24

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S139 of 1991

B e t w e e n -

IMMER NO 145 PTY LIMITED

Applicant

and

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (NSW)

Respondent

Application for a stay

MASON CJ

(In Chambers)

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 24 APRIL 1992, AT 10.16 AM

MR D.P. ROBINSON: If Your Honour pleases, I appear for the appellant. (instructed by Baker & McKenzie)

MR B.W. RAYMENT: May it please Your Honour, I appear with my learned friend, MR K.P. SMARK, for the respondent. (instructed by Clayton Utz)

MR ROBINSON: Your Honour, this is an application for a stay of the Court of Appeal's orders pending the determination by the High Court of this appeal. There is an application on before you, there are two affidavits on both sides and I seek to file a third in Court this morning, but it may not be necessary for Your Honour to deliberate on the matter. Pending some further instructions, we may be able to come to an arrangement between ourselves.

HIS HONOUR: About what?

MR ROBINSON: About a stay in the event that the appellant takes the first available date and there may be a debate about the appellant's ability and his willingness to give security for costs of the appeal.

HIS HONOUR: Yes. I should not have thought that my time ought to be taken up with a debate about a permanent stay and security for costs of the appeal. I would have thought that if the parties displayed some common sense they ought to be able to arrive at some accommodation in relation to that. I am astonished to think that the parties should think that I would give serious consideration to some of the suggestions that are made in the affidavits that have been placed before me.

So in the discussions you have, you might bear that in mind. But I will adjourn now and you can let me know when you want me to sit again.

AT 10.18 AM SHORT ADJOURNMENT

UPON RESUMING AT 10.40 AM:

HIS HONOUR: Yes, Mr Robinson.

MR ROBINSON: Your Honour, the parties have been unable to resolve the matter. May I say at the outset that the appellant, Immer, will take any date awarded by

this Court for its appeal and it offers to provide security in an amount fixed by the Registrar for the costs of the appeal. Apparently those two concessions are not sufficient to meet the respondent's desires - - -

HIS HONOUR: Mr Robinson, I need not hear you further. Yes, Mr Rayment.

MR RAYMENT: Your Honour, so far as the evidence is concerned that was filed in the case we tell Your Honour we object to one sentence in Mr Salgo's affidavit, which is paragraph 12, the second sentence, "In the event".

HIS HONOUR: Why do you object to it?

MR RAYMENT: First of all, it is not a statement of fact, in our respectful submission. We are not sure what it means. There is no reason, in our respectful submission, to think that the settlement of this transaction would cause any special prejudice to the applicant, especially because the money, if paid, can be - - -

HIS HONOUR: I propose to disregard the sentence. All I can say is, Mr Rayment, a dispute about that sentence seems to me to be typical of the disputes that have arisen between the legal representatives for the parties in this case.

MR RAYMENT: Your Honour, the point of it, in our respectful submission, is this: could I refer Your Honour to what we have put forward in Mr Denham's affidavit of 23 April 1992. Does Your Honour have that affidavit?

HIS HONOUR: Yes.

MR RAYMENT: From it, if I can just pick the eyes from it, the Reverend Denham, in paragraph 6 of the affidavit says that what has happened here is that since mid-1989 there has been no work done on the site, "which presently comprises a hole in the ground."

The applicant company, Your Honour, as appears from the search, particularly at page 10 - - -

HIS HONOUR: You mean there are doubts about the liquidity of the applicant company?

MR RAYMENT: Yes, Your Honour, there are, in our respectful submission. It is a $2 company; its assets - - -

HIS HONOUR: It may be unable to complete this agreement.

MR RAYMENT: Yes, Your Honour, and its position and that of any holding company which may provide it with money may, for all we know, deteriorate before this Court gives judgment.

HIS HONOUR: Yes, well?

MR RAYMENT: In our respectful submission, there being no reason - either, Your Honour, they will complete the transaction, if no stay is granted, in which case my clients have put evidence on that they are in a position to repay any money paid to them with interest - - -

HIS HONOUR: But that is a completely impractical solution, Mr Rayment. If the agreement is completed, the subject-matter of the appeal disappears. This Court would not proceed to consider and determine this appeal if the agreement were completed before the appeal came on for hearing.

