

SUPREME COURT OF QUEENSLAND

CITATION: *Lo v Huang (No 2)* [2020] QCA 149

PARTIES: **PEIYI LO**
(appellant)
v
ROBERT YONG CONG HUANG
(respondent)

FILE NO/S: Appeal No 7367 of 2019
DC No 2821 of 2017

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane – [2019] QDC 61 (Jarro DCJ)

DELIVERED ON: 14 July 2020

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser JA and Henry and Brown JJ

ORDERS: **1. The appeal is allowed.**
2. Paragraph 7 of the Orders of 28 June 2019 is set aside.
3. The Court:
(a) Declares that the appellant held an equitable mortgage over 104 Hume Road, Toorbul in the State of Queensland, 4510 as property described as Lot 194, Crown Plan CG1255, Local Government, Moreton Bay (Toorbul Property) in the amount of \$359,854.76;
(b) Declares that the appellant is entitled to distribution of the remaining proceeds of sale of the Toorbul Property, namely \$315,535.66 held on trust by Bruce John Doyle, the Trustee of the Toorbul Property.
4. The appellant have liberty to apply.
5. The respondent pay the appellant’s costs of the appeal.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – OTHER MATTERS – where the appellant was successful in the appeal – where the appellant submitted draft orders at the court’s invitation – where the respondent

did not respond to the appellant's draft orders – where the appellant did not press personal relief on appeal – where the appellant's draft orders sought personal relief – whether personal relief should be ordered

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the appellant was unsuccessful at trial – where the trial costs were reserved – where the appellant was successful in the appeal – whether the appellant should be awarded costs at trial and on appeal

Civil Proceedings Act 2011 (Qld), s 58, s 59

COUNSEL: S Anderson for the appellant
B Vass for the respondent

SOLICITORS: Cathay Lawyers for the appellant
Mills Oakley for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Brown J and the orders proposed by her Honour.
- [2] **HENRY J:** I agree with the reasons of Brown J and the orders proposed by her Honour.
- [3] **BROWN J:** This Court heard the appeal in this matter on 30 October 2019 and published its reasons on 8 May 2020, whereby Mrs Peiyi Lo (the **Appellant**) was successful in her appeal.¹ The Appellant provided draft orders as to the appropriate relief to the Court at its invitation. Mr Robert Huang (the **Respondent**) did not respond to the proposal or provide alternative draft relief.

The Appropriate Form of Orders

- [4] This Court found that the Appellant had an equitable mortgage over the Toorbul Property owned by the Respondent. The Toorbul Property was sold by a statutory trustee on 19 May 2018 and the net proceeds of sale were \$411,183.37. The Appellant was paid \$74,424.41, which represented her one-fifth share of the net proceeds of sale after the trustee's fees were paid. The balance of the money is held in a trust account by the statutory trustee pending the outcome of these proceedings.
- [5] At the hearing, the Court raised with each party the appropriate form of relief if the appeal was successful.² Relevantly, the Appellant had submitted that the only relief sought was a declaration that the Appellant was entitled to the funds held on trust following the sale of the Toorbul Property. Although the Notice of Appeal sought a personal judgment against the Respondent, the Appellant did not press that relief at the appeal, conceding that it was not open on the Appellant's case. That was an appropriate concession given that there was no basis pleaded by which the Respondent

¹ [2020] QCA 97.

² T1-18/30 – T1-20/24 and T1-51/42 – T1-53/5; [2020] QCA 97 at [86].

would be personally liable to repay the mortgage debt. Counsel for the Respondent agreed that declaratory relief would be appropriate should the Appellant succeed.

- [6] The Appellant's draft order, however, seeks orders whereby the Respondent would be personally liable to pay the difference between the proceeds of sale and the monies lent. That was not the basis upon which relief was sought before this Court. The appropriate relief is only a declaration that the Appellant held an equitable mortgage over the Toorbul Property. The Appellant also seeks interest based on s 58 or s 59 of the *Civil Proceedings Act* 2011 (Qld), which applies to a proceeding for money. That was not sought in the Notice of Appeal. Given the relief granted on appeal is a declaration as to an equitable mortgage, not for the payment of money, there is no basis for payment of interest under those provisions.
- [7] The Appellant's draft order further seeks a direction that the statutory trustee who holds the balance of the monies on trust from the sale of the Toorbul Property pay the Appellant the remaining proceeds. The statutory trustee was not a party to the appeal, or to the proceedings below and cannot be made the subject of the direction of the Court. It is, however, appropriate that the Court make a declaration that the Appellant is entitled to the balance of the proceeds with provision for liberty to apply, under which provision the Appellant may apply on notice for an order against the statutory trustee in the event that the statutory trustee is not prepared to act in accordance with the declaration.
- [8] As to the question of costs, it is appropriate that the Appellant is paid its costs of the appeal having been successful. Based on the outcome of this appeal, the Appellant should receive its costs of the trial with respect to the matters in respect of which she has been successful upon appeal. As was stated in my earlier reasons,³ however, given that the learned trial judge reserved the costs of the proceeding, it is appropriate for his Honour to make a determination as to the appropriate order of costs in the District Court in light of this determination, rather than this Court making any such orders.
- [9] The orders of the Court should be:
1. The appeal be allowed.
 2. Paragraph 7 of the Orders of 28 June 2019 be set aside.
 3. The Court:
 - (A) Declares that the appellant held an equitable mortgage over 104 Hume Road, Toorbul in the State of Queensland, 4510 as property described as Lot 194, Crown Plan CG1255, Local Government, Moreton Bay (**Toorbul Property**) in the amount of \$359,854.76;
 - (B) Declares that the appellant is entitled to distribution of the remaining proceeds of sale of the Toorbul Property, namely \$315,535.66 held on trust by Bruce John Doyle, the Trustee of the Toorbul Property.
 4. The appellant have liberty to apply.
 5. The respondent pay the appellant's costs of the appeal.

³ *Lo v Huang* [2020] QCA 97 at [87].