PARTIES:	GEOFFREY RAYMOND SMITH v PAUL DESMOND SWEENEY AND ORNAMENTAL CORNICE PTY LTD (ACN 010 318 546)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	63 of 1996
DELIVERED:	12 February 1997
HEARING DATES:	6 February 1997
JUDGMENT OF:	Kearney J

CATCHWORDS:

Judgments and Orders -Consent orders - Stay of execution pending hearing of application to set aside - Principles applicable to stay of consent orders - General discretion - - Prima facie a successful party entitled to benefit of judgment/order obtained - Burden on applicant for stay - Need for 'appropriate reasons' - Balance of convenience - Consideration of what is 'just and fair' as between parties -

Enterprise Gold Mines v Mineral Horizons NL (No.1) (1987-88) 52 NTR 13, followed.
J C Scott Constructions v Mermaid Waters Tavern Pty Ltd (No1) [1983] 2 Qd R 243, applied.
Re Middle Harbour Investments Ltd (In Liq) (unreported, Court of Appeal (NSW), 15 December 1976), followed.

Judgments and Orders - Amending, varying and setting aside -
Stay of execution pending hearing of application to set aside consent orders on basis they were obtained by economic duress - Concept of economic duress considered -

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40, applied.

REPRESENTATION:

Counsel:

Plaintiff:	S. Southwood
First Defendant:	-
Second Defendant:	J. Kelly

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	-
Second Defendant:	Clayton Utz

Judgment category classification:	C
Judgment ID Number:	kea97005
Number of pages:	28

kea97005

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 63 of 1996

IN THE MATTER of
THE CORPORATIONS LAW

AND IN THE MATTER of
CONSTRUCTION ENTERPRISES PTY LTD (ACN 009 615 785)

BETWEEN:

GEOFFREY RAYMOND SMITH
Plaintiff

AND:

PAUL DESMOND SWEENEY
First Defendant

AND:

ORNAMENTAL CORNICE PTY LTD (ACN 010 318 546)
Second Defendant

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 12 February 1997)

The applications

I rule today on the plaintiff's application of 7 January 1997 to stay orders nos. 5-9 (that is, their execution) made (p9) by consent by Thomas J in these proceedings on 18 April 1996, pending resolution of action no.3 of 1997 instituted by Construction Enterprises Pty Ltd (herein "the Company") and the plaintiff on 7 January 1997 to set aside those orders. The plaintiff contended that the monies paid into Court by the Company in these proceedings as security in relation to those orders, should remain in Court, their payment out to abide the outcome of proceedings no.3 of 1997. The plaintiff also seeks to stay the execution of the order (p10) of Taxing Officer Keyte of 8 November 1996, which allowed the taxed costs of the second defendant in relation to those orders at $9170.82, on the same basis.

I also rule on the second defendant's 'mirror' application of 5 December 1996 for an order that the Court pay out to it the sum of $7,304.10 (plus any accrued interest) deposited in the Court by the plaintiff as security for the second defendant's costs in relation to orders nos.6-7 (p9).

None of this is explicable without reference to the background to these applications, to which I now turn.

The background to proceedings no. 63 of 1996

The Company carries on a franchise business under the name of "Darwin Pioneer Plastamasta Centre". The sole shareholders and directors are the

plaintiff and his wife. In par2 of his affidavit of 15 April 1996 the plaintiff deposed:

> "In early September 1995 [the Company] placed an order with [the second defendant] for cornice to be supplied for a building project in Cairns in the State of Queensland. … This building project was undertaken by S J Smith [a business which he runs]. S J Smith was contracted by Multiplex to undertake the works. S J Smith purchased materials from Construction Enterprises Pty Ltd which had ordered the materials from Ornamental Cornices Pty Ltd. …"

The cornice was delivered to the site in Cairns. A dispute then arose between the Company and the second defendant, the Company contending that the cornice, invoiced at $6152, was "not to the correct specifications", and some of it had arrived on site in a damaged condition. Correspondence ensued between them; the plaintiff contended that his last contact with the second defendant was his letter of 12 December 1995, offering $1134.00 in full and final satisfaction" of the amount due for the cornice. According to the plaintiff, the next relevant event of which he was aware was a telephone call he received some 4 months later on 11 April 1996 from a Mr Bourne, acting for the Liquidator appointed to wind up the Company. The order for winding-up had occurred in the following circumstances, none of which, according to the plaintiff, were known to him prior to 11 April 1996.

The second defendant sued the Company in the Beenleigh Magistrates Court in Queensland to recover the value of the cornice it had supplied to the Company at the site in Cairns. In its Plaint of 20 December 1995 in proceedings 3553 of 1995 the second defendant described the Company as having its registered office at "Lot 23 Bees Creek Road, Bees Creek in the

State or Territory of the Northern Territory". The resulting Summons was deposed by a process server to have been served on the Company on 20 December 1995, by posting it to the Company's registered office described as "Lot 23 Bees Creek Road, Bees Creek, Northern Territory". A company search of 15 December 1995 (annexure MFM4 to Ms Michaels' affidavit of 16 April 1996) shows the Company's registered office as "Lot 23 Bees Creek Road, Bees Creek NT 0822"; that is also listed as its 'principal place of business'. It appears therefore that the Summons was correctly addressed to the Company's then registered office. According to the plaintiff it was never received, the area being one in which the post is not delivered from the local post office at Humpty Doo. The second defendant entered a default judgment against the Company in the Beenleigh Magistrates Court on 22 January 1996 in the sum of $6964.24 for work and labour performed and goods sold, being the cornice invoice cost of $6152.00 plus costs and interest. The plaintiff says that the existence of this judgment was unknown to him until 11 April 1996.