MR RAYMENT: Your Honour, in our respectful submission, there would be no reason why the Court could not go ahead with the appeal and deal with it, and if - - -

HIS HONOUR: But then the agreement would have been completed.

MR RAYMENT: Yes, but Your Honour would order, if it was completed - it is commonplace, is it not, Your Honour, for moneys to change hands and transactions to be completed, pending the hearing of an appeal. If an appeal is upheld, the Court would order the undoing of the transaction ordered to be completed by the court's order below.

HIS HONOUR: It may be commonplace; it is not commonplace as far as this Court is concerned.

MR RAYMENT: I must say I have not come armed with examples of that but, in principle, if an order below is wrong, the court would not only order its undoing but order repayment of any moneys paid with interest, and there are, indeed, reported cases where such orders have been made for the repayment of moneys with interest that were paid under an order set aside.

HIS HONOUR: That may be so, Mr Rayment, but I cannot conceive in this Court that where this Court grants special leave to appeal in relation to a transaction that stands in a particular way, that this Court would readily contemplate that the character of that transaction would change and then there would be a dispute about the purchase money.

MR RAYMENT: Your Honour, it must be a regular position, must it not, if specific performance is ordered by a court at first instance and the agreement completed, the Court of Appeal deals with it - - -

HIS HONOUR: But surely in cases like this the agreement is not completed. Surely in cases of this kind the transaction remains in statue quo until the rights of the parties are finally determined.

MR RAYMENT: We would submit not, Your Honour. We would submit unless there was some prejudice arising from the settlement of the transaction which was shown by the applicant - for example, suppose the council would not transfer it back if it were completed, or something of that nature - - -

HIS HONOUR: But, for example, there must be prejudice. Why should the appellant be compelled to complete the agreement if in fact it transpires that he is not bound to complete the agreement? One reason may be that the appellant has not got the money to complete.

MR RAYMENT: In which case the effect of refusal of the stay would merely be to enable my client to be further advanced in seeking to enforce the position and if the appeal is - - -

HIS HONOUR: But we have to proceed on the assumption, Mr Rayment, that the appellant has an arguable case in support of his appeal.

MR RAYMENT: Yes, Your Honour.

HIS HONOUR: And that that arguable case may result in a declaration by the Court that this contract is validly rescinded. Now, if that possibility exists, it must be a prejudice to the appellant to bring about a situation in which he is bound to complete the contract, pending the determination of the appeal.

MR RAYMENT: We would respectfully submit not, Your Honour.

HIS HONOUR: It must be. It is undeniable.

MR RAYMENT: I do not want to take Your Honour's time with it unduly, but we just put this, that we would respectfully submit that one approaches a case like this, conformably with longstanding authority, on the basis that - - -

HIS HONOUR: You talk about longstanding doctrine, you had better provide me with authority to support that and to support the proposition that there is no prejudice to a party in the position of the

appellant by compelling him to complete, in circumstances where the Court may well hold that he is under no obligation to complete.

MR RAYMENT: Your Honour, *McBride v Sandland*, (1918) 25 CLR 369, was a case in which it was held that conformably with Privy Council authority one essential, on an application of this nature, is that a serious injury would result to the petitioner unless a stay was granted, it not being sufficient that the judgment in question might be wrong. And of course one has the principle that the fruits of the judgment are not to be disturbed merely because an appeal is lodged and, of course, the High Court Rules of their own force provide that unless the Court or a Justice otherwise orders, an appeal shall not operate as a stay of proceedings.

So it is necessary, in the usual case, in our respectful submission, for an applicant to show more than that it would be inconvenient to him if he complied with the orders; he would need to show that in some way the subject-matter of the case might disappear or the ability to prosecute the appeal be rendered nugatory. Something must take the matter out of the general rule. And where you have a solvent recipient of purchase money, no prejudice in our respectful submission, not capable of being cured by an order for interest would, as a matter of law, be incurred.

HIS HONOUR: I take it, all the way through in this case, a stay - no, that would not be right, because you were the appellant in the Court of Appeal.

