09/06; [2006] VSC 170

SUPREME COURT OF VICTORIA

TENTH VANDY PTY LTD v NATWEST MARKETS AUSTRALIA PTY LTD

Hargrave J

26 April, 4 May 2006

CIVIL PROCEEDINGS – PROCEEDING STRUCK OUT WITH RIGHT OF REINSTATEMENT – FIRST APPLICATION TO REINSTATE PROCEEDING DISMISSED - SECOND APPLICATION FOR REINSTATEMENT BASED ON CHANGED CIRCUMSTANCES – WHETHER SECOND APPLICATION AN ABUSE OF PROCESS – APPLICABLE PRINCIPLES.

The correct approach to apply to second or subsequent interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case. It is, generally speaking at all events, open to the court to exercise a wide discretion in the interests of justice in considering whether an applicant who has failed on the merits may none the less succeed on a second application. It follows that a court is not bound to conclude that the second reinstatement application will be an abuse of process unless there is "new evidence" in the sense in which that expression is used in connection with the admission of evidence on appeals. The extent to which the second reinstatement application is based upon evidence which was available to be produced on the hearing of the first reinstatement application, but was not so produced, will be a relevant factor in determining the second reinstatement application. Further, new circumstances that the stay amount has been paid and a proposed further amended statement of claim has been formulated are relevant factors to be taken into account on the hearing of the second reinstatement application. In this regard also, the reasons why these circumstances did not exist at the time of the hearing of the first reinstatement application will be a relevant consideration.

***Nominal Defendant v Manning* [2000] NSWCA 80; (2000) 50 NSWLR 139; (2000) 31 MVR 524, followed.**

***National Parks and Wildlife Service v Pierson* [2002] NSWCA 273; (2002) 55 NSWLR 315, followed.**

***DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582, considered.**

***Guss v Magistrates' Court of Victoria* [1998] 2 VR 113; MC22/97, and**

***Stragan & Co Pty Ltd v Christodoulou* [2002] VSC 78; MC19/02, not followed.**

HARGRAVE J:

1. By notice of appeal dated 6 April 2006 the plaintiff appealed to a judge against the decision of the Senior Master made on 30 March 2006 to dismiss its application that this proceeding be reinstated. The appeal was heard by me in the Practice Court. The appeal raised an important issue of practice and procedure. Accordingly, I reserved my decision.

FACTS

2. The proceeding was commenced on 14 January 2000. The plaintiff makes allegations concerning the conduct of the defendant in and between 1990 and 1994. There have been a number of versions of the statement of claim. Some of the issues which were initially raised have been the subject of summary judgment against the plaintiff, and other allegations have been struck out. There is no doubt that there has been inordinate delay by the plaintiff in the prosecution of the proceeding.

3. On 27 February 2002, Master Kings ordered pursuant to Rule 63.03(3)(a)[1] that the proceeding be stayed until such time as the plaintiff paid the sum of $25,723.40 ("the stay amount") to the defendant. This amount was due in respect of unsatisfied costs orders made by the Court on previous applications. Further, Master Kings ordered that certain paragraphs of the then current statement of claim be struck out and that the plaintiff have leave to file and serve an amended statement of claim within 14 days of payment of the stay amount.

4. The plaintiff did not pay the stay amount. Accordingly, the proceeding remained stayed for over a year.

5. Following correspondence from the Prothonotary's office to the solicitors for the plaintiff in 2003, Bongiorno J ordered on 22 August 2003, on the Court's own motion, that the proceeding be dismissed "with a right of reinstatement".

6. In about April 2004, Mr Leslie Thomas, who is the sole director and shareholder of the plaintiff, met and persuaded a solicitor to act for the plaintiff. Soon after, on 14 May 2004, Thomas (with the assistance of his daughter) borrowed the stay sum and procured the drawing of a bank cheque for that amount in favour of the defendant's solicitors, Mallesons Stephen Jaques. For reasons which are not explained in the evidence, this bank cheque was never tendered to the defendant or its solicitors and became stale.

7. By summons dated 22 August 2005, the plaintiff made its first application to have the proceeding reinstated ("the first reinstatement application"). The first reinstatement application was heard and determined by Master Efthim on 3 October 2005.