On or about 9 February 1996 the second defendant by its Queensland solicitors Messrs Jones King set about enforcing its judgment of 22 January. Attaching a copy of the judgment of 22 January 1996 it made a statutory demand on the Company for payment of the judgment debt of $6964.24, the covering letter being addressed to the Company at "Lot 23 Bees Creek Road, BEES CREEK, NT 0822". The statutory demand of 9 February described the Company as having its registered office at "Lot 23, Bees Creek Road, Bees Creek in the Northern Territory in the State of Queensland (sic)". It is quite clear from an extract of the A.S.C. records of the Company prepared on

15 April 1996 (annexure A to the plaintiff's affidavit of 16 April 1996) that Lot 23 Bees Creek Road ceased to be the Company's registered office on 5 February 1996, and its registered office on and from 6 February 1996 was "Lot 605, Bees Creek Rd, Bees Creek, NT 0835". It might well appear from the covering letter and the statutory demand that the documents were *not* sent on 9 February 1996 to the then registered office of the Company at Lot 605, but to its former registered office at Lot 23. However, one Lenore Betts, apparently a secretary with Messrs Jones King, deposed on 9 April 1996 that she had served the Company with the statutory demand and judgment on 9 February by posting them "to the registered office of the Company at Lot 605, Bees Creek Road, Bees Creek in the Northern Territory in the Northern Territory (sic)".

The plaintiff says that the letter of 9 February and accompanying statutory demand and judgment were not received; see par11 of his affidavit of 15 April. There being no response by the Company to the statutory demand of 9 February, Messrs Jones King instituted proceedings 2186 of 1996 in the Supreme Court of Queensland on 13 March 1996 to have the Company wound up. Notice of this application was advertised in The Australian on 25 March 1996 and in the Commonwealth Gazette on 26 March. An affidavit was sworn on 9 April by Ms Lenore Betts as to the service on the Company of the winding-up application of 13 March and a verifying affidavit by Mr Clarke of 4 March 1996, by posting them on 13 March 1996 to the Company's registered office "at Lot 605, Bees Creek Road, Bees Creek in the Northern Territory in the State of the Northern Territory (sic)". A company search of 9 February

1996 (apparently part of annexure MFM9 to Ms Michaels' affidavit of 16 April 1996) shows that to be the Company's registered office, the "start date" of Lot 605 as the registered office being shown as 6 February 1996. The application for winding-up of 13 March gives the Company's registered office as "Lot 605, Bees Creek Road, BEES CREEK, NT 0835", while Mr Clarke's verifying affidavit of 4 March gives it as "Lot 605, Bees Creek Road, Bees Creek in the Northern Territory."

According to the plaintiff the winding-up application of 13 March and accompanying documents were never received; in par3 of his affidavit of 16 April 1996 he deposes to those documents being located on that day in the Humpty Doo Post Office, with a covering letter of 13 March addressed to the Company at "Lot 23 Bees Creek Road, BEES CREEK NT 0822" - see annexure "B" to the affidavit. According to par4 of the plaintiff's affidavit of 16 April, and annexure "D", the documents were received in the Humpty Doo Post Office on 25 March, and Humpty Doo is a 'non-delivery area' for mail.

A winding-up order was made by the Supreme Court of Queensland on 11 April 1996; Mr Sweeney was appointed as Liquidator for that purpose.

As I recounted earlier (p3), the plaintiff says he first became aware of the proceedings in the Beenleigh Magistrates Court, the winding-up proceedings in the Supreme Court of Queensland, and the resulting order of 11 April, when he was contacted by Mr Bourne from the Liquidator's office on 11 April. Not

surprisingly, news that the Company had been put in liquidation generated a flurry of action by the plaintiff and his solicitors over the next few days.

Proceedings no. 63 of 1996

On 15 April 1996 the plaintiff instituted these proceedings No.63 of 1996 seeking a declaration that none of the following documents - the Plaint, Summons and default judgment entered by the second defendant in the Beenleigh Magistrates Court on 22 January 1996, its statutory demand of 9 February 1996 for payment, its notice of its application to the Supreme Court of Queensland of 13 March 1996 to wind up the Company, and the verifying affidavit of Mr Clarke of 4 March 1996 - had been served on the Company's registered office; and an order staying the winding-up order of 11 April 1996 until the determination of proceedings (instituted on 16 April) in the Beenleigh Magistrates Court to have the default judgment of 22 January 1996 set aside.

I note that it is clear that the Company's registered office changed on 5-6 February 1996 from Lot 23 to Lot 605; the second defendant's statutory demand of 9 February may not have been directed to the then registered office Lot 605; and although the correct registered office Lot 605 is stated in Mr Clarke's verifying affidavit of 4 March, the covering letter of 13 March (with which the winding-up application of 13 March (which also correctly gives Lot 605 as the registered office) and Mr Clarke's verifying affidavit were enclosed) was not addressed to the then registered office Lot 605 of the

Company, but to Lot 23; however, I note that Ms Betts deposes on 9 April that she posted it to Lot 605.

On 16 April 1996 the second defendant applied to have these proceedings no.63 of 1996 transferred to the Supreme Court of Queensland for hearing and determination. On that day the plaintiff amended its originating motion of 15 April, to seek to have the winding up order of 11 April terminated, and not merely stayed.

