3) application of principles

75 It is necessary to give careful consideration to the nature of the "material facts" which are required to be disclosed. What is material will depend upon the nature of the proceeding and the nature of the right affected. So much is acknowledged by the rules, including r 39.35 which requires generally a statement as to the status of any instalment order [59] and, in respect of a cost assessor's certificate, a statement that the certificate is not subject to a statutory suspension as a result of an application to a review panel, [60] or a suspension resulting from an appeal pending in the District Court. [61] These express references are consistent with an obligation to reveal any constraint on the enforcement of a judgment, but say nothing about circumstances where a stay might have been sought, but has not been and where there has been no indication that enforcement would be resisted. Those factors take this matter outside the circumstances in which breach of the duty of disclosure arose in *Garrard* and *Aristocrat*. They also take the present circumstances outside those cases where interlocutory injunctions have been sought, including *Thomas A Edison* and *Town & Country*.

76 With respect to the nature of the power being exercised, the statutory context will be critical. The scheme of the Security of Payment Act has already been addressed. The payments available on the basis of an adjudicator's determination are in the nature of interim orders which may be the subject of adjustment in civil proceedings brought for enforcement of a construction contract, which will be unaffected by anything done by way of recovery of progress payments under Pt 3 of the Act. [62] Further, any

diminution of the entitlement of the builder to payment for work undertaken as it is performed will undermine the statutory purpose as identified in *R J Neller*, namely providing "a speedy and effective means of ensuring cash flow to builders" on the basis that "an assured cash flow is essential to the commercial survival of builders". [63] Thus, although the developer emphasised its willingness (at least if requested to do so) to pay the disputed amount into court, that would merely mitigate the risk of its insolvency in circumstances where the statutory scheme is consistent with the principal bearing the risk of the builder's insolvency, a purpose which the developer was not prepared to embrace.

77 Next, it is necessary to consider the nature of the proceeding within which disclosure is said to be required. There is no doubt that steps taken in the enforcement of judgment may involve discretionary powers and that the power to issue a garnishee order falls within that category. However, it is also true that such powers are routinely exercised by registrars without a hearing. They are, by their nature, significantly different from the kind of interlocutory injunction considered in *Town & Country* and in *Walter Rau*. The question which must ultimately be determined is whether any fact not disclosed would have been likely to affect the outcome of the application. If not, to set the order aside is an entirely penal exercise, which must be proportionate to the consequences for the party in breach.

78 The conduct of the developer had a dual aspect and revealed a degree of ambivalence. On the one hand, the commencement of proceedings in the supervisory jurisdiction of the Court demonstrated that the developer sought to challenge the validity of the adjudicator's determination upon which the judgment was based. On the other hand, it had not taken either of the steps available to it, namely, to seek an undertaking from the builder not to take steps to enforce its entitlements under the determination, or to seek interim relief by way of a stay.

79 The developer may have concluded that the circumstances did not warrant an application for a stay. To obtain a stay, in accordance with accepted principles, the developer would have borne the onus of demonstrating that the successful builder, which had an entitlement to immediate payment of the amount of the determination on an interim basis, should be deprived of that right. Such relief would usually only be granted if it were established that, were the enforcement of the determination not stayed, the possible benefit of a successful application for judicial review would be lost, because it would not be possible to recover the money from the builder. As the primary judge noted, there was no evidence before him to support such a conclusion; nor was there any such evidence before this Court. Even that would not by itself have justified a stay where the legislation deliberately imposed the risk of insolvency on the principal.

80 In addition, the developer would have needed to establish that it had at least reasonable prospects of success on its application for judicial review, which required it to demonstrate jurisdictional error. The error in this case was said to be a "jurisdictional fact", namely that the claim was not made within "the period of 12 months after the

construction work to which the claim relates was last carried out" for the purposes of s 13(4)(b) of the Security of Payment Act. To say that a court exercising powers of judicial review is the only body capable of authoritatively determining when construction work was last carried out would require the applicant to overcome the scepticism of a similar argument put forward in *Parisienne Basket Shoes Pty Ltd v Whyte*, [64] of which Dixon J said: [65]

> "Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed."