8. The plaintiff relied upon two affidavits sworn by Thomas. These affidavits deal with the underlying events about which the plaintiff complains in the proceeding, and with the procedural history of the proceeding. Further, Thomas deposes to his own limited financial means and the fact that he required the assistance of his daughter to borrow money enabling him to procure the bank cheque for the stay amount in May 2004. As I have said, there is no explanation as to why the bank cheque was not tendered to the defendant or its solicitors.

9. Master Efthim also considered a detailed written outline of argument on behalf of the defendant dated 30 September 2005. This written outline discloses that the first reinstatement application was opposed on a variety of grounds, including submissions that:

> (1) It would be futile to reinstate the proceeding because the plaintiff appeared to be insolvent. Reliance was placed upon the fact that further costs orders had been made against the plaintiff in the proceeding, in respect of which a draft bill of costs had been prepared in the sum of $18,141.95, and to the fact that the plaintiff had provided no explanation for "holding back" delivery of the bank cheque for the stay amount.
>
> (2) Because the plaintiff had not paid the stay amount, the present form of the plaintiff's pleading was unknown.
>
> (3) Given the delay in the proceeding, and the fact that all relevant limitation periods had expired, it was futile to reinstate the proceeding because an application to dismiss it for want of prosecution would almost certainly succeed. In this regard, the defendant submitted that there had been inordinate delay in the prosecution of the proceeding and that the Court could safely infer that the delay would prejudice the fair trial of the proceeding.

10. After considering the two affidavits sworn by Thomas and the arguments on behalf of the defendant, Master Efthim determined to dismiss the first reinstatement application. It is apparent that he did so after a full hearing on the merits of the application. In particular, it is apparent that Master Efthim did not dismiss the application *on the sole ground* that the plaintiff had not paid the stay amount or delivered an amended statement of claim consequent upon doing so. Although the Master did not give written reasons for his decision, he incorporated into the "OTHER MATTERS" section of his order the following statements:

> "1. Application is dismissed.
>
> 2. Material filed on behalf of the Plaintiff is deficient:
> - No amended Statement of Claim before the Court
> - No explanation for delay - inferences at best can be made in Affidavit
> - No explanation given by the Plaintiff why cheque drawn in May 2004 was not delivered to the payee and no explanation why application not brought prior to September 2005
> - No explanation how other costs outstanding to be paid
> - Likely to be some prejudice to [Defendant][2]
> - Facts go back to 1990 (likely to have [been] change of personnel)
> - Order 34.05 – used as a guide only."[3]

11. It was submitted on behalf of the plaintiff that I should find that Master Efthim dismissed the first reinstatement application on the sole ground that the plaintiff had not paid the stay

amount, thus lifting the stay ordered by Master Kings and permitting the filing of an amended statement of claim. I reject this submission. Master Efthim clearly considered the arguments put on behalf of the defendant and, in his brief "reasons" referred to a number of factors other than the plaintiff having failed to pay the stay amount and file an amended statement of claim. I find that Master Efthim heard and determined the first reinstatement application on its merits.

12. By notice of appeal dated 7 October 2005, the plaintiff appealed against the order of Master Efthim dismissing the first reinstatement application.

13. The appeal was first considered on 28 October 2005. On that day, Williams J ordered that the further hearing of the appeal be adjourned to 11 November 2005 on condition that the plaintiff pay the stay amount to the Senior Master or the Prothonotary, such amount to be paid to the defendant on the determination of the appeal. The plaintiff did not pay the stay amount. Instead, it abandoned the appeal from the order of Master Efthim and that appeal was dismissed with costs.

14. By summons filed 23 December 2005, the plaintiff made a second application to a master for an order that the proceeding be reinstated ("the second reinstatement application"). In addition, the summons sought leave to amend the statement of claim in the form of a draft amended statement of claim exhibited to an affidavit filed with the summons.