The consent orders of 18 April 1996, and how they came about

After various short hearings on 15, 16 and 17 April, and what I would categorize as 'skirmishing' between the parties, on 18 April 1996 the Court made orders *by consent* (except as to order no.2 which the first defendant neither agreed nor opposed) in the following terms:

> "1. The Plaintiff is to pay into Court the sum of $14,734.24, being the agreed fees and expenses of the First Defendant, the Liquidator, Paul Desmond Sweeney.
>
> 2. The Court orders that the winding-up of the company, Constructions Enterprises Pty Ltd (ACN 009 615 785) be terminated as of 18 April 1996.
>
> 3. On the sealing of the order in respect of order 2 above, the sum of $14,734.24 is to be paid out of Court to the First Defendant. [This represented the Liquidator's agreed costs and expenses].
>
> 4. The Plaintiff's Application for order 1 as set out in the Amended Originating Motion and Amended Summons filed in Court on 16 April 1996 be adjourned sine die with liberty to all parties to apply. [This was the application for a declaration that the various documents (p7) had not been served on the plaintiff's registered office].

5. The Plaintiff to pay the sum of $7,456.20 into this Court to abide the order of the Beenleigh Magistrates' Court in respect of proceedings No 3553 of 1995 and to be applied in discharge of any debts or liabilities of Construction Enterprises Pty Ltd as may be determined by the Court in those proceedings.

6. The Plaintiff to pay the Second Defendant's costs as petitioning creditor in respect of the application [of 13 March 1996 in the Supreme Court of Queensland] to wind up the Company, to be agreed or taxed.

7. The Plaintiff to pay the Second Defendant's costs of this Originating Motion to date, to be agreed or taxed.

8. The Plaintiff to pay into Court the sum of $7,304.10 as security in respect of his liability pursuant to orders 6 and 7 above.

9. Certified fit for counsel for all appearances on the Plaintiff's Originating Motion [of 15 April 1996]."

Orders 5-9 are the subject of the plaintiff's stay application of 7 January 1997 (p2), the subject of the ruling today.

On the day before these consent orders, 17 April 1996, as a result of discussions between the parties, the plaintiff had already paid $29,494.50 into Court, comprising the sums of $7,456.20, $7,304.10 and $14,734.24 mentioned above.

Subsequent activity in 1996

Meanwhile, on 16 April 1996, the Company had applied to the Beenleigh Magistrates Court to have the default judgment of 22 January 1996, set aside. Curiously, and wrongly, in its Notice of Application, its Queensland solicitors described its registered office as being at "Lot 23, Bees Creek Road, Bees Creek in the Northern Territory of Australia"; no doubt this error was a by-

product of haste. On 1 August 1996 the default judgment was set aside. On 3 July the Company had filed a Defence in those proceedings, claiming that part of the cornice supplied by the second defendant was unsuitable for use and the Company had had to replace it at a cost to the Company of $4,827.40, while its cost of rectifying certain cornice which, though defective, it had been able to use, amounted to $650. Proceedings 3553 of 1995 have not yet been heard and determined.

The second defendant next set about taxing its costs, pursuant to pars6 and 7 of the order of 18 April (p9); it eventually filed a Bill of Costs on 14 October. On 8 November its costs were taxed and allowed at $8,531, together with a taxing fee of $639.82, a total of $9,170.82. The order was authenticated on 5 December 1996. It will be noted (p2) that the plaintiff also seeks to stay the execution of this order.

The second defendant then sought the plaintiff's consent to have the sum of $7,304.10 in Court as security for the second defendant's costs, paid out to it, in accordance with par8 of the order of 18 April (p9). The plaintiff did not consent. The second defendant applied on 5 December 1996 to the Court for an order that this sum be paid out to it; this is the second defendant's application (p2) on which I also rule today.

On 12 December 1996 Mr Hardie, the solicitor for the plaintiff, in seeking to have the hearing of the second defendant's application of 5 December adjourned, deposed in par5 of his affidavit, for reasons stated, that:

> "It is my opinion that the consent orders entered into by the Plaintiff were obtained in circumstances which may amount to duress, undue influence and/or unconscionable conduct …".

In par17 he deposed:

> "Once Counsel has had an opportunity to peruse the transcript [of 15-18 April 1996] and take instructions from [the plaintiff] and the Company, it is likely that an Application will be made to stay the current Application [of 5 December] pending an Originating Motion being filed to set the Consent Orders aside. I estimate it will take about three or four weeks to get the necessary instructions and prepare the necessary Affidavit material. This is because of the Christmas period intervening. [The Writ was issued in proceedings no.3 of 1997 on 7 January 1997]"

The hearing of the second defendant's application of 5 December was subsequently adjourned by consent until 6 February 1997.