MR RAYMENT: We lost at first instance and only at Court of Appeal level was there an order for specific performance made. That was the first time on which we obtained such an order. Of course, there was a stay pending the hearing of the special leave application by Mr Justice Mahoney.

HIS HONOUR: Yes.

MR RAYMENT: But, Your Honour, we would respectfully submit that nothing has been shown here which would constitute sufficient prejudice within the meaning of the rule.

HIS HONOUR: Mr Rayment, you had better tell me what is it that you rely upon by way of facts in order to constitute this case of no prejudice.

MR RAYMENT: Your Honour, it is first, that which appears in Miss Newlinds' affidavit of 23 April 1992. She

says, in paragraph 2, that she has made inquiries from the solicitor for the city council - - -

HIS HONOUR: But that does not get you very far, that statement, does it, because it is not binding on the council and, I mean, it is just a pious hope really.

MR RAYMENT: Could I tender a letter. In our respectful submission, it can be assumed to be correct. I tender a letter, if Your Honour pleases - - -

HIS HONOUR: I am not raising any question as to the statement, the accuracy of the conversation between the deponent and Mr Odbert.

MR RAYMENT: No, but Mr Odbert's employee has now obtained instructions on the matter and - - -

HIS HONOUR: Has he, I see, yes. Can I see the letter?

MR RAYMENT: I tender a letter of 23 April 1992.

HIS HONOUR: What does TFS mean actually?

MR RAYMENT: Transferable floor space.

HIS HONOUR: I see. Yes.

MR RAYMENT: Your Honour, next, that as appears from the same affidavit, the holding company of this applicant was delisted in February last year and the last available published accounts for the company are 30 June 1990. Next, that their building consent appears to have lapsed, as appears from paragraph 4 of the same affidavit, on information and belief, because they have not substantially commenced within 12 months.

Then, so far as the Reverend Denham says, it is simply a hole in the ground which has remained in that condition since 1989. Their accounts, in our respectful submission, inspire no confidence that funds are available to them. Their assets appear to be tax losses, as appears from what is on page 19, and as appears from page 20, they describe non-current assets as being inventories, which apparently is the cost of the work done until work stopped - - -

HIS HONOUR: This is page 20 of this affidavit in booklet 4?

MR RAYMENT: Yes, Your Honour. I have picked out - page 19 is the profit and loss statement and Your Honour sees they made, in terms of profit, a loss this year of $195 and nothing last year, but took in an income tax benefit in each year to produce a paper

figure of $8.7 million apparently carried forward tax losses, as far as one can see, described as a benefit, in brackets.

Then, if one turns the page to page 20, one finds that their assets are listed as the cost of construction to date, their building approval now having apparently lapsed. The inventories are explained at page 22 as being the construction costs to date. Next, there was profit by the applicant at one stage, the guarantee of the holding company, for completion of this transaction as a condition of my client agreeing to a stay. That appears at page 87. It is a letter of 12 November last year. They will not give a bank guarantee but:

> we have been instructed that our client is prepared to procure a guarantee from its parent company, Leda Limited, guaranteeing the obligations of Immer as they are determined by the Master and/or the High Court.

Your Honour, that offer or that proposal was withdrawn, as appears from page 92. Today the applicant does not proffer any guarantee from the holding company. Finally, from the affidavits - - -

HIS HONOUR: What is your attitude to a guarantee by - - -

MR RAYMENT: Your Honour, it would be much better for us than what is now offered, which is nothing. Indeed, Your Honour, subject to the applicant procuring a guarantee of its holding companies, Leda Holdings Limited and Leda Limited, in a form to be agreed between the parties, or failing agreement - - -

HIS HONOUR: That is Leda Holdings Limited and Leda Limited - - -

MR RAYMENT: Sorry Leda Holdings Pty Ltd and Leda Limited - subject to the applicant undertaking to procure a guarantee in a form to be agreed between the parties, or failing agreement, to be settled by the Registrar, in respect of payment by the appellant of the purchase money and any interest or damages in respect of late settlement which the appellant may be ordered to pay, then - - -

HIS HONOUR: You would agree to a stay.

MR RAYMENT: The terms otherwise proposed by the other side are acceptable.

HIS HONOUR: Now, what other matters, Mr Rayment?