15. In a further affidavit sworn by Thomas, he stated:

> "On behalf of the Plaintiff, I hereby irrevocably undertake that in the event that this Court exercises its discretion to reinstate the proceeding in accordance with the Plaintiff's current Summons, the Plaintiff shall pay the sum of $25,723.40 as a condition of any such re-instatement within 7 days of the making of an order for conditional re-instatement. I had previously procured a Bank cheque in this sum with the support of my daughter as evidence of my ability to raise the necessary funds to discharge the cost orders in the even(t) that the proceeding was reinstated. These funds remain available to discharge the taxed costs ordered in favor of the Defendant."

16. The second reinstatement application was heard by the Senior Master on 8 and 30 March 2006.

17. On 8 March 2006, the Senior Master adjourned the second reinstatement application to enable two things to happen. First, the Senior Master ordered that unless the plaintiff tendered to the defendant a bank cheque for the stay sum by 4.00 pm on that day, the application would stand dismissed.[4] Secondly, the Senior Master directed the parties to exchange written outlines of argument on the following question:

> "... concerning whether on a second application, in effect to set aside a judgment, the applicant is confined to new evidence (taken in conjunction with the old) which was not available to the applicant at the time of the hearing of the first application."

18. Following the payment of the stay sum and the exchange of the written outlines of argument ordered by the Senior Master, the Senior Master heard and determined the second reinstatement application on 30 March 2006. The Senior Master dismissed the second reinstatement application, in the following circumstances.

19. On the hearing of the second reinstatement application, counsel for the defendant made an oral application to dismiss the second reinstatement application as an abuse of process. The Senior Master heard and determined this oral application and determined to accept it. The Senior Master's brief reasons appear in the "OTHER MATTERS" section of his authenticated order.

20. In summary, the Senior Master decided that the second reinstatement application sought an order akin to that sought in an application to set aside a judgment in default of appearance or defence, or in consequence of non-compliance with an order of the Court. Based upon this characterisation of the second reinstatement application, the Senior Master held that he was bound by two single judge decisions of this Court in *Guss v Magistrates' Court of Victoria*[5] and *Stragan and Co Pty Ltd v Christodolou*[6]. The Senior Master continued:

> "In consequence, the Court as presently constituted may not have regard to the evidence adduced

> on the previous application or evidence which could have been produced on the previous application unless there is also in support of this application 'new' evidence or material which was not available and could not have been available to the plaintiff for the previous application."

21. The Senior Master held that the "new material" relied upon by the plaintiff, being the payment of the stay amount and the production of a proposed further amended statement of claim, did not satisfy the test of "new evidence" required by the decisions in *Guss* and *Stragan*. Accordingly, he dismissed the second reinstatement application as an abuse of process, without considering the merits of the application.

22. As I have said, by notice of appeal dated 6 April 2006, the plaintiff appeals against the decision of the Senior Master.

23. On the hearing of the appeal, I was asked to proceed in the same way as the Senior Master proceeded, and hear and determine the oral application by the defendant to dismiss the second reinstatement application as an abuse of process. Although the hearing of an appeal from a Master is a rehearing *de novo*, I accepted the submission of both parties that I should proceed in this way. Having considered the written outlines of argument filed on behalf of the parties, it seemed to me that, if the defendant's submissions concerning the applicable law were correct, this would avoid the necessity for the Court to consider the merits of the second reinstatement application and the substantial affidavit material filed in respect of it.

APPLICABLE LAW

24. On behalf of the defendant, it was submitted that I was bound to find that the second reinstatement application was an abuse of process because it was not based upon "new evidence" which was not available at the time of the hearing of the first reinstatement application. Reliance was placed upon the Court of Appeal decision in *DA Christie Pty Ltd v Baker*[7] and on the application of the principles discussed in *Christie* by Batt J in *Guss* and Beach J in *Stragan*.

25. In *Christie*, the Court of Appeal considered an appeal from a decision of a County Court judge to allow a second application for an extension of time within which to bring an action under s23A of the *Limitation of Actions Act* 1958 (Vic). An initial application for extension of time had been dismissed by a different County Court judge on the grounds that there was no explanation for the delay. The second application was supported by material explaining the delay. The appeal was allowed by majority, Brooking and Hayne JJA, (Charles JA dissenting).