The hearing on 6 February 1997

(I) The affidavit material

I indicated at p2 the relief sought by the plaintiff on 7 January 1997. In his supporting affidavit of 7 January the plaintiff deposed to his arrangements with Mr Rod Clarke of the second defendant for the supply of the cornice to the building project in Cairns, its "largely unsuitable" nature when delivered, his discussions with Mr Clarke in relation thereto, and the consequences for the Company had the winding-up order not been terminated on 18 April 1996. In pars13 and 14 he deposed:

"13. As a result of the winding up order being made [on 11 April 1996] I was under extreme pressure to take whatever steps I could to terminate the winding up and keep Construction Enterprises Pty Ltd operating as a going concern. I at all times believed the company was solvent and that the company had a meritorious defence to the vast bulk of the claim made [in the Beenleigh Magistrates Court] by Ornamental Cornice Pty Ltd and that the maximum of any claim that Ornamental Cornice Pty Ltd had against the company plus any costs associated therewith would be less than $2,000.00. Consequently I first instructed my solicitors to obtain either a permanent stay, injunction or termination of the winding up - that is, whatever was the appropriate order. I believed such an order could be readily obtained on the merits of Construction Enterprises Pty Ltd's case. However, I subsequently received further advice from my solicitor and barrister. The substance of the advice was that :-

(a) there was no Judge available to expeditiously hear in full the merits of any application I wished to make to the Court on behalf of Construction Enterprises Pty Ltd;

(b) the Second Defendant would not consent to any order in the nature of a stay or termination other than on the terms contained in the orders of 18 April 1996 and the Second Defendant required an adjournment prior to being able to deal with the proceeding on the merits.

(c) as is otherwise set out in the Affidavits of Mr Hardie [his solicitor] and Mr Tippett [his barrister in April 1996], in these circumstances and in the circumstances deposed to herein and in the Affidavits filed on behalf of the Plaintiff, I most reluctantly agreed to the Consent Orders [of 18 April 1996]. *I believed I had no choice other than to consent to the orders obtained on 18 April 1996 as otherwise Construction Enterprises Pty Ltd would have been ruined.*

14. *I made the decision* on behalf of myself and Construction Enterprises Pty Ltd *to consent to the orders obtained on 18 April 1996 because of the pressure exerted on me and the company by Ornamental Cornice Pty Ltd* in having obtained judgment [of 22 January 1996] and a winding up order [of 11 April 1996] without notice to the company and without acknowledging the damage and defects in the cornice supplied by it to the company, pursuing a winding up when the company was solvent, refusing to concede to a termination of the winding up on any other grounds than those set out in the orders of 18 April 1996, stating that they needed an adjournment in order to be able to deal with the Application [of 15 and 16 April 1996 to terminate the winding-up] on the merits, that they would likely oppose an Application on the merits, the

Second Defendant's conduct in the proceeding and the risk of Construction Enterprises Pty Ltd being ruined." (emphasis added)

On 5 February 1997 Mr Tippett, the barrister who had appeared in Court for the plaintiff at the 4 hearings in April 1996, deposed to what had then occurred. In pars 10-12 of his affidavit he deposed:

"10. On 18 April at the time I received my trial instructions to return to the Courtroom and consent to the orders that were finally made by Justice Thomas, *the Plaintiff* was in an impossible position and *figuratively speaking* as in submissions stated to the Court, *had a gun to his head*. The following circumstances existed:-

(a) the Liquidator was preparing to return to Darwin to take charge of the company at a cost to the company of $3,000.00 per day plus airfares and incidental expenses;

(b) the company's reputation was at serious risk;

(c) the Liquidator had advised the Plaintiff through its solicitor Mr Neville Henwood in a telephone conversation with myself on 16 April 1996 that if the creditors were not notified of the application [to stay the winding-up], the stay could be refused;

(d) the company's trading position and hence the maintenance of its contractual obligations depended upon the goodwill of its creditors. The company was a construction company that also had a reputation to maintain in its business of tendering for major Northern Territory and Commonwealth Government contracts. I crave leave to refer to the Affidavit of [the plaintiff] affirmed on 18 April 1996 and the Affidavits of Carry Graham Hansen sworn 16 April 1996 and 18 April 1996 for details of the instructions I had as to the company's trading position as at 18 April 1996 and the likely effects upon the trading position of the company should it have remained in liquidation;

(e) the Supreme Court was unlikely to be able to hear the matter before the Liquidator of the company returned to Darwin and this was likely to cause the company further harm to its trading position and considerable additional expenditure.

11. Because of the circumstances outlined in paragraphs 9, 10 and 11 of this Affidavit I advised the Plaintiff that there was no reasonable option

available to the Plaintiff other than to consent to the orders sought by the First and Second Defendants. The Plaintiff in our conference in the late afternoon of 18 April 1996 was extremely reluctant to give me instructions to consent to the orders sought and it was only after it was made clear to him that the company would remain in liquidation with the attendant risks to its trading position and with the considerable costs involved if he did not consent, that his instructions to do so were forthcoming.

12. The orders of Justice Thomas made on 18 April 1996 arose in particular because of the Second Defendant's unconscionable position that it intended to resist any order for a stay of the winding up order or alternatively a termination of that order, upon the grounds that the company was insolvent in circumstances where the Second Defendant had not asserted by Affidavit material or otherwise that it had good grounds for adopting that position, and where the Plaintiff had paid into Court sufficient funds to indemnify the Second Defendant for its alleged judgment debt and its costs. I advised [the plaintiff] that the Second Defendant's position was in my opinion unconscionable but that the circumstances prevented the Plaintiff from arguing the Second Defendant's unconscionability." (emphasis added)

In his affidavit of 7 January 1997 the plaintiff's solicitor Mr Hardie deposed to the events which had occurred from the time that he was first instructed to act by the plaintiff on 12 April 1996. In par2 he deposed:

> "On Friday 12 April 1996 I received a telephone call from [the plaintiff] whom I had been acting for in an unrelated matter. [The plaintiff] informed me that he had been contacted at his office the previous afternoon by a representative of the First Defendant, a Liquidator, appointed to wind up his company, Construction Enterprises Pty Ltd …".

