

# SUPREME COURT OF QUEENSLAND

CITATION: *Prestige & Rich Pty Ltd v McGregor* [2019] QCA 225

PARTIES: **PRESTIGE & RICH PTY LTD**  
ACN 141 590 383  
(applicant)  
v  
**JANEY ELLEN MCGREGOR OF THE OFFICE OF  
FAIR TRADING**  
(respondent)

FILE NO/S: CA No 236 of 2019  
DC No 75 of 2019

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: District Court at Brisbane – [2019] QDC 151 (Rackemann DCJ)

DELIVERED ON: 22 October 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Morrison JA

ORDERS: **1. The orders of the District Court made on 20 August 2019 in BD75/2019 and the orders made in the Magistrates Court at Holland Park on 18 December 2018, in matter number 1859/18, are stayed pending determination of the application for leave to appeal.**

**2. Costs of the parties are reserved.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF ORDERS – where the applicant was convicted of an offence under s 28(2)(a) of the *Agents Financial Administration Act 2014* (Qld) by the Magistrates Court – where an appeal to the District Court was dismissed – where the applicant has sought a stay of the whole of the orders made by the District Court and the whole of the orders made in the Magistrates Court – whether the appeal has a reasonable chance of success – whether the allowing of a stay would be prejudicial to either if the parties if granted

COUNSEL: Richard Hong, general manager of the appellant, with leave K Hillard for the respondent

SOLICITORS: Office of Fair Trading for the respondent

- [1] **MORRISON JA:** Prestige & Rich Pty Ltd has applied for leave to appeal in respect of the orders of a District Court judge made on 20 August 2019. In turn, those orders were made on an appeal from a decision of a magistrate handed down on 18 December 2018. The decision of the District Court judge<sup>1</sup> dismissed the appeal, which had been instituted pursuant to s 222 of the *Justices Act* 1886 (Qld), and ordered the applicant to pay costs.
- [2] In the Magistrates Court the applicant was convicted of an offence under s 28(2)(a) of the *Agents Financial Administration Act* 2014 (Qld). It was fined \$5,000 and ordered to pay costs totalling \$2,223.75.
- [3] The stay sought on this application is of the whole of the orders made by the District Court and the whole of the orders made in the Magistrates Court.
- [4] In order to succeed in the grant of a stay the applicant must show that the circumstances indicate that the grant is an appropriate one. That involves a consideration of:<sup>2</sup>
- (a) whether there is a good arguable case on the appeal; in other words, the likelihood of success in the appeal;
  - (b) the prejudice to the applicant if the stay is not ordered; and
  - (c) any competing prejudice to the respondents in the event that a stay is granted.
- [5] A stay should not be granted unless the applicant establishes a sufficient basis to outweigh the considerations that the judgment should not be treated as merely provisional, and courts generally should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending an appeal is to ensure that the orders which might ultimately be made by the courts are fully effective. Where the court is able to make a preliminary assessment of the strength of the case, the prospects of success on appeal might be significant and would favour refusal of a stay if they were not.<sup>3</sup>
- [6] The applicant is a licensed real estate agent who was appointed by a vendor to sell some property. A contract was entered into, and made subject to finance. A deposit of \$24,500 was paid into the applicant's trust account. Under the contract the buyer was entitled to the return of the deposit if the contract was terminated without default on its part.
- [7] Ultimately, the contract did not proceed to settlement. The purchaser purported to terminate pursuant to the finance clause and the vendor ultimately accepted that the contract was terminated on that basis. As between the vendor and purchaser, there was no dispute before the Magistrates Court or the District Court that the purchaser was entitled to the return of the whole deposit.
- [8] The issue arose because, whilst the vendor had requested the applicant to release the deposit to the purchaser, and the purchaser had requested the same thing, the applicant refused to do so. Instead, it transferred the whole of the trust funds into its general account, deducted its commission and sent the balance of \$4,500 to the vendor. The applicant claimed the commission on the basis that the contract had not been terminated on the grounds stated by the purchaser and vendor, but had

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<sup>1</sup> *Prestige & Rich Pty Ltd v McGregor* [2019] QDC 151.

<sup>2</sup> *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347 at [4] and [8].

<sup>3</sup> *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453.

been terminated by some mutual agreement or in circumstances where the deposit was liable to be forfeited.