26. Brooking JA decided the appeal on the basis that the second application was caught by the principle of issue estoppel.[8]

27. Brooking JA continued:

> "If I were wrong in this view, I should still be of the opinion that the appeal must succeed.... If the principle of issue estoppel was inapplicable, then it was for the judge to consider whether it was an abuse of process for the respondent to apply again when he had failed on the merits and when he vouchsafed no explanation of his omission to put forward at the time of the first application the additional material on which he now relied. If the decisions I have cited do not lead to the conclusion that an issue estoppel arose here, then in my view they at least support the conclusion that on the facts of this case the respondent, having not 'come fully prepared with proper materials in the first instance', and having not sought any adjournment once the gap in his case became apparent, and having offered no explanation of his failure to put forward the material which was later provided, should not be allowed to vex the appellant with a second application. The judge failed to turn his mind to this question. We are in as good a position as he to determine the question and we should do so adversely to the respondent, and allow the appeal. I agree, with respect, with what Hayne JA has written on the subject of abuse of process."[9]

28. However, Brooking JA stated clearly that he was not stating a general rule which was applicable to all interlocutory applications, and his acceptance of the reasoning of Hayne JA on abuse of process must be viewed in this light. Brooking JA stated in this regard:

> "It is arguable ... that, questions of practice and procedure being under the control and generally within the discretion of the court in which the action is brought, it is, generally speaking at all events, open to the court to exercise a wide discretion in the interests of justice in considering whether an

> applicant who has failed on the merits may none the less succeed on a second application. ... We are concerned, not with the ordinary interlocutory application made in the course of litigation, which is governed by the court's own practice and procedure, but with an application under a statute which empowers a court to enlarge a limitation period if it decides ..."[10]

29. Hayne JA decided the appeal on the ground of abuse of process. Counsel for the defendant in this proceeding placed particular reliance upon the following statement by Hayne JA:

> "Consideration of the private interest of a respondent to an application under s23A in having certainty on the question whether action may be brought against it notwithstanding the expiration of the relevant limitation period, together with consideration of the important public interest in ensuring that judicial determinations are binding, final and conclusive and that there should not be conflicting decisions on the same issue lead me to the view that the circumstances in which second applications under s23A may be made after dismissal of an earlier application are limited. So far as presently relevant that limitation is to be imposed by an application of principles concerned with abuse of process and in at least most cases may be resolved by concluding that a second application is an abuse unless there is proof of fraud or it is sought to adduce fresh evidence, 'fresh', that is, in the sense in which that expression is used in connection with the admission of evidence on appeals."[11]

30. In common with Brooking JA, Hayne JA made it clear that he was not laying down any general rule to be applied to interlocutory applications of whatever kind:

> "Whether the same considerations apply to interlocutory applications of the kind I have mentioned earlier – those under the control of and generally within the discretion of the court in which the action is brought – is not a matter I have to decide. Nothing I say here should be read as deciding whether the renewal of such an application is an abuse of process. Moreover, given the breadth of possible application of the principles of abuse of process, I do not intend in what I say to attempt some definition of the circumstances properly to be regarded as constituting an abuse of process or to say that it is only upon proof of fraud or the adducing of fresh evidence that a second application of the kind now under consideration can be said not to amount to an abuse. The hazards of attempting some general definition of such broad and discretionary principles as are encompassed in the simple expression 'abuse of process' are well known and need not be restated."[12]

31. In *Guss*, the defendant sought judicial review of a decision of the Magistrates' Court allowing the plaintiff's third application to set aside a default judgment. Notwithstanding the clear statements by both Brooking and Hayne JJA in *Christie* that they were not laying down any general rule as to when an interlocutory application will constitute an abuse of process, Batt J appears to have applied *Christie* as establishing a rule of general application. Batt J stated:

> "But in my view the second defendant was also correct in his submission that the magistrate was not bound to consider the whole of the material and in particular the material which he and Mr Myers had previously considered. In my view, that conclusion is required by the judgments of Brooking JA and Hayne JA in *DA Christie Pty Ltd v Baker*, when properly understood, even though small passages in those judgments, if taken by themselves, might be argued to point in the opposite direction. Further, on the view of Hayne JA and, I think, of Brooking JA, the magistrate was probably only bound to consider material that was not available at the time of the previous application. Their Honours relied on the principle relating to abuse of process, holding that a second application is an abuse of process unless there is proof of fraud or it is sought to adduce 'fresh' evidence, in the sense used in relation to admission of evidence in appeals. If the evidence was available at the time of the first application and there is no explanation of why it was not then put forward, then, at least, the second application will constitute an abuse of process. Those conditions were satisfied in the third application in the present case and, if, as I think, that part of *Christie v Baker* is applicable to s110, the magistrate was bound to dismiss the application and not to investigate it, contrary to the plaintiff's contention before me. If anything, the magistrate's test of 'newness' was too generous. Certainly he should not have gone further, as the plaintiff contended."[13] (Citations omitted.)

32. Later in his judgment, Batt J stated the principle in this way:

> "I would add that statements in other cases, such as *Carr, Hall v Nominal Defendant*, *Guss v Johnstone* and *Seymour v Holm*, show that, except where there has been a dismissal of the first application for a technicality or where there is fraud or where new evidence becomes available after the dismissal of the first application, a second application is almost certainly doomed to failure. Statements to that effect seem to me to recognise that the judicial officer hearing the second or subsequent application need not reconsider any of the material considered on earlier applications, save of course to the extent necessary for comparing the corpus of material before him or her with that before his or her predecessor in order to ascertain what is new material."[14] (Citations omitted.)

33. In *Stragan*, Beach J considered an application for judicial review of a decision of a magistrate to allow a second application to set aside a default judgment. Beach J followed the decision of Batt J in *Guss* and, because there was no new evidence on the second application, set aside the order of the magistrate.

34. It was submitted on behalf of the defendant that the second reinstatement application was indistinguishable from the second and third applications to set aside the default judgments which were considered in *Guss* and *Stragan*. As those decisions relate to a matter of practice and procedure, it was submitted that I ought to follow them unless convinced that they were clearly wrong. Reliance was placed upon *Bunting v Venville*.[15]

35. Since the decisions in *Guss* and *Stragan* there have been further developments. In *Global Realty Development Corp v Dominion Wines Ltd (in liq)*,[16] Mandie J considered a second application for injunctive relief. Reliance was placed upon *Christie*. Mandie J rejected the submission that *Christie* established a general rule as to what constituted an abuse of process for all interlocutory applications.[17]

36. In *Nominal Defendant v Manning*,[18] the Court of Appeal in New South Wales, by majority, declined to follow the majority decision in *Christie*.[19] Like *Christie*, *Manning* involved a consideration of whether a second application to extend the time within which to commence proceedings was an abuse of process. Although the majority declined to follow *Christie* in respect of such applications, there was agreement that it was undesirable to lay down any general rule to be applied in considering whether an interlocutory application constitutes an abuse of process. For example, Heydon JA said:

> "... there are considerable differences between the particular goals of each type of [interlocutory] order and the categories of circumstances in which each type of order is made. These differences make it difficult to propound a general rule suitable for all cases when the controversy in one specific case for decision does not have characteristics which are common to all categories. Not only are the categories different, but the circumstances of particular cases falling within each category are almost infinitely various. It is unlikely that a single set of rigid and exhaustive criteria could justly settle all issues."[20]

37. In *National Parks and Wildlife Service v Pierson*[21] the Court of Appeal in New South Wales considered a second application to reinstate a proceeding which had been struck out for default in compliance with the Court's directions. Palmer AJA, with whom Mason P and Santow JA agreed, considered that if an application for reinstatement was made before the default had been cured, and was dismissed for this reason, there was no bar to a second application after the default had been cured. This was because "there will have been a change in the circumstance which led to the refusal of the first application."[22] Further, Palmer AJA considered that it was not impossible for a second application for reinstatement to succeed, even if the default has not been cured prior to the making of the application, "because the overriding principle governing the approach of the court to interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case."[23]