Mr Hardie related the various to-ing and fro-ing which then occurred, the plaintiff being "greatly concerned about the effect the continuing liquidation would have on the company's commercial reputation". Intensive negotiations continued, with the Liquidator requiring that his costs be paid, and that the amount of the second defendant's debt be paid into Court. Terms of

agreement were ultimately apparently arrived at between the parties on 16 April; Mr Hardie deposed in pars19, 20 and 21:

> "19. When the Court resumed sitting at 4.30pm Mr Wyvill [of counsel for the second defendant] read to the Court "terms of agreement struck" between [the plaintiff] and the Second Defendant. Mr Wyvill sought an adjournment until the next day to draw up an order in the terms read out by him. The orders read out by Mr Wyvill had the effect of allowing the Second Defendant to withdraw from the proceeding at that time. The orders would then allow the Court to hear the [plaintiff's] application to terminate the winding up without opposition, as the Liquidator indicated to the Court that once paid, [he] would not oppose such a termination. The matter was adjourned for further consideration at 4.30pm on 17 April 1996 and for mention at 9.00am that morning.
> [The plaintiff] had very reluctantly agreed to the terms proposed by Mr Wyvill during the adjournment. He appeared to believe that he had no choice but to accept the onerous conditions if he wished to protect the company and its continued reputation.
>
> 21. The effect of the agreement reached was that the Plaintiff would pay into Court:-
>
> (a) $ 2,999.55 Jones King's costs of winding up [in Queensland]
>
> (b) $ 1,600.00 Clayton Utz' [the solicitors for the second defendant] costs
>
> (c) $ 1,400.00 Counsel's fees [ie counsel for the second defendant]
>
> (d) $14,734.29 Liquidator's costs
>
> (e) $ 6,964.24 Judgment debt [as per judgment of 22 January 1996 in the Beenleigh Magistrates Court]
>
> $24,698.03 TOTAL"

Mr Hardie deposed that later, however, the second defendant's solicitors sought to have the terms of agreement which had been read onto the Court transcript on 16 April, amended. These amendments involved the addition of the words "certified fit for counsel", and the costs of the summons which the

second defendant had filed in these proceedings seeking to have them transferred to the Supreme Court of Queensland. This led to a further impasse on 17 April; Mr Hardie deposed that the second defendant's solicitors said that if agreement could not be reached on the inclusion of these additional matters "they would not consent to any orders that afternoon". In pars26 and 27 Mr Hardie deposed:

> "26. At 4.30pm on 17 April 1996 we again attended at the Supreme Court before Thomas J. Following a brief statement by Mr Tippett, Mr Wyvill informed the Court that his clients would not consent to the orders [read out on 16 April]. In the absence of consent, Her Honour indicated she would need to hear argument concerning our application [to terminate the winding-up].
>
> 27. It became clear to myself during the course of this hearing that our application would not be heard until some time during the following week because of Her Honour's trial commitments. During the course of the hearing I was instructed to consent to the amendments sought by Ms Michaels. Mr Tippett indicated to the Court those instructions, and Her Honour adjourned until 4.30pm on 18 April 1996."

Mr Hardie then described the concluding episode in Court in April, at par32:

> "32. At 4.30pm on 18 April 1996 Mr Tippett of Counsel and myself again attended the Supreme Court before Thomas J. Mr Tippett of Counsel filed in Court a Further Amended Summons, Originating Motion and further Affidavit material from Messrs Smith [the plaintiff] and Hansen. Mr Tippett of Counsel submitted that the Court should grant a stay [of the winding-up order] until Thomas J could hear our application [to terminate it] which would have been probably at the earliest the following Tuesday 23 April 1996. Mr Wyvill opposed this, even though no prejudice to his client could be demonstrated. Mr Wyvill also submitted that other creditors would need to be notified before a stay could be granted. Mr Tippett submitted that Mr Smith had in effect "a gun at his head", that he had paid nearly $30,000 into Court and that all he sought was an opportunity to have a fair hearing and argue the question of costs. Mr Henwood [solicitor for the Liquidator] submitted that the Liquidator would need to return to Darwin if formal orders were not made at that time [that is, on 18 April]. I was aware that the Liquidator was charging in excess of $3,000.00 per day whilst in Darwin and if we continued to

> argue, my client would be liable for the Liquidator's costs in returning to Darwin. The Court then adjourned for a short time. When the Court resumed, formal orders [that is, those set out at nos 1-9] were made."

Against this background, I turn to the submissions made on 6 February 1997.

(ii) The second defendant's submissions

Mr Southwood of counsel for the plaintiff noted that the basis for his application of 7 January 1997 was that the consent orders nos.5-9 of 18 April 1996 had been obtained by duress or unconscionable conduct for which the second defendant was responsible. I accept that it is clear from *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 that the proper procedure by which to seek to have those consent orders set aside was by instituting a fresh action; the plaintiff was correct in proceeding by issuing Writ no.3 of 1997 on 7 January 1997.

