

COURT OF APPEAL

McPHERSON JA

Appeal No 9101 of 2002

MAYTREND PTY LTD
(ACN 079 394 611)

Defendant/Applicant

and

FARZAD NOORAVI and
HOMA NOORAVI

Plaintiff/Respondent

BRISBANE

..DATE 4/10/2002

ORDER

MR A C WRENN (directly instructed) for the applicant

MR K J PRIESTLY (instructed by Mark G Johnston) for the respondent

McPHERSON JA: The application before me is to stay enforcement of a judgment for possession given summarily by Mr Justice Moynihan earlier this week.

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The subject matter of the order is a building which is leased by the plaintiff respondent to the application to the defendant applicant before me. It is a building that is used for a commercial purpose of some kind and has been the subject of what appear to have been more than one proceeding in the past arising out of what is alleged to be non-payment of rent.

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At some time, in about July 2001, Justice Jones gave relief against forfeiture for non-payment of rent at that date, on terms of payment of rent outstanding at the time. Since then, there is alleged to have been a further omission to pay the rent and it was in respect of that that Justice Moynihan heard the application for which summary judgment was given.

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From what I have seen of the papers and from what I have been told about the matter by counsel, it does not seem to me to be a case in which there is a good prospect of success on the appeal. In any event, however, in a matter of this kind, one of the principal questions which has to be determined is how the judgment creditor, if his right of enforcement is taken

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away from him, can be assured that he will not suffer any real

disadvantage in the period pending determination of the appeal.

It is, to my mind, unlikely that the appeal would be determined within the next six months or so, with the consequence that the plaintiff landlords would be left without their rent for that period. If they were to accept the rent, even if it were paid, it is possible that it would prejudice their right to possession. I do not say that, but it is a fact to be considered.

The ultimate difficulty is, however, to my mind, that the defendant applicant has not been able to propose any satisfactory method by which the plaintiff judgment creditors can be assured of getting the rent in their hands during that period. Payment into Court would do them no good at all because they will not be receiving the rent and, as I said to Mr Wrenn on behalf of the applicant, it simply amounts to diverting the rent that is payable to the landlords from them to the Court. In the result, he made an offer to pay the ongoing rent that would accrue during that period directly to the plaintiff respondents to this application, but he did not offer any means that I can identify of securing the obligation or undertaking to carry out that promise.

The same promise or covenant appeared in the lease and was not carried out, and to offer nothing more than an undertaking that the rent will be paid is not, to my mind (and obviously not the minds of the landlords or their legal representatives) a satisfactory way of resolving the obvious problem of the prejudice to them if the promise is not carried out.

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In all the circumstances I am not satisfied that there should be a stay of these proceedings, and I do not see any reason for differing from the conclusion that Mr Justice Moynihan reached in that regard. I would not make an order for the stay of the judgment, or of the proceedings intended to be taken in order to enforce it.

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McPHERSON JA: The order is that the applicant pay the costs of and incidental to this application to stay enforcement of the order made by Justice Moynihan.

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