[9] The central issue before the District Court was whether the conviction should stand, which in turn required a consideration of the operation of division 5 of the *Agents Financial Administration Act*. The detail of the facts underlying the rival contentions do not need to be set out in full. The following steps are sufficient to indicate the parties' position:

- (a) an extension of time to obtain finance had been sought by the purchaser, but that had not been agreed by the vendor;
- (b) the purchaser advised that finance had been declined, and they terminated the contract and sought the refund of the deposit;
- (c) having sought a copy of the letter declining finance, the vendor nonetheless told the applicant on settlement day that, upon advice by their lawyer, a decision had been made to send an email accepting the termination of the contract;
- (d) acceptance of the termination was not actually communicated on that day;
- (e) later, but still on settlement day, the purchaser sent a copy of the letter declining finance, and sought a confirmation of termination and refund of the deposit;
- (f) in that state of affairs the applicant sent a notice under s 26 of the Act, notifying that it considered that a dispute about the release of the deposit had arisen or might arise; that notice nominated the vendor as the party entitled to the deposit, on the basis that the purchaser had failed to demonstrate that it had taken all reasonable steps to obtain finance; it also gave notice that the applicant would be authorised to pay the amount in dispute at the expiry of about 60 days, unless certain things as provided for in s 26 had occurred;
- (g) two weeks later the applicant was notified that there was no longer any dispute between the vendor and purchaser, the vendor confirming that the contract was terminated, and instructing the applicant to release the deposit to the purchaser;
- (h) when the applicant did not do as it had been instructed, the purchaser started Supreme Court proceedings against the applicant for various orders; there was no adjudication on the rights in that case, as the view was taken that it should be in the Magistrates Court; and
- (i) on the same day as the Supreme Court proceedings were dismissed (two days after the 60 day period specified in the notice under s 26 of the Act), the applicant advised both the vendor and purchaser that the amount had been released to the seller.

[10] The applicant was convicted of an offence under s 28(2)(a) of the Act. The essential argument in the District Court, and proposed on appeal before this Court, by the applicant is that it was entitled to act as it did under s 26 of the Act, in which case s 27 did not apply and in turn s 28 did not apply.

[11] Section 26 provides as follows:

- “(1) This section applies if the agent considers that a party to the transaction is entitled to the amount in dispute.
- (2) The agent may give all parties to the transaction a written notice to the following effect—
- (a) the agent considers that a stated party is entitled to the amount in dispute;
  - (b) the agent is authorised, under this Act, to pay the amount in dispute to the stated party on or after a stated date (at least 60 days after the notice is given), unless—
    - (i) a proceeding disputing the stated party’s entitlement to the amount in dispute is started and the agent is advised of the start of the proceeding; or
    - (ii) all parties to the transaction authorising payment of the amount to the stated party before the stated date;
- (3) The agent may pay the amount in dispute to the stated person if—
- (a) after the stated date, the agent is unaware of the start of a proceeding claiming an entitlement to the amount; or
  - (b) on or before the stated date, the agent receives written notice under subsection (2)(b)(ii) authorising payment of the amount to the stated party.
- ...
- (5) To remove any doubt, it is declared that this section —
- (a) provides a process for the payment of an amount in dispute; and
  - (b) does not decide legal entitlement to the amount or prevent a person legally entitled to the amount recovering it from the person to whom it was paid.”

[12] It was not disputed before the Magistrate that a notice was given under s 26(2) by the applicant. The applicant contended that on the day it gave that notice, it made decisions that it considered a dispute may arise in relation to the deposit and that the vendor was entitled to the amount in dispute. It also contended that, having made those decisions, they prevailed over the contrary instructions from the parties to the contract, namely to pay the purchaser. Essentially, it contended it having made the decision it was unable to revisit or remake its decision.

[13] The learned District Court judge found that the applicant was not bound by its notice to pay the amount in dispute to the vendor in accordance with the view it held on the day it gave the notice. At most, his Honour held, the notice may have enlivened a discretion to do so.

[14] Section 27 of the Act provides for one way of dealing with amounts in dispute, and s 28 provides another. Those provisions are as follows:

**“27 Dealing with amount in dispute if not dealt with under s 26**

- (1) This section applies if the amount in dispute is not dealt with under section 26.
- (2) The agent must not pay out the amount in dispute unless the agent receives written notice —
  - (a) from all parties to the transaction stating the person who is entitled to the amount; or
  - (b) a proceeding has been started to decide who is entitled to the amount.