Mr Southwood relied in particular on *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40. In that case the plaintiff unsuccessfully contended that it had only executed a mortgage to the Bank because the Bank had applied economic duress, by refusing to release certain monies retained from the sale of the plaintiff's property unless the plaintiff executed a mortgage. At 45-6 McHugh JA analyzed the fairly novel concept of economic duress:

> "The rationale of the doctrine of economic duress is that *the law will not give effect to an apparent consent which was induced by pressure* exercised upon one party by another party *when the law regards that pressure as illegitimate*: *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 384 per Lord Diplock. As his Lordship pointed out, the consequence is that the "*consent is treated in law as revocable unless approbated either*

expressly or by implication after the illegitimate pressure has ceased to operate on his mind" (at 384). In the same case Lord Scarman declared (at 400) that the authorities show that there are *two elements in the realm of duress*: (a) *pressure* amounting to compulsion of the will of the victim and (b) *the illegitimacy of the pressure exerted*. "There must be pressure", said Lord Scarman "the practical effect of which is compulsion or the absence of choice".

The reference in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* and other cases to compulsion "of the will" of the victim is unfortunate. They appear to have overlooked that in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, a case concerned with duress as a defence to a criminal proceeding, the House of Lords rejected the notion that duress is concerned with overbearing the will of the accused. The Law Lords were unanimous in coming to the conclusion, perhaps best expressed (at 695) in the speech of Lord Simon of Glaisdale "that *duress is not inconsistent with act and will, the will being deflected, not destroyed"*. Indeed, if the true basis of duress is that the will is overborne, a contract entered into under duress should be void. Yet the accepted doctrine is that the contract is merely voidable.

In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But *he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.*

In their dissenting advice in *Barton v Armstrong* [1973] 2 NSWLR 598; [1976] AC 104, Lord Wilberforce and Lord Simon of Glaisdale pointed out (at 634; 121):

> "… in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law; for this *the pressure must be one of a kind which the law does not regard as illegitimate.* Thus, out of the various means by which consent may be obtained - advice, persuasion, influence, inducement, representation, commercial

> pressure - *the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion."*
>
> In *Pao On v Lau Yiu Long* [1980] AC 614, the Judicial Committee accepted (at 635) that the observations of Lord Wilberforce and Lord Simon in *Barton v Armstrong* were consistent with the majority judgment in that case and represented the law relating to duress.
>
> It is unnecessary, however, for the victim to prove that the illegitimate pressure was the *sole* reason for him entering into the contract. It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the agreement. Once the evidence establishes that the pressure exerted on the victim was illegitimate, the onus lies on the person applying the pressure to show that it made no contribution to the victim entering into the agreement: *Barton v Armstrong* (at 633; 120) per Lord Cross." (emphasis added)

I respectfully adopt that as a statement of the essence of the modern law of economic duress; it has been approved in later authorities in New South Wales and the United Kingdom. I consider it may be applied to consent orders made by a Court. See also the learned article 'Doctrine of Economic Duress' by M. P. Sindone in (1996) 14 Aust Bar Rev at 34 and 114. It can be seen that the notion of coercion lies at the root of the doctrine, which requires it come about by the application of *illegitimate* pressure and not mere commercial pressure. See, for example *Pao On v Lau Yiu Long* (supra) at 635, *Equiticorp Finance Ltd (in Liq) v Bank of New Zealand* (1993) 32 NSWLR 50, and *Caratti v Deputy Federal Commissioner of Taxation* (1993) 27 ATR 448. It is often difficult to draw the line between pressure which the law regards as illegitimate pressure, and legitimate commercial pressure. I note that a victim may lose his rights if he afterwards delays to such a degree as to show acquiescence or affirmation; see *Allcard v Skinner* (1887) 36 Ch.D. 145 and

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron) [1979] QB 705.

I note that the plaintiff also relies on unconscionable conduct on the part of the second defendant; as to that (separate) doctrine see *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474 per Deane J.

Mr Southwood referred to the factual matters which, he submitted, gave rise to the illegitimate pressure in April 1996 by the second defendant upon which the plaintiff relied: the fact that the Company was in liquidation at the time; that this had resulted from a default judgment by the second defendant for a relatively small sum of money obtained in circumstances in which the second defendant well knew that there was a commercial dispute between itself and the Company, and where, on the merits, the second defendant was unlikely to be able to make out in the Beenleigh Magistrates Court its claim for the amount in which it had signed default judgment on 22 January 1996; that the plaintiff contended that the initiating process in both the Beenleigh Magistrates Court and the Supreme Court of Queensland had never been served on the Company, and it was not sufficient for the second defendant to respond by relying on the provisions for service in s220 of the *Corporations Law*. He referred to the circumstances in which the plaintiff found himself in the Court proceedings in April 1996 when seeking to terminate the winding-up, particularly when faced with the second defendant's application to transfer the proceedings to the Supreme Court of Queensland, and its applications for more time to consider the plaintiff's application before deciding whether or

not it would oppose it. In particular, the second defendant had insisted on what later became consent orders nos.5-9 on 18 April 1996, if it were to change its position; and so insisted in a situation in which, Mr Southwood submitted, the plaintiff had plainly demonstrated that the Company was solvent, was in a commercially hazardous situation if it did not have the winding-up order promptly terminated, and in circumstances where it seemed unlikely that judicial time would be available for the Court to deal urgently with the plaintiff's application, on its merits.

On the question of delay in making the application for a stay, Mr Southwood submitted that the second defendant had been on notice since August 1996 that the plaintiff would apply to set aside consent orders nos.5-9.