MR RAYMENT: Finally, Your Honour, there was a request made, as Your Honour sees at page 97, for information about that inventory figure, and whether it had been supported by any evaluation report. That is where the correspondence remains. Page 98, they say they will obtain instructions in relation to that and ask why the question was asked. That question was answered at page 99 and then no further information is provided.

HIS HONOUR: One other question, Mr Rayment. From your point of view, what amount would you nominate as appropriate security for costs?

MR RAYMENT: $20,000, Your Honour, being a figure which one would imagine would be less than taxed costs at the end of the day.

HIS HONOUR: $20,000 strikes me, prima facie, as an eminently reasonable figure. Yes, Mr Robinson.

MR ROBINSON: Firstly, I would not disagree with $20,000 for security for costs. Your Honour, may I file in Court an affidavit of Anthony Phillip Spencer of 23 April 1992. It is a very short affidavit.

HIS HONOUR: Have you shown that to Mr Rayment?

MR ROBINSON: Yes, I have. May I read that first? The annexures are the only relevant matters. The first annexure is the associate's record of proceedings. That deals with the contested proceedings before the parties in the Court of Appeal and says the order made by Mr Justice Mahoney is that:

> If leave granted application for stay to be made to that Court.

Meaning to the High Court. That is why the matter is here and not before Mr Justice Mahoney.

The second exhibit is a facsimile from the respondent's solicitors to the appellant's solicitors, the last paragraph of which is material. The writer says:

> In the meantime, we reiterate that our client is prepared to refrain from insistence upon completion of the Agreement in accordance with the orders of the Court of Appeal provided that your client prosecutes the appeal expeditiously by agreeing to the 22 June 1992 hearing date for the appeal.

Now, Your Honour, that was a letter of 22 April and on 23 April, with some reluctance, and that is for dealing with the convenience of senior

counsel, that point is no longer pressed. The third paragraph - - -

HIS HONOUR: What do you mean, that point is no longer pressed? You mean you are no longer pressing insistence upon - - -

MR ROBINSON: Meeting the convenience of the senior counsel. Your Honour, we have done that as - we have just decided to do that. It is not the usual practice, as we understand it in this Court, but for the benefit of a stay we will take the earliest possible date.

HIS HONOUR: I do not know about the usual practice in this Court. This Court has no practice in terms of ensuring that parties have or can continue to retain the services of their counsel for an appeal. I know that the Registrar does what he can, consistently with the interests of the Court, to enable that to occur.

MR ROBINSON: It was only that practice that I was referring to and the Registrar, apparently, does a very good job, from what I am told by counsel who regularly appear in this Court.

HIS HONOUR: I shall pass that compliment on to him.

MR ROBINSON: Your Honour, relevantly, though, Mr Salgo on behalf of the appellant says that he wishes to take up that offer which seems to be unequivocal - that is an offer by the respondent's solicitors on 22 April that if the appellant was to take 22 June, then there would be no problem about a stay, and that is done. The case, as it is unfolding before Your Honour today, appears to go into different matters and that is that - - -

HIS HONOUR: Of course it does, and I must say that is what has attracted my criticism, that in a sense I think both parties have altered their stance here. It is particularly irritating to find that the time of this Court is taken up in dealing with a matter where, in my opinion, the legal representatives of the parties have not acted sensibly and practically. My criticism goes to both sides equally in relation to this matter.

But the fact is that you brought this on your own head, in a sense. But your point now is, as I understand it, that because the respondent has indicated that if a particular condition was satisfied they would not oppose a permanent stay, and belatedly, you are prepared to offer compliance with that condition, they should be held to it.

MR ROBINSON: It would be a significant matter in the exercise of Your Honour's discretion. It may not be a perfect offer and acceptance, but it would be a significant matter.

HIS HONOUR: I suppose you say you are going further now by offering security, which they did not ask for then.

MR ROBINSON: In some correspondence they did, Your Honour.

HIS HONOUR: Earlier?

