

COURT OF APPEAL

McMURDO P

Appeal No 9031 of 2001

ANITA BERNSTROM

Appellant (Plaintiff)

and

NATIONAL AUSTRALIA BANK LTD

Respondent (Defendant)

BRISBANE

..DATE 20/08/2002

ORDER

THE PRESIDENT: The applicant was unsuccessful in her appeal to this Court sitting in Cairns earlier this year from a decision of the trial division entering judgment for the respondent bank allowing them to exercise a power of sale over her mortgaged property, see *Bernstrom v. National Australia Bank Limited* [2002] QCA 231.

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The applicant feels aggrieved about her treatment by the bank and, unsurprisingly, does not wish to have her premises sold by them, although the material clearly demonstrates that she has not met her commitments under the mortgage.

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She has applied for special leave to appeal to the High Court of Australia from this Court's decision and seeks a stay of this Court's decision dismissing the appeal from the trial division's order for summary judgment.

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The application was listed as a stay application before me as I am currently the Judge of Appeal rostered to hear such matters. A Judge of Appeal has jurisdiction to order a stay of the enforcement of all or part of a decision subject to an appeal under rule 761 UCPR. In context, a decision subject to an appeal under that rule must mean an appeal to this Court, not an appeal to the High Court of Australia. But *Jennings Construction Ltd v. Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681 makes it clear that the Court of Appeal has jurisdiction to grant a stay in these circumstances.

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Section 43 Supreme Court of Queensland Act 1991 (Qld) gives extensive powers to a Judge of Appeal which would appear to include the granting of a stay of the type sought here.

The ordinary rule is that a successful litigant is entitled to the fruits of its favourable judgment and the granting of a stay requires special circumstances, *J C Scott Constructions v. Mermaid Waters Tavern Pty Ltd (No 1)* [1983] 2 QdR 243 and 255.

The order for summary judgment is, of course, unpalatable to the applicant. There is no affidavit material filed on her behalf demonstrating however that success on the appeal to the High Court will render her success nugatory although it is obvious enough that, without a stay, the sale of her property by the respondent will mean that, if she were successful in the High Court appeal, it could not be returned to her in its present condition. There is, however, no reason to conclude that she could not be fully compensated by damages.

There is likely to be some considerable delay before the hearing of any application for special leave. The applicant has not offered any undertaking as to damages so that if the appeal to the High Court is unsuccessful the respondent would be compensated for any loss it suffered as a result of any stay.

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Importantly, the applicant has not persuaded me that she has any real prospects of success in the application for special leave.

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Furthermore, the granting of a stay would be futile because, as the respondent has demonstrated in affidavit material before me today, it would be entitled to commence new proceedings and obtain a further judgment because of the applicant's continued non-compliance with her contractual obligations to the respondent.

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The applicant has not discharged her onus in persuading me that there are special circumstances or that, on the balance of convenience, the ordinary rule entitling the respondent to the fruits of its favourable judgment should be departed from.

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I refuse the application for a stay with costs to be assessed.

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