He submitted that in dealing with the plaintiff's application of 7 January 1997 to stay, the approach set out in *Enterprise Gold Mines v Mineral Horizons NL (No.1)* (1987-88) 52 NTR 13 should be followed. That case involved an application for a stay of execution of orders to deliver up core samples and the results of assays, pending the outcome of an appeal. I said at 16-18 and 20:

16. "It is clear that whether or not a stay should be granted is a matter within the discretion of this court.

    …

    The common form of stay rule [in the Rules of Court] strikes a balance between the competing interests that a successful party ought not to be deprived of the fruits of his judgment, and that a successful appeal should not be rendered nugatory: see *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd (No1)* [1983] 2 Qd R 243 at 247.

17. When the issue is whether a stay should be granted *it is*, I think, *irrelevant to consider whether the judgment under appeal is to be presumed to be correct.* That question is relevant to the entirely separate and important question of how an appellate court should approach its functions, a question now resolved by *Warren v Coombes* (1979) 142 CLR 531; 23 ALR 405. *Subject to the appeal, the decision* of the warden's court *is conclusive as between the parties and determines their rights; that is its legal effect and the source of the respondent's entitlements to the fruits of its judgment.*

…

The true position, as I understand it, is that *this court has a general discretion to stay execution upon a judgment* which is under appeal, but where a common form rule such as r83.09 regulates the question of a stay, the construction of the terms of such rules indicates that *there is in general to be no stay unless the circumstances are such as to warrant it. That is, the norm is no stay.* The court cannot look beyond the rule: see *Attorney-General v Emerson* (1889) 24 QBD 56 at 58. The circumstances

18. which would displace this general approach have been described as "special" or "exceptional"; see, for example: *Klinker Knitting Mills Pty Ltd v L'Union Fire Accident & General Insurance Co Ltd* [1937] VLR 142 at 143 and *FCT v Myer Emporium Ltd* (1986) 64 ALR 325 at 327. This, I think, puts *the burden* too high though it *is one which is not lightly discharged.* As Lowe J put it in *Klinker Knitting Mills Pty Ltd, (supra)* at 143: "*The facts must justify the stay*". The burden upon an appellant under the common form rule is perhaps better expressed in terms used in *Alexander v Cambridge Credit Corp Ltd (Receivers Appointed)* [1985] 2 NSWLR 685 at 694: "*… it is sufficient that the applicant for a stay demonstrates a reason or an appropriate case to warrant the exercise of the discretion in his favour*". In other words, in a case under the common form rule the general discretion to stay is not fettered, but "*appropriate reasons" must be shown by an applicant before a stay will be granted*: see *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 33 SASR 590 at 594-5, per White J, where his Honour notes that it is also necessary "to show that the appeal machinery is not being used as an instrument of oppression or merely as a delaying tactic". There are many illustrations of what are "appropriate reasons" for this purpose: for example, if there is a risk that the appeal would be rendered nugatory in the absence of a stay: see *Wilson v Church (No2)* (1879) 12 Ch D 454.

…

20. In summary, I consider that the principles applicable upon this

application are as follows. *To succeed, the applicant must make out a case which warrants the discretion to stay being exercised in its favour. The court has a general discretion* on the question of granting a stay and the terms on which it will be granted. In exercising its discretion *the court will consider the balance of convenience and what is fair and just as between the parties.* If it is established, for example, that there is a real risk that the appeal will be nugatory without a stay, in the sense that there is a real risk that it will not be possible for a successful appellant to be restored substantially to its former position if the judgment of the warden's court is executed, a stay will normally be granted: see *Scarborough v Lew's Junction Stores Pty Ltd* [1963] VR 129 at 130. *The court will not speculate on the applicant's prospects of success in its appeal, unless it appears not to have an arguable case*. The terms of any stay must fairly take account of the interests of both parties." (emphasis added)

Mr Southwood submitted that the plaintiff had made out a case "which warrants the discretion to stay being exercised in [the Company's] favour." The balance of convenience as between the parties pointed to a stay, the second defendant not having suggested that it would be prejudiced thereby; so did the consideration of what was "fair and just" between the parties. The plaintiff's application of 7 January to stay was essentially founded on his application in proceedings no.3 of 1997 to have consent orders nos.5-9 set aside; if a stay were not granted, the Company, if ultimately successful in those proceedings, would have lost the "fruits" of that judgment in that it would then have to seek damages or repayment from the second defendant. Mr Southwood stressed that the claims currently being litigated in the Beenleigh Magistrates Court really involved 'set-off'-type arguments. He noted that appropriate terms could be imposed on any stay which was granted, such as a requirement that the plaintiff 'top up' the amount the Company had paid in, by amounts which would represent an allowance for interest from time to time.

(iii) The second defendant's submissions

Ms Kelly of counsel for the second defendant submitted that many of Mr Southwood's submissions were irrelevant to the present application of 7 January for a stay. She accepted that the principles applicable to the grant of a stay were as stated in *Enterprise Goldmines NL v Mineral Horizons NL* (supra) at 20 - see pp22-3.

She submitted that the plaintiff bore the onus of establishing that the discretionary power to order a stay should be exercised in the Company's favour, in the sense that he must show that it was an "appropriate case" for a stay to be granted. The norm was that there should be no stay, and the second defendant should be permitted to enjoy "the fruits of [its] judgment" in the form of the enforcement of consent orders nos.5-9 by the payment out on account of its taxed costs of monies which had been paid in as security for those costs.