Maximum penalty — 200 penalty units or 2 years imprisonment.

**28 Where amount in dispute must be paid if person is entitled under s 27 or proceeding is started**

- (1) This section applies if a person is entitled to the amount in dispute under section 27(2)(a) or a proceeding to decide entitlement to the amount is started.
- (2) The agent must pay the amount in dispute immediately —
  - (a) if notice under section 27(2)(a) is received — to the person stated to be entitled to the amount or in accordance with the person’s direction; or
  - (b) if a proceeding disputing entitlement to the amount is started — to the court in which the proceeding was started.

Maximum penalty — 200 penalty units or 2 years imprisonment.”

[15] Following the applicant having given its notice under s 26 of the Act, the parties to the contract had each sent written communications to the applicant requesting or directing repayment of the full deposit to the purchaser. The purchaser had done so seven days prior to the applicant’s notice, in the letter terminating the contract and seeking return of the deposit. It had done so again on the same day as the notice by the applicant. The vendor had done so 13 days later, in a letter accepting that the contract was terminated under the finance clause, and instructing the applicant to release the deposit to the purchaser.

[16] As at the date of the vendor’s letter, accepting termination of the contract, the amount in dispute had not been “dealt with” under s 26 of the Act. Therefore, it was contended, that s 27 was enlivened. That is what the learned District Court judge held. Consequently, the applicant had notice under s 27(2)(a), that is, a notice from all parties to the transaction stating who was entitled to the disputed amount. That notice having not been obeyed, s 28(2)(a) applied, but the applicant did not obey the notice and paid the money to the purchaser.

[17] That is the essence of the findings in the District Court. The applicant seeks to challenge those findings, both on the basis of statutory construction, but as well contending that the conviction in the Magistrates Court was unreasonable, and the fine imposed was manifestly excessive. Part of the contentions advanced in the

District Court included that there had been dishonest or illegal acts on the part of the purchaser, and public policy considerations would operate so as to prevent the purchaser from benefiting from those acts. These contentions apparently related to the identity of the purchaser and the authority of the person who executed the contract, namely the purchaser's son.

### **Discussion**

- [18] It is difficult to form a particular view about the likelihood of success on the appeal. On the face of it the applicant's contentions seem unpromising, but in the absence of full argument on the question of statutory construction, one cannot conclude that the case is hopeless.
- [19] In its submissions the respondent made three points: (i) it cannot be said that the applicant would suffer irreparable damage if a stay were not granted; and (ii) there was no concessions of error on the part of the District Court judge, but much of the decision below turned upon questions of statutory construction; and (iii) a pragmatic approach was adopted in consenting to a stay. It is, in my view, implicit in that consent, that the respondent concedes there is an arguable case on the appeal, even though that case might fail.
- [20] Whilst I do not consider the prospects of success as being strong, I cannot say that they must fail.
- [21] The prejudice to the applicant if a stay is not ordered is manifest. It has had a conviction recorded against it, and a penalty imposed. In addition it has been ordered to pay costs in excess of \$2,000 in the Magistrates Court and in excess of \$3,000 for the District Court proceedings. Absent the stay steps could be taken to enforce the costs orders and the penalty, to the detriment of the applicant.
- [22] The respondent, by its consent to the stay, effectively concedes that there is no material prejudice to it if the stay is granted.
- [23] I am unable to come to the conclusion that the proposed appeal is one which treats the judgment of the District Court as being merely provisional. The central contentions turn on a matter of statutory construction and a contest about whether a notice under s 26 of the Act is efficacious once a notice under s 27 of the Act is given. By its consent to the stay, the respondent accepts the entitlement of the applicant to press its case, if it can.
- [24] In the circumstances, it seems to me appropriate that the orders in the District Court and those in the Magistrates Court be stayed pending determination of the application for leave to appeal, and any consequent appeal.
- [25] The orders are as follows:
- (a) The orders of the District Court made on 20 August 2019 in BD75/2019 and the orders made in the Magistrates Court at Holland Park on 18 December 2018, in matter number 1859/18, are stayed pending determination of the application for leave to appeal.
  - (b) Costs of the parties are reserved.