81 How that assessment should be made in respect of an adjudicator under the Security of Payment Act is not a question which can be further explored. The point is rather that it would be difficult for a registrar, or even a judge, to give much significance to the mere fact that an application for judicial review has been lodged, on a somewhat insecure basis, and no stay has been sought. Given the manifest purpose of the Security of Payment Act, it is much to be doubted that the mere making of the s 69 application was a material fact which ought to have been disclosed on the application for a garnishee order.

82 The point is not to determine how the registrar might have viewed, or should have viewed, the relevant disclosure, but rather to note that what would have been required was consideration of discretionary factors which might have been put before the court, with evidential support, on an application for a stay, an approach which the developer had eschewed. For it now to say that the registrar would have been required to act on the basis of its s 69 application and, in effect, to grant a stay in circumstances where it had not sought one, and without undertaking the burden of proving its entitlement, provides an unattractive basis upon which to set aside the garnishee order. Yet that was the consequence of the contention that its own application for judicial review was a "material fact" relevant to making a garnishee order.

83 In any event, it is not necessary to dispose of this case on the basis that there was no duty to disclose the existence of the judicial review proceedings; it is sufficient that the considerations set out above are relevant to the exercise of the discretionary power to grant equitable relief now sought by the developer. The approach of the primary judge was, in that respect, correct.

Approach to discretionary relief (ground 1)

84 The developer placed significant weight in its submissions on the statement by Isaacs J in *Thomas A Edison* that an order obtained ex parte without full disclosure of material facts is an order which "must almost invariably fall." However, that statement was not made with respect to an order that had been executed and was spent before the application to set it aside was made, nor where the utility in setting aside the order depended upon the grant of additional relief by way of a mandatory injunction requiring the repayment of the money paid from the applicant's bank account. If the applicant

had been dilatory, in the sense identified by the primary judge, in protecting its interests, so that such relief would not be granted in accordance with equitable principles, then no purpose was identified in setting aside the garnishee order.

85 That was the factor which the primary judge considered determinative. That conclusion is supported by a further consideration, namely that, not only did the applicant not protect its position by seeking a stay of the enforcement of the determination, the relief it now sought assumes that a stay would have been granted, in circumstances where it has still not presented the evidential basis for obtaining a stay or demonstrated why it should have been granted if sought by a timely application.

86 It remains to note that the Court was referred to no case which involved a grant of equitable relief to mandate repayment of a sum acquired pursuant to an executed garnishee order, assuming that there were grounds to set the order aside. The result is that no error of principle has been identified which would warrant interference with the judge's refusal to exercise a discretionary power on equitable grounds.

Conclusion

87 The matter was listed with a high degree of expedition on the basis that there would be a concurrent hearing of the application for leave to appeal (from a concededly interlocutory judgment) and the appeal itself. In those circumstances, the Court should make the following orders:

(1) Grant the applicant leave to appeal from the judgment in the Equity Division refusing relief on the notice of motion filed in the Division on 6 February 2017.

(2) Direct that the applicant file within 7 days a notice of appeal in the form of the draft notice of appeal contained in the white folder.

(3) Dismiss the appeal.

(4) Order that the applicant pay the respondent's costs in this Court.

88 **LEEMING JA**: I agree with Basten JA that this appeal should be dismissed with costs. I shall not repeat the facts or the applicable legislation, and I shall refer to the parties as the developer and the builder.

Obligation to notify the developer that a certificate had been filed?

89 Grounds 2(d) and (e) of the developer's appeal turned upon there being an obligation upon Atlas to notify the developer of the fact that a (deemed) judgment had been obtained by filing an adjudication certificate, before any attempt was made to enforce it (including by way of garnishee order). The submission was based upon the idea that s 25(4) contemplated what was said to be a "statutory stay" of execution upon payment into Court of the amount of the challenged adjudication, and that that "right" would be rendered nugatory were enforcement of the judgment to be able to take place without the knowledge of the judgment debtor. This was the main point argued before the primary judge.

90

There is nothing in this point. I agree with Basten JA's reasons on these grounds, but would go further. First, the implied obligation to give notice for which the developer contends conflicts with the express statement in s 25(1) that the deemed judgment created by the filing of an adjudication certificate "is enforceable accordingly" as a judgment of the court. The developer's implication also conflicts with UCPR r 36.14, which requires that the rules be read on the basis that judgments need *not* be served unless express provision is made. An example of such provision is found in the provisions dealing with execution by way of contempt. There is no such express statement in the rules governing execution by way of garnishee.

