**[2019] QCA 171**

**COURT OF APPEAL**

**McMURDO JA**

**Appeal No 4853 of 2019**
**DC No 1352 of 2017**

**IRA PLATH** **Applicant**

**v**

**ALEXIS DUDLEIGH PLATH** **Respondents**

**CHEYENNE KELSEY PLATH**

**BRISBANE**

**WEDNESDAY, 4 SEPTEMBER 2019**

**JUDGMENT**

**McMURDO JA:** This is an application to stay a judgment given in the District Court against the applicant pending the outcome of his proposed appeal. I say "proposed appeal" because there was no notice of appeal filed within the appeal period, and it appears that an extension of time will be required. The matter is to be heard on the 21st of October. Absent an existing appeal, a stay cannot be granted under rule 761, but there is an inherent power to grant the stay: see *Upton v Westpac Banking Corporation* [2016] QCA 55, citing *Cox v Mosman* [1908] St R Qd 210.

The plaintiffs in the proceeding – the respondents to this application – are sisters of the applicant. They sued the applicant in their capacity of the personal representatives of the estate of their late father, who died in June 2011, having been predeceased by his wife, the

parties' mother, who died in September 2010. They sued to enforce the terms of a mortgage granted by the applicant to his parents in May 2009, securing an amount of $300,000. After a hearing, in which they were represented by counsel, but in which the applicant was unrepresented (as he remains) they were given judgment for an amount of $432,794.10 and for the recovery of possession of the mortgaged property, which is a house at Turkey Beach.

Until May 2009, the late Mr and Mrs Plath were the registered owners of this house. They then consulted a solicitor, Mr Kingston, about transferring it to the applicant. On at least one of the occasions when they did so, the applicant was present. On their instructions, Mr Kingston prepared a form of contract of sale, in the standard REIQ terms, and the mortgage. By the contract, they agreed to sell to the applicant the house for a price of $315,000, comprising a deposit of $15,000 and the balance to be secured by the mortgage. The property was then transferred and the applicant successfully applied for a first home buyer's grant on the evidence of these documents.

The applicant's case at the trial was that his parents represented to him that he would not be required to pay any of the secured amount of $300,000 and that instead, after 12 months had passed, they would release him from the mortgage debt. He said that his parents were wanting to give the property to him, notwithstanding the terms of the documents which were prepared and signed, out of gratitude for everything which he had done for them many preceding years. He says that in reliance on their representations, he went ahead with the transaction and that his parents, and thereby the personal representatives of his father's estate, were estopped from enforcing the mortgage against him.

Alternatively, he claimed, on a restitutionary basis, the reasonable value of the services which he said he provided to his parents, which he valued in a sum in excess of $800,000. His counter-claim for that amount was dismissed. But it is the judge's reasoning in upholding the claim against him, which is the basis for his application for a stay.

The trial judge had evidence from a number of witnesses, but it is sufficient to refer only to her Honour's assessment of the evidence of the applicant and that of Mr Kingston. The judge

accepted that before the applicant and his parents went to see Mr Kingston, the parents had considered over some years the possibility of giving the property to him. Mr Kingston said that when he was consulted by the parents in May 2009, he specifically discussed with them the option of simply giving him the property outright. But he told them that this would have the consequence that the applicant could not obtain a first homeowner's grant. In order to obtain that grant, Mr Kingston advised the property would have to be sold to the applicant. He advised them that in the future, it would be for the parents to decide what to do with that debt.

On Mr Kingston's evidence, therefore, the documents which he prepared were intended to have legal effect according to their terms. At no stage did he receive instructions from the parents that the loan would be forgiven within a certain time or that the mortgage was only a, "dummy mortgage" in that in reality no payments would ever have to be made by the applicant.

The trial judge accepted the evidence of Mr Kingston. It's unnecessary here to set out the particular reasons which her Honour gave for doing so. It is sufficient to say that there is no obvious flaw in that reasoning. Any challenge to her Honour's conclusion in that respect would be made yet more difficult from the fact that her Honour heard and saw the evidence as it was given.

Thus far, the applicant has not articulated a proper basis for this court to disturb the judge's finding that Mr Kingston's evidence was true. However, that isn't the end of the matter. The applicant's pleaded case, as it would appear from the judgment, was not that the mortgage was never intended to have any legal effect. Rather, it was that he executed the mortgage, giving it legal effect, on the faith of representations by his parents that they would later release him from it. It is at least arguable that the trial judge did not consider that particular case. A consideration of that case would have required a wider factual inquiry than one which involved only the inconsistencies between the evidence of Mr Kingston and that of the applicant.

The estoppel case was not without some evidentiary foundation. It appears that the parents did mean to give the property to the applicant when they went to see Mr Kingston. It is unlikely that they then decided that instead, they would make the applicant legally obliged to pay them $300,000 and commercial rates of interest, in the long term. And from the applicant's perspective, it is unlikely that he would have made himself bound by those obligations, in order to receive a relatively small homeowner's grant, without an expectation from them that they would later release him from those obligations. The fact that there was no subsequent document which did so might be explained by the illness of the late Mrs Plath within months of these events and her death in the following year. In my view, there is an arguable case, putting it no higher than that, for the appellant in this appeal.

A consideration against the grant of a stay is that the appellant did not challenge the judgment by a notice of appeal lodged within the time allowed. Against that, however, absent the stay, the applicant would lose possession of his property. And to that extent, the benefit of any successful appeal would be lost to him because it is not a sufficient answer to say that the loss of real property can be compensated in money. The appeal is listed for hearing next month so that the period of the stay would be a short one.

Money has been spent by the respondents attempting to enforce their judgment with a view to selling the property, but if the appeal is dismissed, those funds would be recoverable under the mortgage and there is no evidence that the value of the property would be insufficient to enable that to occur.

In my conclusion, the judgment should be stayed pending the appeal. The orders will be:

1. The judgment of the District Court delivered on 4 April 2019 is stayed pending the determination of the proceeding in this court.

2. The costs of this application will be each party's costs in the proceeding in this court.