38. In *Philip Morris Ltd v Attorney General for the State of Victoria & Lindsey*[24] the Court of Appeal considered a ninth application by a vexatious litigant for leave to commence proceedings. Maxwell P was of the view that it was not open to Philip Morris to argue that the application itself was an abuse of process.[25] However, as the matter had been fully argued, Maxwell P considered whether the application was itself an abuse of process. In doing so, Maxwell P considered *Christie, Manning* and *Pierson*.[26] Although Maxwell P did not state expressly that he disagreed with the majority in *Christie*, a full reading of his Honour's judgment indicates a preference for the approach by the New South Wales Court of Appeal in *Manning* and *Pierson*, and the dissenting judgment of Charles JA in *Christie*. However, Maxwell P confined himself to distinguishing *Christie* on the basis that it was a different kind of application and did not involve "judge shopping."[27]

39. Ormiston JA was not convinced that Philip Morris could not argue that the application was itself an abuse of process.[28] As to whether *Christie* should be applied to interlocutory applications generally, and not just applications to extend time to commence proceedings, Ormiston JA stated:

> "Moreover I would prefer to express no opinion as to the extent to which *Christie v Baker* should be applied in relation to applications such as the present. I would say only that it must be remembered

> that the rules relating to *res judicata* and issue estoppel frequently are inapplicable to matters decided on interlocutory applications such that, if there be no firm rules relating to the relitigation of matters on interlocutory applications, there might well be a rush of applications from unsuccessful applicants mending their hand in the light of unfavourable interlocutory decisions."[29]

40. Eames JA agreed with Ormiston JA that Philip Morris was not prevented from arguing that the application was itself an abuse of process. Whilst agreeing with the reasons of Maxwell P as to why the application in that case did not constitute an abuse of process, Eames JA stated that he did not consider Maxwell P to have cast doubt on the statements of principle made in *Christie*. With respect, as I have said, my view of the judgment of Maxwell P is that it indicates, without deciding, a clear preference for the approach of the New South Wales Court of Appeal over that expressed in *Christie*.

41. My review of the authorities has led me to the conclusion that I am not bound, in considering the second reinstatement application in this case, to apply *Guss* and *Stragan*, with the effect that I am limited to considering any "new evidence" which was not available on the hearing of the first reinstatement application. I am of this view for the following reasons.

42. In the first place, although the second reinstatement application is of a similar kind to an application to set aside a default judgment, it is a different application.

43. Secondly, the decision of Mandie J in *Global Realty* constitutes a single judge decision which is contrary to the decisions in *Guss* and *Stragan*. In these circumstances, the weight to be attached to the fact that the decisions in *Guss* and *Stragan* concern matters of practice and procedure is diminished.

44. Thirdly, and most importantly, both Brooking and Hayne JJA in *Christie* clearly stated that they were not purporting to lay down any general rules to be applied in determining whether any interlocutory application constitutes an abuse of process.

45. Fourthly, the variety of interlocutory applications and of the circumstances pertaining to each individual application dictate, in my view, that it is undesirable that there be a set of rigid rules to be applied to every case where a second interlocutory application is made after the refusal of a first application for the same relief. In this regard, I respectfully adopt the passage from the judgment of Heydon JA in *Manning* quoted above[30] which was referred to with apparent approval by Maxwell P in *Philip Morris*.[31]

46. As a result, it is my view that the correct approach to apply to second or subsequent interlocutory applications is that stated in *Manning* and *Pierson* that "the overriding principle governing the approach of the court to interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case."[32] As I have said, this statement was referred to with apparent approval by Maxwell P in *Philip Morris*.[33] Further, this approach is consistent with the statement of Brooking JA in *Christie* quoted above in respect of interlocutory applications concerning questions of practice and procedure that:

> "... it is, generally speaking at all events, open to the court to exercise a wide discretion in the interests of justice in considering whether an applicant who has failed on the merits may none the less succeed on a second application."[34]

CONCLUSION

47. It follows that the application by the defendant to dismiss the second reinstatement application on the grounds that it is an abuse of process is not to be determined in accordance with the submissions made on behalf of the defendant. I am not bound to conclude that the second reinstatement application will be an abuse of process unless there is "new evidence" in the sense in which that expression is used in connection with the admission of evidence on appeals. Having said that, the extent to which the second reinstatement application is based upon evidence which was available to be produced on the hearing of the first reinstatement application, but was not so produced, will be a relevant factor in determining the second reinstatement application. Further, the new circumstances that the stay amount has been paid and a proposed further amended statement of claim has been formulated are, in my view, relevant factors to be taken into account on the hearing of the second reinstatement application. In this regard also, the reasons why these

circumstances did not exist at the time of the hearing of the first reinstatement application will be a relevant consideration.