91 Further, by reason of s 9(3) of the *Civil Procedure Act 2005* (NSW), r 36.14 has the force of statute (it was originally part of Schedule 7 to that Act). The developer's implication therefore conflicts not merely with a rule of court which speaks directly to whether service is required, but with a rule with the force of statute which was enacted more recently than the section on which the implication is founded.

92 Secondly, the premise of the developer's submission is not made out. Section 25(4) is not a freestanding right. To the contrary, s 25(4) presupposes the existence of a right on the part of a judgment debtor to set aside a judgment, and qualifies that right in the circumstances in which it applies by (a) limiting the matters which the judgment debtor may raise in those proceedings, and (b) requiring payment into court of the unpaid portion of the adjudicated amount. Saying that it gives an entitlement to a "statutory stay" is inaccurate and is apt to lead to confusion of thought.

93 Thirdly, s 25(4) in terms contemplates that the judgment debt may have been wholly or partially satisfied by the time the proceedings are commenced. That is the force of the words "the unpaid portion of the adjudicated amount." That is to say, far from connoting a statutory right to a stay, on the strength of which there may be implied an obligation to give notice to the judgment creditor before steps are taken by way of execution, the very words upon which the developer relies presuppose that there may have been partial or full satisfaction of the judgment debt.

94 Fourthly, the developer's argument gives prominence to s 25(4) at the expense of the primary provisions of ss 23(2), 24(1) and 25(1). The argument neglects the fact that the statutory obligation to pay the adjudicated amount is found in s 23(2), and that the provisions in ss 24 and 25 provide consequences for what amounts to a continuing failure to perform that obligation. It is, with respect, a paradigm example of the tail wagging the dog.

95 Fifthly, where this Act requires something to be served, it tends to say so explicitly. See ss 13(1), (4) and (5) (service of payment claim); s 14 (service of payment schedule); s 17(5) (service of adjudication application); s 19 (service of notice of acceptance by adjudicator); s 20(3) (service of adjudication response), and, most relevantly for present purposes, s 23(1)(a) (service of the adjudicators' determination). It can be dangerous to rely upon reasoning based on the *expressio unius* maxim, as was observed in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*

(2002) 213 CLR 543; [2002] HCA 49 at [34], but the absence of any provision mandating service of a judgment obtained by filing an adjudication certificate within the highly prescriptive provisions of this Act makes this a strong case for its application.

96 Sixthly, there is in my view no sound reason to engraft a further obligation upon the statutory regime in the way for which the developer contends. If this part of the regime is engaged, there will have been an adjudication application, a response from the developer, a determination by the adjudicator which will have been served upon the developer, giving rise to an obligation upon it to pay within five business days. By that stage, any developer should be taken to know that it is at risk of the unpaid claimant seeking a certificate, obtaining a deemed judgment and taking ordinary steps by way of execution if the developer fails to make payment and fails to obtain (whether by undertaking or injunction) an assurance that the judgment will not be enforced. Given the tight time limits governing the process leading to the determination, there would ordinarily be no basis to think that the successful claimant would not insist on being paid within the five days mandated by the Act. And it is to be recalled that all of the rights under Division 2 are qualified by the limiting effect of s 32. In particular the (deemed) judgment created by s 25(1) does not give rise to a *res judicata* or an Anshun estoppel in relation to any claim the judgment debtor may have under the contract which is the subject of the registered determination.

97 The seventh point overlaps with the sixth. The purpose of the Act is to ensure that a disputed claim is resolved speedily, but without prejudice to the parties' rights following a final hearing. As Basten JA has observed, by reference to the authorities, the Act is about cashflow, and altering the incidence of the risk of insolvency. The developer's implication would not promote that purpose, contrary to s 33 of the *Interpretation Act 1987* (NSW).

98 The primary judge was correct to dismiss this submission. I would not wish the length of these reasons to suggest that the developer's submission had more substance than it does. The reason I have sought to expose the full extent of its weakness is that it is relevant to the remaining grounds of appeal.