MR ROBINSON: I am not sure - may I just find where that is, Your Honour. I am sure that it was asked for. It was asked for very belatedly and we are prepared to comply with that, Your Honour. One matter that Mr Rayment has not drawn your attention to is the fact that he has security in this sense, that he has the air rights, which are valuable - indeed, the price of those air rights is some $2 million. He has always secured - - -

HIS HONOUR: Are they still as - I would have thought that the market value of air rights in this city has probably deteriorated significantly since this contract was entered into.

MR ROBINSON: There is no evidence of that, Your Honour, and Mr Rayment has not put any evidence on of that. I understand it is a very volatile market, but Your Honour might be correct. I think it is general knowledge there has been a down turn in the building industry but to what extent that general down turn would affect the trading in air rights is another question. But Mr Rayment's client has those air rights and they will stand as security, just as in the normal vendor/purchaser case the vendor still has his property, and always has that, in the relevant sense, as security.

Your Honour, may I then read the two other affidavits which Your Honour may have glanced at. They are Mr Salgo of 22 April 1992. I do not know if Your Honour has glanced at that. That sets out a bit of the history of the proceedings.

HIS HONOUR: Yes, I have looked at this.

MR ROBINSON: The most relevant exhibit is AMS-5 where the respondent's solicitors say that, on page 2, after fixing a date for completion of the agreement - I do not know if Your Honour has that. That is page 2 of a facsimile dated 15 April.

HIS HONOUR: Yes.

MR ROBINSON: Page 1 sets out an appointment and some interest calculations for settlement. The last paragraph on page 2 of that facsimile says:

> We should add that our client's insistence on completion of the Agreement as outlined above is the direct result of your client's apparent failure to prosecute the appeal expeditiously. In particular, we note that your client is not prepared to accept the hearing date offered in the week commencing 22 June 1992 because of the unavailability of Mr Conti, QC at that time.

And then there is a reference to the Registrar indicating a telephone conversation - - -

HIS HONOUR: Quite obviously you could not regard that attitude on the part of your client as a failure to prosecute the appeal expeditiously. I do not know that Mr Rayment would contend otherwise. The fact is that the Registrar offers, from time to time, earlier positions in a list in a city away from the city of origin of a case. But the offer is, as I understand it, basically conditional upon both parties agreeing to have the case transferred away from the city of origin or at least from Canberra to a different city. So I disregard that suggestion that there has been a failure to prosecute the appeal expeditiously.

MR ROBINSON: But, Your Honour, it gives the motivation as to why it would otherwise not be appropriate for a stay. There is no insistence on any other term or condition. There is just the assertion that by not taking the Brisbane sittings there is a delay in the prosecution of the matter. Therefore, we are appointing a date for settlement of the matter. The inference is - the very strong inference is that if you were to have taken the June sittings, we would have gone along with the stay - an unconditional stay, Your Honour. We seem to be only now debating what the terms of any stay would be. It seems, at the last moment, indeed the very last moment, there are now terms as to security imposed in the last day or so. This matter was debated, as Your Honour would suspect, in the Court of Appeal after a contested hearing - - -

HIS HONOUR: Before Mr Justice Mahoney?

MR ROBINSON: Before Mr Justice Mahoney and Mr Justice Mahoney made the order he did, and he made the order he did after a fully contested hearing where both parties called evidence and Mr Justice Mahoney made the order until the special leave application was determined. There has been

no relevant change, Your Honour, since then to any of the parties' positions. As Mr Rayment points out, Immer is dormant and is not trading.

May I just refer you to a page in the affidavit of Mr Denham, page 93. If Your Honour looks at the second paragraph at page 93, it is a letter from Baker & McKenzie to the respondent's solicitors:

> ("Immer") does not trade. It is the holder of a leased property situated at 197-199 Castlereach Street Sydney ("the Catholic Club site"). Work on the Catholic Club site is presently suspended, and because of this, Immer's financial position remains static. ImmQer is prepared to provide an undertaking that, until the proceedings before the High Court are finalized, it will not trade or incur any liability other than as may be required to maintain and hold its interest in the Catholic Club site, honour the obligations which it has undertaken by lease and in relation to the conduct of proceedings instituted against it with respect - - -

HIS HONOUR: Is it prepared to offer that undertaking?

MR ROBINSON: It does, to this Court at this moment, until the determination of the appeal in this Court.

