



## Précis Paper

### ***Skyworks v 32 Drummoyne Road [2017] NSWSC 343***

Ian Roberts SC and Declan Byrne discuss the NSW Supreme Court decision of *Skyworks* and the requirements for freezing orders.

#### **Discussion Includes**

- The history of Mareva Injunctions
- The legislative equivalent (Freezing Order) in the *Uniform Civil Procedure Rules* 2005 (NSW) and the relevant Court Practice Notes
- Threshold issues and evidentiary burdens for freezing orders
- Minimising and managing risk through the security of payment legislation, the adjudication process, and prompt applications.
- The usual undertaking as to damages

## Précis Paper

### ***Skyworks v 32 Drummoyne Road* [2017] NSWSC 343**

1. In this edition of BenchTV, Ian Roberts (SC, Barrister) and Declan Byrne (Barrister) discuss the NSW Supreme Court decision in *Skyworks v 32 Drummoyne Road* [2017] NSWSC 343 which considered the conditions required for a freezing order. Both presenters represented the successful plaintiff.

#### Facts of the Case

2. Single purpose developer 32 Drummoyne had engaged the builder, Skyworks, to construct a block of 11 luxury apartments in Drummoyne. A dispute arose between the parties. At the time of the claim the project was almost complete. Occupation certificates had been issued and the strata plan was in the process of being registered. Once the latter occurred, the developer would be at liberty to complete contracts of sale that had been made during the course of the project.
3. The use of a Special Purpose Vehicle (SPV) meant that after the registration of the strata plan, the units were the only assets remaining in the jurisdiction that could enable the builder's claim for the construction work to be satisfied. This was the basis for the original application for a traditional freezing order that was granted on an ex parte basis before Justice Hammerschlag.
4. The substantive claim then proceeded in the usual manner in the Technology and Construction list. During this time the parties established a regime to place the proceeds from the remaining unit sales in a fund. The defendant no longer desired to maintain this fund as negotiated. This was the basis for the application heard by Justice McDougall.
5. The application raised a number of issues, including:
  - a. Whether or not the plaintiff was able to satisfy the usual undertakings as to damages; and,
  - b. Whether or not a freezing order can be made in respect to a particular asset.
6. The developer claimed, that if a specific freezing order were granted over the unit sales fund, the plaintiff would be put in the position of a secured creditor. Furthermore, without a proprietary interest in the fund the plaintiff was not entitled to a freezing order over that fund. These arguments were rejected.

#### Mareva Injunction

7. Freezing orders are the modern statutory version a 'Mareva Injunction'.
8. In *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 the owners let the vessel, 'Mareva' to the defendants who subsequently sub-chartered it. Money paid for the latter arrangement went into a bank account in London. The defendants were unable

to pay the balance owing under their time charter with the owners. The court froze the funds paid into the bank account under the sub-charter agreement to protect the shipowners. This type of order was henceforth known as a Mareva Injunction. More recently, rules of various courts have converted it into a freezing order, or as it is sometimes known, an asset protection order.

#### The Legislative 'Freezing order'

9. The Legislative equivalent of a freezing order is in the interim preservation orders. In Part 25 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'), r. 25.11 provides in subsection (1) that "The court may make an order (a "freezing order"), upon or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied." Subsection (2) expands what the freezing order can be made in respect to, "A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets."
10. A similar style of orders is set out in Division 7.4 in the *Federal Court Rules* (2011). Court practice notes provide practical guidance on these orders, i.e. Practise Note SC Gen 14 [Supreme Court] or the General Practice Note FRZG [Federal Court]. The formal order for a freezing order is much longer than for a traditional injunction due to the potential gravity of its effects on entities whose assets are frozen
11. There are essentially two threshold issues applicants must establish to be successful in an application for a freezing order. Firstly, the applicant must have a good arguable case and secondly, there must be a danger, by reason of the defendant absconding or removing assets from the jurisdiction or dissipating them within the jurisdiction, that the applicant, if it succeeds, will not have its judgment satisfied.