Obligation to inform Court of commencement of proceedings?

99 The remaining grounds of the developer's proposed appeal assert that there was an obligation upon the builder, when applying for a garnishee order, to disclose the facts that (a) the developer had commenced proceedings in this Court and had stated that it would not oppose orders directing that payment be made into court, and (b) the builder had not informed the developer of the filing of the certificate and did not intend to do so.

100 Although these were the first grounds in the draft notice of appeal, and were prominent in the submissions in this Court, that was not how the matter was argued before the primary judge, nor was it how his Honour determined the urgent application before him. The gravamen of the reasons of the primary judge for refusing relief was to reject the developer's submission based on an implied obligation to provide notice of the

judgment, and then to refuse relief as a matter of discretion, given the absence of evidence of inability to repay coupled with the developer's delay in seeking relief. The developer had failed either to apply during the five days following service upon it of the adjudicator's determination for injunctive relief or to seek an undertaking not to obtain and register an adjudication certificate, as the builder was entitled to do following non-payment.

101 That was the force of his Honour's statements at [17] about the availability of interlocutory relief restraining the acting on a determination or the enforcing of a judgment, at [20] about the need to move promptly, at [21] about the failure of the covering letter to request an undertaking and at [24] as to the "well-recognised jurisdiction to restrain enforcement of adjudication determinations".

102 True it is that at the end of his Honour's reasons his Honour expressed the view that an application for a garnishee order was not to be equated with an ex parte application to a judge seeking injunctive or equivalent relief. His Honour added that on the facts before him, "the circumstances of this case seem to me to fall well short of any such bad faith". Even so, it may be doubted that that passage was intended as more than a tentative rejection of one submission, the result of which was not material to the ultimate exercise of discretion. As much is confirmed by the way the developer's submissions had been advanced. At page five of the transcript both submissions were framed thus:

> "CHRISTIE: But in a case where there is an underlying dispute, **we submit it is arguable** that a high degree of disclosure is required in an ex parte application. **Our primary submission** is that we should have been given an opportunity to exercise our rights under s 25(4)." [Emphasis added.]

103 The secondary nature of this aspect of the developer's submission is further confirmed by this aspect of his Honour's reasons commencing, "I am not sure that this is correct", and then, after the passage of which complaint is made, the judge returning to conclude that relief should be refused on discretionary grounds. It may be added that in oral submissions in reply, what had been advanced in chief as arguable was framed unequivocally, but even so it remained a secondary submission.

104 Moreover, there was no evidence before the primary judge, or indeed before this Court (although fresh evidence was adduced in this Court) of any risk of insolvency should the builder be required to repay the $11 million. Yet the developer sought equitable relief before the primary judge, and seeks such relief if it were successful before this Court, including what amounted to a mandatory injunction for the repayment of that sum.

105 Thus, the issue raised by these grounds of appeal was a secondary matter raised before the primary judge, and one which (for understandable reasons given the urgency of the application) his Honour did not address on a concluded basis. I agree with what Basten JA has said at [55]-[57], noting that none of those matters arose in the present case for disclosure, and with the force of what Basten JA has said as to the developer in substance seeking to achieve in this appeal a result which denies the

successful judgment creditor the fruits of judgment without demonstrating a risk that the money once paid could not be recovered in the event of the developer's ultimate success.

106 Given the way the argument was advanced before and determined by the primary judge, there is much to be said for refusing leave in respect of these grounds, on the basis that there has not been shown a proper basis to interfere with the exercise of discretion by his Honour. However, the matter having been argued at length in this Court, I agree with the orders proposed by Basten JA.

107 I would add the following observations, in deference to the submissions which were made on these grounds.

108 First, insofar as there may be an obligation of disclosure applicable when a garnishee order is sought following a judgment obtained following the filing of an adjudication certificate, the absence of any implied obligation to notify the developer, and the reasons for that absence which I have sought to indicate above, tend to speak against the materiality of the fact that proceedings had been commenced challenging the determination. In particular, the fact that, highly unusually, the judgment created by the filing of the certificate does *not* (by reason of s 32) stand in the way of a later curial determination of the same dispute between the same parties, suggests that any obligation of disclosure to the Court is lessened.