HIS HONOUR: Yes. What about the guarantee that was formerly offered?

MR ROBINSON: That is no longer offered, Your Honour.

HIS HONOUR: Is there any reason why it is no longer offered?

MR ROBINSON: I would have to get instructions on that, Your Honour.

HIS HONOUR: Perhaps you might obtain instructions. When I ask you to obtain instructions, I mean maybe you will not get instructions. In other words, I am not insisting that you obtain instructions, but I give you the opportunity to obtain them.

MR ROBINSON: I can tell Your Honour that no guarantee by Leda is proffered to the Court at this time. The undertaking to the Court that Immer will not do anything to change its financial position is offered to the Court, in terms of that paragraph which I read out to Your Honour.

HIS HONOUR: But that undertaking is confined to Immer.

MR ROBINSON: That is right, Your Honour.

HIS HONOUR: It does not go to Leda.

MR ROBINSON: No, Your Honour, that is right. There is no undertaking by Leda. Your Honour, that is the evidence I propose to rely on.

Your Honour, there is no case that I can find where, in situations where the appellant has a right of appeal, he has been forced to complete the conveyance. The status quo is preserved in this sense, that the subject-matter of the litigation, so far as the appellant sees it, is its right not to complete the contract and not to have to borrow money or procure money from some source which it would have to do given its balance sheet.

Mr Rayment is correct to say that such assets as it has, future tax benefits and the value of a construction contract which, when one reads the notes, is not readily transferable into money nor is it able to be borrowed against because that contract is itself charged by the documents referred to in Mr Denham's affidavit.

If the completion of the transaction was to take place prior to the determination by the High Court, the appellant would not be free to deal with those air rights in the sense of realize them or resell them unless at the loss of any order that this High Court might make to reverse the transaction.

Your Honour, the respondent has the benefit already of interest running on the settlement figures. That was a condition of the stay imposed by Mr Justice Mahoney and that would compensate them for a settlement which would occur at a later time rather than an earlier time. There is a promise to repay the money by the respondent to the appellant if the transaction were to be reversed. There is no evidence of any capacity to do so. What we do know about the capacity of the respondent is that it is in debt to $3.6 million. It has the chance to obtain - - -

HIS HONOUR: But these church property trusts are the Church's relationship with Mammon, are they not? I have never really understood that there is any doubt about the liquidity or the solvency of church property trusts and, if I may say so, going back to my old experience which, admittedly, is decades old, less doubt perhaps about this particular property trust than any other.

MR ROBINSON: That might be so, Your Honour, but the respondent has not taken the trouble to put on any evidence of that.

HIS HONOUR: I must say, for my part, in the absence of evidence, I am going to assume that the respondent has unquestioned capacity to repay the money in the event that that becomes a live question. Again, Mr Robinson, I think this is typical of the attitude taken by the legal representatives in this case. It is a desertion of reality to put that submission to me.

I mean, it is the sort of submission that may go down in a police court and even then I have some doubt about it, but it is not a submission that is going to receive any attention from me at all.

MR ROBINSON: I will not persist in it, Your Honour, but I only say it arises from the evidence which is put before Your Honour and, coupled with the promise to repay, which is apparently the central focus of the case made by the respondent, it would be normally incumbent upon that person to support the promise.

HIS HONOUR: Yes. But, Mr Robinson, if the parties really gave their attention to this offer as a serious means of resolving the difficulty that now arises, I have no doubt that you would be insisting that any moneys you paid over were to be held in some sort of special account and trust.

MR ROBINSON: I was going to put that second submission, Your Honour, because what inferential - - -

HIS HONOUR: It is fairly obvious, is it not, that that would be the way of dealing with the problem? That is the customary way of dealing with this sort of problem. What is the point of putting a submission to me that the respondent may not have the capacity to repay the money?

MR ROBINSON: Your Honour, with respect, that is not the way in which the evidence inferentially is given by the Reverend Denham. If I may put it this way: he says, "We owe $3.6 million. Interest is accumulating at a certain amount per day." He then makes reference to the fact that $2.4 million or thereabouts is owed on this conveyance. One assumes that he wishes to place the $2.4 million against the $3.6 million.