#### A Good Arguable Case

12. Traditionally, for summary disposal and strike out applications the court has regard to the existence of a prima facie cause of action, i.e. if the facts pleaded are proved, is there an arguable case? A good arguable case has a higher threshold, whereby the plaintiff, with admissible evidence, must further demonstrate that the case has some prospect.
13. In *Skyworks* there was a right in the contract for damages for delay. In circumstances where an extension of time was granted for a compensable cause the contractor had to prove that actual costs had been incurred because of the delay. Expert evidence was relied upon to ascertain the quantum of costs incurred from the delays. This included from the granted delays and those that were not granted. Through this evidence it was possible to show a reasonable prospect that the delaying events would entitle the plaintiff to recover substantial sums of money in costs.

### The danger of a judgement being frustrated

14. In *Skyworks* it was relevant to adhere to the particular circumstances of the case when considering if the defendant was likely to remove assets beyond the reach of the plaintiff and remove the utility of the proceedings. Although the assets would stay in jurisdiction, if they were shifted to other corporate entities within the corporate group they would be effectively beyond the reach of the plaintiff. Considering the relevant circumstance of the case is consistent with the Court of Appeal's judgement in *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319.
15. Although traditional freezing orders stop assets from being removed from the jurisdiction, the court may lift the corporate veil where it is being used to disguise a defendant's dissipation of assets. *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 identifies a broad formulation for the disposition of property, to be any which is 'intended to frustrate or having the necessary effect of frustrating the plaintiff in his attempt to seek through the court a remedy for the obligation to which he claims the defendant is subject'. There is no specific test to assess the danger of assets being removed however it is not appropriate for the court to intervene unless there is a more than usual likelihood of the danger occurring.
16. Justice Von Doussa in *Beach Petroleum NL v Johnson* [1992] FCA 868 provides authority that it is not essential to show a positive intention on behalf of the defendant to frustrate the judgement. An applicant must only establish, 'in the absence of relief, there is a danger that assets will be dealt with in a way which will prevent the applicant from recovering the judgement'. On that basis, the finding can be one of inference.
17. In *Skyworks*, the following elements helped establish that there was a danger of the funds being moved to another company,
  - a. A Company and Property search showed a general practice of the group of companies to which the Defendant was a part of, to set up a new SPV for each development project they were doing.
  - b. PPSR searches identified that each of the companies in that group had charges over it.
  - c. A balance sheet that the defendant put into evidence showed that the defendant had virtually no money on trust after it had sold all the units subject of the development. It also showed the defendant owed significant money on intercompany loans.
  - d. The defendant expressly admitted an intention to use the funds to satisfy some of those intercompany loans if the undertaking was released.
18. This admission in *Skyworks* was unusual. However, it is often possible to go through the accounting material made available in preliminary discovery to demonstrate that a party can only continue to trade through moving assets beyond the reach of the applicant. In this

manner, it is likely that even without the admission the danger in *Skyworks* would have been established.

### Minimising and Managing Risk

19. It is important to minimise the risks involved in a project. It is important to know the parties with whom you contract and their asset position. Particularly as the use of SPVs is common, it is not always possible to ensure the developer is an entity with means.
20. To manage the risks involved in a project it is advised that those within the industry use the security of payment legislation when it is applicable to the contract. Security of payment (regulated by *Building and Construction Industry Security of Payment Act 1999* (the Act)) allows claims to be submitted regularly and the use of an adjudication process to prevent risks growing out of all proportion to the contract. Furthermore, this may facilitate work practices to be appropriately adjusted throughout the project.
21. It is important that applications for these sorts of orders are made promptly. This was evident in *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53. The contractor had acted upon an adjudication certificate for 11 million dollars and acquired payment from the debtor's bank. The developer commenced proceedings to quash this determination without taking steps to prevent it being enforced. The developer applied to Justice McDougall to have the money repaid. Justice McDougall outlined that if a party wishes the court of equity to exercise its discretion in their favour, it is essential that they act promptly. This sentiment equally applies to requests for interim preservation orders [at 22-23].
22. In *Skyworks* certain signs triggered the plaintiff's application. These included a recognition of the creation of an SPV and that the registration of the strata plan triggered an entitlement to start settling sale contracts. It was known that after these sales were settled, no other assets would be left to satisfy a judgment.
23. The triggers within each case are dependent upon the relevant factual circumstances. It is important for contractors and those within the industry to continuously assess their contractual partners and actively work to minimise their risk using the legislative avenues available.