109 Secondly, in my view, the starting point for analysis must be the precise terms of the legislative regime governing enforcement. I agree with the force of what Basten JA has said as to giving careful consideration to the nature of the "material facts" required to be disclosed. That is essential, because that regime has changed over time, and materially. What was said in relation to the discretion to issue a garnishee order under an earlier regime may not automatically translate to the current regime.

110 Thirdly, the application may be dealt with in the absence of the parties and need not be served on the judgment debtor or the proposed garnishee: UCPR r 39.34(1). There is of course good reason for such a provision – for if notice is given, then the attempt at enforcement may be rendered futile (for example, in the case of a bank account, by a transfer of funds to an offshore bank). This has long been appreciated, but the way in which such orders operate has changed over the years, as will be seen below.

111 A garnishee order is quite different in nature from an interlocutory injunction. The reason that an application for an ex parte injunction is accompanied by a duty of disclosure is that ordinarily the court will have the benefit of submissions from both sides. In contrast, the rules expressly contemplate that a garnishee order will be sought ex parte and without a hearing and make no provision for a subsequent *inter partes* hearing.

112 Fourthly, the UCPR make it clear that an order is not made as of right. There is a discretion to issue a garnishee order if the order would be "inappropriate". One relevant matter is indicated by r 39.38(2), namely, if the amount is small. Other occasions where

the discretion might be exercised may be seen in *Martin v Nadel* [1906] 2 KB 26 (where a foreign garnishee would remain liable to pay the amount a second time pursuant to an order by a foreign court) and in the cases considered by Brereton J in *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577; [2007] NSWSC 859 at [56]-[60] of bankruptcy or insolvency where (speaking generally) the effect of an order is to give a preference to the judgment creditor.

113 But this is a long way away from an equitable discretion. There is a statement in *Halsbury's Laws of Australia* that "the jurisdiction is equitable in nature" (at [325-9965] in the section on Attachment of Debts (section current to 29 June 2016)). But that is not so. The case cited, *Prichard v Westminister Bank Ltd* [1969] 1 WLR 547 (the same decision is reported as *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999), does not support the statement in the text; it merely confirms that such an order is discretionary. There are of course many discretions which are not equitable: the power to impose sentence which generated the statement of principle in *House v The King* (1936) 55 CLR 499 at 504-505 is one. It is also true that Vaughan Williams LJ in *Martin v Nadel* at 30 observed that "it would be inequitable to make the order asked". But again, that use of "inequitable" does not convert the discretion into an equitable one. The immediate statutory origins of the power (namely, the *Common Law Procedure Act 1854* – see below) tell against the discretion being equitable. So too does the decision of the Court of Common Pleas sitting *en banc* in *Re Price* (1869) LR 4 CP 155 refusing an application based upon an order of the Master of the Rolls to pay a call, where Bovill CJ, with whom Byles and Keating JJ agreed, said at 157:

> "Notwithstanding there is no power in the Court of Chancery to attach a debt in the hands of a third party, I think it never was intended by the Common Law Procedure Act 1854, to enable the Courts of common law to give effect to its decrees in that way."

114 Likewise, Montague Smith J said that "this Court has no power to give execution on a decree or order of the Court of Chancery." The fact that the process became available after the Judicature legislation to execute judgments founded on equitable rights does not make the discretion or the process equitable.

115 Fifthly, the developer relied on *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662, where there was complete compliance with all the provisions of the rules, and yet there was an obligation to proffer additional information before enforcing the taxation of a costs order, and the reasons of Gageler J in *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3; (2016) 90 ALJR 370, also given in a costs context. Against this, there is force in the builder's submission that the mandatory provisions in UCPR r 39.35(2)(c) treat costs separately, requiring additional disclosure. The fact that the rules in terms differentiate between the subject matter giving rise to the judgment calls into question the correctness of submissions framed at a high level of generality about obligations of disclosure.

116

Sixthly, garnishee orders have changed over time. A convenient starting point is the process of "foreign attachment" in the Lord Mayor's Court of London, one of the most successful local courts, described by the Law Journal in 1870 as "the best Court for the recovery of small amounts in the kingdom": (1870) 5 *LJ* 508. For present purposes, the following will suffice to describe the process:

> "by a foreign attachment, debts are attached for the purpose of compelling the defendant to appear and put in bail to the action": *Chitty's Archbold's Practice of the Court of Queen's Bench* (London, H Sweet, 1862) Vol 1 p 700.