HIS HONOUR: Well, maybe, but really it is on the margins of this case, Mr Robinson.

MR ROBINSON: Your Honour, the only other matter that I can come back to is that it is true that the air rights

may have deteriorated in their value but that is security which the respondent holds in respect of this which has not been valued. Those are my submissions.

HIS HONOUR: Yes. Now, do you want to say anything in reply, Mr Rayment, because I cut Mr Robinson short early on and that may have deprived you of an opportunity of responding to some matters that he has raised?

MR RAYMENT: Yes, thank you, Your Honour. Your Honour, in our respectful submission, the flurry of activity which occurred before the filing of this application in which there were some attempts to resolve it ought not to govern its outcome, that is to say, the proposal to have an early hearing date and to have the matter disposed of in that way was of importance to my clients and they wished to achieve it. Having failed to do so, in our respectful submission, whatever they have said before the application is filed ought not to govern the outcome of the application which ought to be dealt with on its merits.

HIS HONOUR: I suppose you can put that submission but, after all, if the matter were to be heard in June - and I understand the date is still available - then, it seems to me, the lapse of time is inconsiderable.

MR RAYMENT: It is less and one has to add to it only the time in which this Court reserves judgment.

HIS HONOUR: Yes, that is true. But, after all, it is not a particularly difficult case, I should have thought, Mr Rayment.

MR RAYMENT: No, I accept that.

HIS HONOUR: When I say, "it is not a particularly difficult case", it is a case that is in small compass and, after all, it has one or two narrow issues in it.

MR RAYMENT: Yes, I accept that. But one would never know how long a judgment might take in this Court.

HIS HONOUR: No, no, that is true. That is granted.

MR RAYMENT: Your Honour, we submit that the key matter here is this: we submit that one would not make an order having the effect of granting a stay if prejudice might be caused to the respondent who, after all, at the moment enjoys an order for specific performance made by the Court of Appeal which has not been disturbed which cannot be compensated for by some appropriate order.

Now, Your Honour, if it be an order that the moneys be kept separate, my clients are content with that. But that which is most significant, in our respectful submission, is the refusal of the applicant to proffer the guarantee of its holding companies and persisted in, Your Honour having given the opportunity to have an explanation for it, that offer not being taken up. We would respectfully submit that that is a material circumstance with respect to the fate of this application and it ought to lead to it being dismissed or, at any rate, the order being made conditional upon such an undertaking being proffered, and failing its being proffered within several days, we respectful submit the application should be refused.

HIS HONOUR: Yes. Thank you, Mr Rayment. Now, I will stand this matter over until 10.15 on Monday morning and I will give my decision then. The Court will adjourn until then.

AT 11.24 AM THE MATTER WAS ADJOURNED
UNTIL MONDAY, 27 APRIL 1992

23

IMMER NO.145 PTY. LIMITED

v.

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (N.S.W.)

JUDGMENT

MASON C.J.

IMMER NO.145 PTY. LIMITED

v.

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (N.S.W.)

This is an application by the appellant for a stay of orders made by the New South Wales Court of Appeal pending the determination of the appellant's appeal to this Court from those orders, a stay having been granted by Mahoney J.A. in the Court of Appeal pending determination by this Court of the appellant's application for special leave to appeal. The substantive orders made by the Court of Appeal from which the appeal is brought require the appellant to complete an agreement for the transfer of "airspace" rights ("TFS") embodied in a deed, the respondent being the transferor and the appellant being the transferee. The price payable by the appellant for the transfer is $2,306,600. The appellant's case on the appeal is that it validly rescinded the agreement so that, if the appeal succeeds, the appellant will not be bound to complete.

The application for the stay is opposed on several grounds. It is said that the appellant will suffer no prejudice if the agreement is completed before the appeal is determined. In this respect, the City Solicitor has, in a letter to the respondent's solicitors, stated that, in the event that the purchase is completed and an entry to that effect made in the City Council's Register of Transferable Floor Space, that entry *could* be set aside in the event that the appeal to this Court succeeds, subject to the Council "being provided with documentation acceptable to it evidencing that the transfer of the TFS had been set aside, and provided that [the City Solicitor is] also satisfied that [the appellant] has not dealt with the TFS".