### Anomaly in the case

24. The application in *Skyworks* was not for a traditional freezing order but rather for an injunction giving effect to the agreed upon regime or an order to deny the developer relief from their undertaking.
25. The undertaking was the voluntary regime that established a solicitor's trust account from the last unit sales.
26. In response, the defendant claimed that an application for a freezing order over the specific fund required a proprietary interest in that fund. However, Justice McDougall [at 56] did not

regard the rules in UCPR [r25.11] limiting in that way, 'any assets' did not preclude the court from making an order in the limited form sought by Skyworks. The court ordered the fund to be sequestered.

Providing the usual undertaking as to damages.

27. Before the Court will grant an interlocutory order, the party seeking the order will almost always offer or be required to give to the Court the "usual undertaking as to damages" [UCPR r25.8; GPN-UNDR, s2.2]. Note should be taken of the particularised formulation of undertakings for freezing orders [Practice Note SC GEN 14, s16; Practice Note GPN-FRZG, s2.16].
28. In *Skyworks* insufficient ability on behalf of the plaintiff to satisfy the undertakings were overcome by having the related entities provide undertaking as to damages in addition to the plaintiff. It may be, that in certain cases, the plaintiff, as a member of a group or as a corporate entity with natural persons behind it may not be able to satisfy an undertaking as to damages, and thus other parties can supply, as well as, or, in substitution of, the plaintiff, so that an order can be granted.
29. A Freezing order is a significant inroad into the right of a party to deal with their own assets, which can have significant consequences. Therefore, the party seeking the order must undertake to pay compensation to any person who is adversely affected by the interlocutory injunction. If the applicant has insufficient means, the respondent should raise the insufficiency of the undertaking and the requirement for additional security [Practice Note SC GEN 14 s17; Practice Note GPN-FRZG s, 2.17].

## **BIOGRAPHY**

### **Ian Roberts SC**

Barrister, Greenway Chambers, Sydney

Ian Roberts SC went to the Bar in 1996. Since then, he has built a hugely successful practice, was appointed Senior Counsel in 2011, and is also an accredited mediator. Ian accepts briefs in Building & Construction, Commercial and Contracts Law, Equity, Transport Law.

### **Declan Byrne**

Barrister, Greenway Chambers, Sydney

Before being called to the Bar, Declan spent six years working as a solicitor and then Senior Associate in the construction litigation teams at HWL Ebsworth and Herbert Geer. He has also had extended experience working in an in-house environment. In addition to having undertaken an eight-month secondment to John Holland, prior to moving to Sydney, Declan spent three years working in Brisbane as a contracts advisor for the ASX-listed engineering practice, Cardno Ltd. Declan accepts briefs in all areas of commercial law, and has particular expertise and experience in construction and property law.

## **BIBLIOGRAPHY**

### **Focus Case**

*Skyworks v 32 Drummoyne Road* [2017] NSWSC 343.

### **Benchmark Link**

xxxx

### **Judgment Link**

yyyy

### **Cases**

*Beach Petroleum NL v Johnson* [1992] FCA 868

*Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53

*Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213

*Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319.

*Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264

### **Legislation**

*Uniform Civil Procedure Rules* 2005 (NSW)

*Building and Construction Industry Security of Payment Act* 1999 (the Act)

*Federal Court Rules* (2011).

Supreme Court Practice Note, SC GEN 14

Federal Court Practice Note, GPN-FRZG