117 The formalities are described in the special case in *The Mayor and Aldermen of the City of London v London Joint Stock Bank* (1881) 6 App Cas 393 at 394, and it was indeed the process of foreign attachment which gave rise to the famous case of *The Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239.

118 Although foreign attachment was used at the outset of litigation to compel a defendant's attendance, in contrast with garnishee orders being an aspect of execution of a judgment at the conclusion of litigation, the basic similarity lay in a plaintiff obtaining access to debts owed to the defendant. The process was one reason for the Lord Mayor's Court's success into the twentieth century (see for example the entry for that court in volume 22 of the 2nd edition of *Halsbury's Laws of England* (1936)). The importance of foreign attachment is confirmed by the fact that the note in the Law Journal referred to above stated that no fewer than 995 foreign attachments had been issued in 1869.

119 As was noted in *Bruton Holdings Pty Limited (in liq) v Commissioner of Taxation* (2009) 239 CLR 346; [2009] HCA 32 at [24], the Commissioners inquiring into the reform of the common law in the mid nineteenth century relied upon foreign attachment in the Lord Mayor's Court of London (as well as foreign practice and writs of execution at the suit of the Crown) to support the new garnishee provisions introduced by ss 60-67 of the *Common Law Procedure Act 1854* (17 & 18 Vict c 125).

120 The *Common Law Procedure Act 1857* (20 Vic No 31), ss 27-33 enacted the English provisions in New South Wales, because:

> "[a] part of the duty of the Attorney-General (or at least it was so during my tenure of that office) is to attend to the Acts of each session of the British Parliament, and apprise the local Government of such measures as might advantageously be adopted and declared to extend to New South Wales": R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Royal Australian Historical Society, Sydney University Press (1863, facsimile edition 1974), 361.

121 Section 27 made it lawful for a Judge upon the ex parte application of such judgment creditor to make an order attaching the debt to answer the judgment debt, and for the garnishee to appear and "shew cause why he should not pay the judgment creditor".

122 I will not attempt a comprehensive description of the subsequent developments in New South Wales (details may be found in an illuminating account in A G Saddington, "Orders of Court and Garnishee Process" (1948) 21 *Australian Law Journal* 346). The

only point I wish to note is that, so far as I can see, until 2005 the process involved two stages: the making of an order nisi (or something in the nature of an order nisi) followed by a contested hearing by the garnishee or the judgment debtor.

123 By way of overview, the 1857 provisions were incorporated within Part XIX of the *Common Law Procedure Act 1899*, and the rules required that notice be given to the judgment debtor at least three days before the return day of the order nisi: General Rules of Court, Order XIX r 8 (see R Walker, *The Practice of the Supreme Court of New South Wales at Common Law* (4th ed 1958), p 219). Under the Supreme Court Rules 1970 (NSW), garnishment was addressed by Pt 46. Again, there was a two-stage procedure. Pursuant to Pt 46 r 3, a judgment creditor might, with the leave of the court, file and serve a "garnishment notice" on the garnishee, and could move for leave to do so without filing or serving notice of the motion. The effect of service of a garnishment notice was to attach "all debts" owing by the garnishee to the judgment debtor: Pt 46, r 5. Then, pursuant to Pt 46 r 4, no less than three days before the date fixed for the motion for payment, the judgment creditor was required to serve the garnishment notice and affidavits in support upon the garnishee and the judgment debtor.

124 The garnishment notice considered in *ML Ubase Holdings Co Ltd v Trigem Computer Inc* was issued before the commencement of the *Civil Procedure Act* 2005 and so (pursuant to the transitional provisions) was governed by (former) Pt 46 of the Supreme Court Rules 1970 (see at [3]). Hence his Honour's reference at [56] to the "making of a garnishee order absolute" being discretionary.