48. The issue remains as to how the second reinstatement application should be disposed of. The merits have not yet been enquired into by a master. In all the circumstances, I will not make any orders on the appeal at present. Once the parties have had an opportunity to consider these reasons, I will proceed to hear and determine the second reinstatement application, which is before me on the appeal for rehearing *de novo*.

---

[1] *Supreme Court (General Civil Procedure) Rules* 1998.
[2] The authenticated order refers, in error, to prejudice to "Plaintiff". This is an obvious error, as the relevant question before the Master, which was the subject of submissions by the defendant, concerned prejudice to the defendant.
[3] The reference to Order 34.05 is a reference to a submission put on behalf of the defendant that the judgment which the plaintiff was seeking to set aside was obtained in circumstances which were comparable to a judgment obtained in accordance with the previous Rule 34.05.
[4] In fact, the stay amount was paid after 4.00 pm on 8 March 2006. However, on 30 March 2006, the Senior Master extended the time for payment of the stay sum *nunc pro tunc*.
[5] [1998] 2 VR 113.
[6] [2002] VSC 78.
[7] [1996] VicRp 89; [1996] 2 VR 582.
[8] [1996] VicRp 89; [1996] 2 VR 582 at 597.
[9] [1996] VicRp 89; [1996] 2 VR 582 at 597-8.
[10] [1996] VicRp 89; [1996] 2 VR 582 at 597.
[11] [1996] VicRp 89; [1996] 2 VR 582 at 605.
[12] [1996] VicRp 89; [1996] 2 VR 582 at 605-6.
[13] [1998] 2 VR 113 at 123.
[14] [1998] 2 VR 113 at 124.
[15] [1980] VicRp 59; [1980] VR 633 at 634, per Lush J.
[16] [2005] VSC 474; (2005) 225 ALR 361.
[17] [2005] VSC 474 at [20], [21]; (2005) 225 ALR 361.
[18] [2000] NSWCA 80; (2000) 50 NSWLR 139; (2000) 31 MVR 524.
[19] Heydon JA and Foster AJA; Mason P *contra*.
[20] [2000] NSWCA 80; (2000) 50 NSWLR 139 at 147-8; (2000) 31 MVR 524.
[21] [2002] NSWCA 273; (2002) 55 NSWLR 315.
[22] [2002] NSWCA 273; (2002) 55 NSWLR 315 at 318.
[23] [2002] NSWCA 273; (2002) 55 NSWLR 315 at 318, referring to Foster AJA in *Manning* (2000) 50 NSWLR 139 at 161.
[24] [2006] VSCA 21; (2006) 14 VR 538.
[25] [2006] VSCA 21 at [48]; (2006) 14 VR 538.
[26] [2006] VSCA 21 at [51]-[61]; (2006) 14 VR 538.
[27] [2006] VSCA 21 at [63]; (2006) 14 VR 538.
[28] [2006] VSCA 21 at [120]; (2006) 14 VR 538.
[29] [2006] VSCA 21 at [120]; (2006) 14 VR 538.
[30] [2000] NSWCA 80; (2000) 50 NSWLR 139 at 147-8; (2000) 31 MVR 524.
[31] [2006] VSCA 21 at [60]; (2006) 14 VR 538.
[32] *Pierson* [2002] NSWCA 273; (2002) 55 NSWLR 315 at 318; *Manning* [2000] NSWCA 80; (2000) 50 NSWLR 139 at 161; (2000) 31 MVR 524.
[33] [2006] VSCA 21 at [61]; (2006) 14 VR 538.
[34] [1996] VicRp 89; [1996] 2 VR 582 at 597.

APPEARANCES: For the plaintiff Tenth Vandy Pty Ltd: Mr J Selimi, counsel. Radebe & Associates, solicitors. For the defendant Natwest Markets Australia Pty Ltd: Mr J Styring, counsel. Mallesons Stephen Jaques, solicitors.