Ms Kelly submitted that the *only* way in which the plaintiff could show that this was an "appropriate case" for the grant of a stay, was to show that if no stay were granted the plaintiff, if ultimately successful in proceedings no.3 of 1997, would be deprived of the 'fruits' of that judgment. She submitted that the plaintiff had produced no evidence to suggest that the second defendant would be unlikely to be able to repay the amount paid out, if the plaintiff were ultimately successful in its action no.3 of 1997. She referred to the affidavits of Mr Dodd and Mr Clarke as evidence to the contrary.

She submitted that the prejudice to be suffered by the second defendant if a stay were granted, was clear: it would not obtain payment of monies which had been paid into Court specifically as security for the costs it had now had taxed, and had incurred further costs by opposing this application. She submitted that any stay ordered should be on terms of payment in by the plaintiff of a further sum, by way of further security for the second defendant's costs.

Ms Kelly relied on what was said by Mahoney JA in *Re Middle Harbour Investments Ltd (In Liq)* (unreported, Court of Appeal (NSW), 15 December 1976):

> "Where an application is made for a stay of proceedings, it is necessary that the applicant demonstrate an appropriate case. *Prima facie, a successful party is entitled to the benefit of the judgment obtained by him* and is entitled to commence with the presumption that the judgment is correct. These are not matters of rigid principle and *a court* asked to grant a stay *will consider each case upon its merits*, but where an applicant for a stay has not demonstrated an appropriate case but has left the situation in the state of speculation or of mere argument, weight must be given to the fact that the judgment below has been in favour of the other party." (emphasis added)

I note that the onus is on an applicant for a stay to demonstrate a proper basis for that stay which will be fair to all parties.

Ms Kelly submitted that in considering the grant of a stay, the merits of the plaintiff's case in proceedings no.3 of 1997 should not be considered, but rather the circumstances surrounding the execution of the consent orders. In

any event, she submitted, the plaintiff had little prospect of establishing its case in action no.3 of 1997, on the basis that it had suffered economic duress.

She submitted that the plaintiff would have had little chance of having the winding-up order stayed in April 1996, or terminated, had the second defendant not consented thereto, as it would have been entitled to do. *Re Warbler Pty Ltd* (1982) 6 ACLR 526 at 531-3 indicated that an applicant for such a stay had to make out a positive case, and prove that all creditors and contributories had been served with notice of the application to stay, their attitude thereto being a relevant consideration; the nature and extent of creditors had to be shown, and whether or not all debts had been discharged. She submitted that the evidence produced by the plaintiff had not shown that it was solvent in the sense that it could pay all of its debts when they fell due and payable.

Ms Kelly submitted that both the default judgment of 22 January 1996 in the Beenleigh Magistrates Court and the winding-up order of 11 April 1996 in the Supreme Court of Queensland had been regularly obtained by the second defendant; further, it had served the process in relation thereto in accordance with the requirements of the *Corporations Law*. She noted that the default judgment of 22 January 1996 had been set aside only on terms that the costs thrown away by the second defendant were paid.

(iv) The plaintiff's submissions in reply

Mr Southwood submitted that the general effect of the evidence was that the plaintiff was solvent; he noted that the Liquidator had not eventually opposed the application to have the winding up terminated.

He again stressed the general discretion of the Court on an application for a stay. He submitted that no particular weight should be given to the fact that orders nos.5-9 had been made; this was because they had been made as a matter of the parties' agreement and not following a hearing and adjudication on the merits. He submitted that the plaintiff had shown that it had a strongly arguable case on the merits in proceedings no.3 of 1997. The second defendant had not shown that it would suffer any hardship if a stay were granted, while the plaintiff if a stay were refused would lose the benefit of its judgment in action no.3 of 1997, if successful.

Conclusions

I express no opinion on the plaintiff's prospects of success in proceedings no.3 of 1997, or on whether the pressure to which the plaintiff claimed to have been subjected in April 1996 by the second defendant, and on which it relies, was 'illegitimate' in the sense in which that word is used in the authorities relating to economic duress (pp17-19).

I apply what I said in *Enterprise Gold Mines NL v Mineral Horizons NL* (supra) at pp21-3. The discretion to grant a stay is of a general order. A difficult weighing up is involved, in light of the relevant considerations.

I set aside any question of the correctness of consent orders nos.5-9 of 18 April. The fact is that unless and until the plaintiff obtains an order setting those consent orders aside, they determine the respective rights of the parties and constitute the source of the second defendant's present entitlement to the 'fruits' of those orders. Has it been shown that the circumstances are such as to warrant a stay of consent orders nos.5-9? With some hesitation, I have come to the conclusion that such circumstances have not been shown. I am not satisfied that the facts, as disclosed, justify the stay sought; I do not consider, on the whole, that the plaintiff has made out an "appropriate case" (p22) for the discretion to be exercised in his favour. I consider that the balance of convenience does not point in favour of the plaintiff; nor do considerations of what is 'fair and just', as between the parties. I do not consider that it has been shown that there is a real risk that if the plaintiff succeeds in his action no.3 of 1997 his success therein will be rendered nugatory by the refusal of a stay today. I should say, in passing, that I do not accept Ms Kelly's submission (p24) that this would be the *only* way in which the plaintiff can show that there was an "appropriate case" for a stay.

In the result I consider that the plaintiff's application of 7 January 1997 (p2) for a stay should be refused, and that the relief sought in par1 of the second defendant's application of 5 December 1996 (p2) should be granted. Orders accordingly.

———————————————