125 A different procedure now obtains under the *Civil Procedure Act* and Pt 39 of the UCPR. In particular, there is no longer a two stage procedure, commencing with (or with something akin to) an order nisi. Section 117 of the *Civil Procedure Act* and UCPR r 39.39 provide that debts accruing to the debtor from the garnishee are attached at the time of service, and by dint of s 118 of the Act are to be paid within 14 days. Section 124 provides for a further application by the judgment creditor if the debt is not paid. Conspicuous by its absence are provisions dealing with a contested hearing in which the onus lies upon the judgment creditor to justify execution, as well as provisions requiring the notification of the judgment debtor at a fixed period of time before the second stage of that procedure.

126 There may be arguments in both directions flowing from the changes introduced in 2005. In the absence of submissions on the point, there is much to be said for deciding no more than is necessary. The foregoing may perhaps assist the formulation of submissions in some future case.

127 The orders proposed by Basten JA should be made.

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Endnotes

1. Atlas Construction Group Pty Ltd v Fitz Jersey Pty Ltd [2017] NSWSC 72 ("Atlas Construction").

2. R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397 at [39] (Keane JA).
3. R J Neller at [40]; see also Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190 at [207] (McDougall J).
4. Chase Oyster Bar at [207] (McDougall J).
5. Security of Payment Act, s 17(1).
6. Security of Payment Act, s 13(4)(b).
7. Security of Payment Act, s 22(1)(a).
8. Security of Payment Act, s 22(3).
9. [2016] NSWCA 379.
10. See further at [48] below.
11. Civil Procedure Act, s 134.
12. Civil Procedure Act, s 135(1).
13. Atlas Construction at [8].
14. Atlas Construction at [14].
15. Atlas Construction at [17].
16. Atlas Construction at [19].
17. Atlas Construction at [21].
18. Atlas Construction at [22].
19. Atlas Construction at [23].
20. Atlas Construction at [24].
21. Atlas Construction at [27].
22. Atlas Construction at [25].
23. Atlas Construction at [26].
24. Atlas Construction at [26].
25. Atlas Construction at [26].
26. Set out at [8] above.
27. UCPR, r 36.14.
28. See s 25(4)(a)(iii).
29. Shade Systems at [54].
30. Shade Systems at [53].
31. (1993) 32 NSWLR 662.
32. Garrard at 676F-G (Mahoney AP).
33. See [36].
34. (1913) 15 CLR 679.
35. Edison at 681-682.
36. (1850) 2 Mac & G 231; 47 ER 1754; 42 ER 89.
37. Garrard at 674B-D.
38. Garrard at 677E-F.
39. (1988) 20 FCR 540 (Davies, Gummow and Lee JJ).
40. Town & Country at 543.
41. Town & Country at 543.
42. [2016] HCA 3; 90 ALJR 370.

43. (2009) 240 CLR 319; [2009] HCA 49 at [130]-[133].

44. D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12.

45. [1912] HCA 72; (1912) 15 CLR 679 at 682.

46. [1988] 1 WLR 1350.

47. Brink's Mat at 1356-1357.

48. Brink's Mat at 1359B.

49. [1917] 1 KB 486.

50. Brink's Mat at 1358C-E.

51. UCPR, Pt 39, Div 4.

52. (2007) 69 NSWLR 577; [2007] NSWSC 859 at [56].

53. ML Ubase at [69].

54. ML Ubase at [75].

55. ML Ubase at [69]-[71].

56. [2005] FCA 955 (Allsop J).

57. Garrard at 674F-675C (Mahoney AP, Clarke JA agreeing).

58. See Young v Cooke [2017] NSWCA 33 at [28] (Gleeson JA, Macfarlan JA agreeing) referring to J Aron Corporation v Newmont Yandal Operations Pty Ltd [2004] NSWSC 533; 183 FLR 90 at [18] (Barrett J).

59. UCPR, r 39.35(3).

60. Legal Profession Uniform Law Application Act 2014 (NSW), s 86(1).

61. Legal Profession Uniform Law Application Act, s 90(1).

62. Security of Payment Act, s 32.

63. R J Neller at [39]; see also Shade Systems at [66].

64. (1937-1938) 59 CLR 369 at 388-389.

65. Parisienne at 391.

Amendments

23 March 2017 - [11] Changed "filed" to "serve" in last line.
[74] Changed "here" to "there" in last sentence.

Decision last updated: 23 March 2017