FEDERAL COURT OF AUSTRALIA

Langbein v Mottershead Investments Pty Ltd [2019] FCA 1619

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| Appeal from: | *Mottershead Investments Pty Ltd v Aircraft Support Industries Engineering Pty Ltd (in liquidation) and Ors* [2019] FCCA 1375  |
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| File number: |  |
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| Judge: | **STEWART J** |
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| Date of judgment: | 26 September 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application by appellant for an extension of a stay of the judgment the appellant appeal’s from under r 36.08 of the *Federal Court Rules 2011* (Cth) – where respondent has offered personal undertakings to repay the judgment sum in the event that the appeal is successful – where appellant has already paid the judgment debt and the respondent has not yet had the use of that money – application dismissed**PRACTICE AND PROCEDURE** – respondent’s application for security for costs – where appellant is a resident out of the jurisdiction and there are no assets available within the jurisdiction to pay costs of appeal – security ordered |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 56*Federal Court Rules 2011* (Cth) rr 36.08, 36.09 |
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| Cases cited: | *Henderson v Amadio Pty Ltd (No 3)* (1996) 65 FCR 66*KP Cable Investments Pty Ltd v Meltglow Pty Ltd*  [1995] FCA 76; 56 FCR 189*PS Chellaram & Co Limited v China Ocean Shipping Company* [1991] HCA 36; 102 ALR 321 |
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| Date of hearing: | 26 September 2019 |
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| Registry: | New South Wales |
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| Division: | General |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Number of paragraphs: | 32 |
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| Counsel for the Appellant: | J T Johnson |
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| Solicitor for the Appellant: | JT Law |
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| Counsel for the Respondent: | S Bell |
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| Solicitor for the Respondent: | Terrett Lawyers  |

ORDERS

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|  | NSD 1157 of 2019 |
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| BETWEEN: | MARK CALVIN LANGBEINAppellant |
| AND: | MOTTERSHEAD INVESTMENTS PTY LTD ACN 119 740 304Respondent |

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| JUDGE: | STEWART J |
| DATE OF ORDER: | 26 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

**Appellant’s Interlocutory Application filed on 11 September 2019**

1. The appellant’s interlocutory application filed on 11 September 2019 is dismissed.
2. The appellant is to pay the costs of its interlocutory application filed on 16 September 2019.

**Respondent’s Interlocutory Application filed on 16 September 2019**

1. Pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) and r 39.01 of the *Federal Court Rules 2011* (Cth) the appellant is to give security for the respondent’s costs of the appeal in the sum of $30,000 to be provided by 4:00pm on the twenty-first (21st) day after the date of these Orders by payment into Court in this proceeding pursuant to r 2.42 of the *Federal Court Rules 2011* (Cth).
2. Pursuant to r 36.09(1)(b) of the *Federal Court Rules 2011* (Cth), the appellant’s appeal be stayed until the security for costs sum has been provided by the appellant pursuant to Order 3.
3. The costs of the respondent’s interlocutory application for security for costs filed on 16 September 2019 are to be costs in the appeal.

**General**

1. The matter is listed for case management on 24 October 2019 at 9:30am, which is also to be the return day for any application brought by the respondent in the event that security is not established pursuant to Order 3.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered ex tempore)

STEWART J:

1. There are two competing applications before the Court. The respondent seeks security for its costs in the appeal in the event that the appeal fails. The appellant seeks an extension of a stay of the judgment that he appeals from, namely that he pay the sum of $209,000 from funds currently held in trust by his solicitor. The judgment was stayed by the primary judge until the first case management hearing in the appeal, when it was further extended until the determination of this stay application.
2. I will consider the stay application first.
3. There is $300,000 held by the appellant’s solicitors in trust. That sum is part of the proceeds of sale of the appellant’s Manly house which occurred during the proceeding at first instance. The primary judge ordered that that sum be retained in trust to satisfy any judgment that might subsequently be made against the appellant. The primary judge is yet to determine the interest and costs that are claimed in the proceeding at first instance. The balance of the sum of $300,000 after the principal sum of $209,000 is paid is held to meet the judgment on interest and costs once it is made.
4. The appellant relies on r 36.08 of the *Federal Court Rules 2011* (Cth) (**FCR**), which provides that an appeal does not operate as a stay of execution or a stay of any proceedings under the judgment subject to the appeal. However, an appellant or interested person may apply to the court for an order to stay the execution of the proceeding until the appeal is heard and determined.
5. The relevant principles are well-established. The assumption is that the judgment appealed from is correct and that the court should not deprive a person of the fruits of their victory. It is not necessary for an appellant to show special or exceptional circumstances in order to justify a stay, but some reason must be demonstrated. Also, the court can order a stay on appropriate conditions, such as with regard to the provision of security for the judgment, or it can refuse a stay subject to conditions with regard to the respondent, that is, the judgment creditor providing security for repayment in the event that the appeal succeeds.
6. The respondent refers to *Henderson v Amadio Pty Ltd (No 3)* (1996) 65 FCR 66 at 69D, where Heerey J stated as follows:

I do not think that the circumstances need to be “special” or “exceptional” in the sense of being unusual or rare. For example, where the judgment sought to be stayed is for payment of a money sum and costs, as is the case here, the appellant will often be concerned with the prospect that without a stay the proceeds of the judgment may be dissipated or seized by other creditors or for some other reason be impossible or very difficult to recover. In such a case, the appellant has to show there would be no reasonable probability of getting back monies paid under the judgment if the appeal succeeds in full. See *Andrews v John Fairfax & Sons Ltd* [1979] 2 NSWLR 184 at 189 … However this could hardly be considered a special, exceptional, rare or unusual situation.

1. The prospects of success in the appeal can be a relevant consideration. In this case, there is nothing to suggest that the appeal is other than bona fide, but I am not in a position to make any assessment as to its prospects of success. That is because the appeal is on a question of fact, and to make any kind of assessment would require getting into the evidence in considerable detail, which would not be an appropriate or proportionate use of the Court’s time at this stage of the proceeding. Indeed, Mr Johnson, who appeared for the appellant, did not urge that on me. He submitted that I can deal with the matter on the basis that the appeal is bona fide and genuinely brought and that it is of relatively narrow compass.
2. The respondent is a corporation of unknown assets and creditworthiness. Those are circumstances that would count in favour of the extension of the existing stay of the judgment as the appellant could be justifiably concerned that it might not be repaid in the event that the appeal is successful.
3. However, the respondent has offered personal undertakings from three natural persons to repay the judgment sum in the event that the appeal is successful. Evidence has been adduced as to the real property owned by each of them to found the submission that the undertakings have value.
4. The first undertaking is by Mr Ross Mottershead, the sole director of the respondent in the proceeding and a Chartered Accountant. The undertaking is made to the court and to the appellant. It is that in the event that the appellant is successful in his present appeal, Mr Mottershead will pay into court such amount, up to $300,000, as may have been paid out of the sum presently held pursuant to the orders of the primary judge. The evidence shows that the property owned by Mr Mottershead, which is in Queensland, is heavily mortgaged such that there is not much equity in that property. Mr Mottershead should nevertheless be assumed, as a professional person, to be honourable and to at least have the honest belief that he will be able to pay the sum that he has undertaken to pay.
5. The second undertaking offered is by Mr Peter Terrett, the respondent’s solicitor in this proceeding. Mr Terrett offers an undertaking to the court that in the event that Mr Mottershead, who offers the first undertaking, fails to pay on his undertaking, then Mr Terrett as guarantor will pay that sum into court, up to the sum of $60,000. Mr Terrett has real property in New South Wales that has sufficient equity to meet his undertaking, limited as it is. As a solicitor of this court, Mr Terrett’s undertaking to the court must be assumed to be good.
6. The third undertaking is by Mr Neil Mottershead, who is the brother of Ross Mottershead. He undertakes that if Ross Mottershead fails to pay any sum up to $200,000 under his undertaking, then he, Neil Mottershead, will pay that amount into court. The evidence indicates that Neil Mottershead has real property in New South Wales that has very considerable equity in it far in excess of the value of his undertaking.
7. The present circumstances are that the appellant has already, in effect, paid the judgment debt. That occurred a long time before judgment when the proceeds of the sale of his property were put in trust under the orders of the primary judge. However, the respondent has not had and does not yet have the use of that money.
8. In view of the authorities and in particular in view of the undertakings that have been proffered, which taken together I accept are very likely to produce repayment of any amount that is paid out of the $300,000 in the event that the appellant succeeds in the appeal, I am not satisfied that the judgment should continue to be stayed, and I will dismiss the stay application. That is expressly on the basis of the undertakings that have been proffered.
9. I now turn to the security for costs application.
10. The respondent moves on an amended interlocutory application dated 24 September 2019 for security for its costs in the appeal in the sum of $70,000 or such other amount as the court may consider appropriate. The application is made pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) and r 36.09 of the FCR.
11. The court’s discretion to order security is broad and unfettered, although it must be exercised judicially. I refer to *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* [1995] FCA 76; 56 FCR 189 at 196 per Beazley J. A non-exhaustive list of discretionary factors is set out by her Honour. Those include the following: *first*, that such applications should be brought promptly; *second*, that regard is to be had to the strength and bona fides of the applicant’s case; *third*, whether the applicant’s impecuniosity was caused by the respondent's conduct subject of the claim, that is, if the security is resisted on the basis of the appellant’s impecuniosity; and *fourth*, whether the respondent's application for security is oppressive, in the sense that it is being used merely to deny an impecunious applicant a right to litigate. There are further factors which are not relevant to the present case where the appellant is a natural person and not a corporation.
12. There is no evidence in this proceeding that ordering security would stultify the appeal or would be likely to preclude the appellant from obtaining access to justice. In *PS Chellaram & Co Limited v China Ocean Shipping Company* [1991] HCA 36; 102 ALR 321 at 323, McHugh J observed that:

[F]or over 200 years, the fact that a party, bringing proceedings, is resident out of the jurisdiction and has no assets within the jurisdiction has been seen as a circumstance of great weight in determining whether an order for security for costs should be made.

1. The appellant appears to be resident out of the jurisdiction, and there appear to be no assets available within the jurisdiction to pay the costs of the appeal save for the appellant’s interest in funds held in trust. That is the funds held in the primary proceedings, being the sum of $300,000 already mentioned, and also a sum of approximately $2.3 million held in another proceeding in this court. Mr Terrett obtained a national property ownership report in respect of the appellant that reveals that the appellant does not currently own any real property in Australia.
2. The appellant holds a New Zealand passport, and his nationality is that of New Zealand. The evidence is that he lives most of the time in the Philippines with his family on a farming property, although he does return to Australia from time to time. He also has business interests in Singapore.
3. As I have indicated, the judgment amount from which the appellant appeals is $209,000, whereas there is a sum of $300,000 held to meet that judgment. That sum, however, must also meet any judgment that might still be made by the primary judge in respect of interest and of costs. On the figures given to me, there is at least a reasonable prospect that the further judgment by the primary judge may deplete what will remain in that fund of $300,000.
4. The appellant relies on the circumstances in the other proceeding in this court to which I have referred where the sum of approximately $2.3 million is being held under the control of the court. That proceeding is prosecuted by the liquidator of Aircraft Support Industries Engineering Pty Ltd (in liquidation) concerning an insolvent trading claim against the appellant before me. I do not know enough about that proceeding to have sufficient confidence that any part of the fund of $2.3m will be available to meet any costs order on appeal in this case.
5. The respondent’s solicitor, Mr Terrett, has estimated the respondent’s costs on appeal are likely to be in the region of $76,000, including GST. He has prepared a detailed schedule showing how that estimate was arrived at. Although I do not doubt Mr Terrett’s experience or his bona fides, his schedule appears to me to overstate the calculation of an appropriate figure for security for costs in this appeal.
6. I have in mind in particular the following considerations.
7. *First*, the appeal is from the Federal Circuit Court, in which the principal sum of only $209,000 is at stake. Only questions of fact arise on the appeal. It is important that the costs are not disproportionate to what is at stake.
8. *Second*, the schedule makes provision for senior and junior counsel. I am not persuaded that that is justified on a party-party basis. Indeed, I am not satisfied that it is justifiable to brief senior counsel at all. I will, therefore, adjust that amount by removing those items providing for senior counsel.
9. *Third*, the schedule appears to have been prepared on an indemnity basis, whereas security should only be provided on a party-party basis. By removing the amounts provided for briefing senior counsel and for the work of senior counsel, approximately $35,000 comes out of the amount, leaving, say, $40,000. On a rough and ready basis, I estimate that if costs were to be awarded on a party-party scale, that might be reduced to, say, $30,000.
10. The appellant submitted that if I was to order him to furnish security for costs, a sum of $15,000 would be more appropriate. That seems to me to be too low, and I am satisfied that an appropriate amount, at least at this stage, is $30,000.
11. To recap, on the appellant’s interlocutory application seeking an extension of the stay, I will simply dismiss the application, and I will hear the parties on costs.
12. On the respondent’s amended interlocutory application seeking security for costs, I will order that the appellant provide security in the sum of $30,000, and again I will hear the parties on costs.

## Later, on costs

1. On the appellant’s stay application, as the respondent has been wholly successful, the appellant should pay the respondent’s costs.
2. On the security for costs application, although the respondent has been successful in getting orders for security, it has certainly got a lot less security than it held out for. In my view, justice is best served by making those costs costs in the appeal.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart. |

Associate:

Dated: 30 September 2019