I do not regard that statement as amounting to an iron-clad assurance that the Register would be appropriately amended if the appeal were successful. The respondent also undertakes to the Court, if the appeal is successful, to repay to the appellant the amount which the appellant has been ordered to pay for the purposes of completion of the agreement.

The respondent contends that there are strong reasons for doubting the financial soundness of the

applicant and its holding company. Certainly the material before me is such as to raise a real doubt about the financial soundness of the two companies. The respondent is therefore concerned that, if the appellant's appeal is unsuccessful, the appellant will not be able to pay the purchase price and its ability to do so may deteriorate pending the determination of the appeal. There is some substance in this contention. But my impression is that the appellant may well have difficulty in financing the completion of the agreement *now*, as well as at a time in the future after the disposition of the appeal. The possibility of a deterioration in the financial position of the appellant in the interregnum can be met by the giving of an appropriate undertaking.

I approach this case on the footing that the appellant is required to show that special circumstances exist which justify a departure from the ordinary rule that a successful litigant is entitled to the fruits of his or her litigation pending the determination of the appeal. It seems to me that the subject-matter of the appeal and the financial position of the appellant constitute those special circumstances. The question at issue is whether the appellant is bound to complete the agreement and, to

that end, make the financial arrangements necessary, if it is able to do so. That question disappears if completion is to take place before the determination of the appeal. It may be that, in that event, a question would arise as to the efficacy of the completion; in other words, the appellant could argue that its rescission was effective, that the transaction should be set aside and the moneys paid restored with interest, in conformity with the appellant's undertaking. But to allow completion to take place would, I think, radically transform the case and the situation of the parties as it presently exists. Moreover, it would place the appellant in a far more disadvantageous position than it would be if it ultimately succeeds in the appeal. The circumstances are such as in my opinion to warrant the grant of a stay.

In reaching that conclusion, I take into account other features of this case to which I now refer. On 22 April 1992 the respondent's solicitors wrote to the appellant's solicitors, saying:

> "[W]e reiterate that our client is prepared to refrain from insistence upon completion of the Agreement in accordance with the orders of the Court of Appeal provided that your client prosecutes the appeal expeditiously by agreeing to the 22 June 1992 hearing date for the appeal".

The reference in this passage to a hearing date was to an offer made by the Registrar of the Court to list the appeal for hearing in the Brisbane sittings of the Court in June. The appellant's solicitors had indicated their unwillingness to accept this date owing to the unavailability of Mr Conti Q.C., the appellant's senior counsel. The appellant maintained this unwillingness until the application for a stay was listed for hearing on Friday last.

The respondent's solicitor described this unwillingness as a failure to prosecute the appeal expeditiously, a description which has no substance whatsoever, as the Registrar's offer was conditional upon the consent of both parties and as it is not usual to transfer an appeal originating in Sydney for hearing

in Brisbane. Moreover, the respondent's solicitors have relied upon the appellant's refusal to accept the June date of hearing as a reason for refusing to agree to a stay at all, notwithstanding that the alternative date for hearing is a date in September.

Furthermore, the appellant has offered to provide security for costs of the appeal in the form of $20,000, an amount nominated by the respondent's counsel, has agreed to accept the June date of hearing and will undertake that it will not trade or incur any liability other than as may be required to maintain and hold its interest in the Catholic Club site, honour the obligations which it has undertaken by lease and in relation to the conduct of the proceedings instituted against it with respect to the site (including these proceedings).

In these circumstances I consider that I should make an order for a stay. Accordingly, I make the following orders:

1. I order that the appellant provide security for the costs of the appeal in the sum of $20,000, that security to be in form satisfactory to the

Registrar and to be provided within seven days of the date of this order.

2. Upon the appellant's undertaking to the Court by its counsel that, until the appeal is determined by this Court, it will not trade or incur any liability other than as may be required to maintain and hold its interest in the Catholic Club site, honour the obligations which it has undertaken by lease and in relation to the conduct of the proceedings instituted against it with respect to the site (including these proceedings), I order that the orders made by the Court of Appeal be stayed until the determination of the appellant's appeal to this Court or until further order.

3. Each party to pay its own costs of this application.