

SUPREME COURT OF QUEENSLAND

CITATION: *Cth Bank v Nagamuthu* [2002] QCA 484

PARTIES: **COMMONWEALTH BANK OF AUSTRALIA**
ACN 123 123 124
(plaintiff/respondent)
v
ELAKKUMIDEVI NAGAMUTHU
(defendant/applicant)

FILE NO/S: Appeal No 10001 of 2002
DC No 222 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution
Application for Security for Costs

ORIGINATING COURT: District Court at Cairns

DELIVERED EXTEMPORE ON: 7 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 7 November 2002

JUDGE: Davies JA

ORDER:

- 1. Dismiss the application by the applicant for a stay of enforcement of the judgment dated 31 May 2002.**
- 2. The applicant to provide security for costs of her proposed appeal within 14 days of paying into Court or otherwise securing to the satisfaction of the Registrar the sum of \$7,000, failing which any application for leave to appeal and any appeal will stand dismissed with costs.**
- 3. The costs of these applications will be costs in the appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL-PRACTICE AND PROCEDURE - QUEENSLAND - STAY OF PROCEEDINGS - where the respondent bank obtained default judgment against the applicant - where the applicant has admitted to owing the respondent bank a debt - where the application for leave to appeal and the appeal have little prospect of success - whether a stay of enforcement of the judgment should be granted

APPEAL AND NEW TRIAL - APPEAL-PRACTICE AND PROCEDURE - QUEENSLAND - SECURITY FOR COSTS - WHEN REFUSED - where the respondent bank obtained default judgment against the applicant - where the applicant has admitted to owing a the respondent bank a debt - where the application for leave to appeal and the appeal

have little prospect of success - whether the applicant should be ordered to provide security for costs of her appeal

District Court of Queensland Act 1967 (Qld), s 118

Carr v Finance Corporation of Australia (1981) 147 CLR 246, considered

COUNSEL: The applicant appeared on her own behalf
J Jacobs (Cairns) for the respondent

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SOLICITORS: The applicant appeared on her own behalf
A J Mullumby for the respondent

DAVIES JA: On 31 May 2002 the respondent bank obtained judgment against the applicant, Dr Nagamuthu, for recovery of possession of land and a dwelling-house on that land of which the applicant is the registered proprietor. The claim was based on the applicant's default under the terms of a bill of mortgage granted by her as security for an advance by the bank to her to enable her to purchase the property.

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On 30 September 2002 the applicant filed an application to stay enforcement of the default judgment and the application was dismissed by a District Court judge on 17 October 2002.

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Then on 23 October 2002 the applicant filed an application to set aside the default judgment of 31 May 2002. No substantial basis was shown for that application. On the contrary, the applicant admitted owing a debt which it seems is perilously close to or possibly even more than the value of the property the subject of the mortgage. The outstanding debt is now sworn to be more than \$170,000. The principal originally owing was \$140,000, so that sum is not surprising. The property has been valued independently at \$170,000, with a

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forced sale of \$155,000 value. Dr Nagamuthu today says that she has a real estate person with her in Court who would say that it is worth substantially more than that. In my opinion I don't think that matters. The application to set aside the default judgment was dismissed by another District Court Judge on 28 October 2002.

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A notice of appeal has been filed against the judgment of 28 October 2002. An appeal from such a judgment requires leave, not being a final judgment within the meaning of section 118 of the District Court of Queensland Act 1967 (Qld). See Carr v. Finance Corporation of Australia (1981) 147 CLR 246. As the applicant has admitted the extent of the mortgage debt now owing I think it is highly unlikely that leave will be granted.

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There are two applications before me. One is an application by the applicant for a stay of enforcement of the judgment pending the appeal. The other is an application by the respondent bank for security for the costs of that appeal.

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No basis has been shown to me for staying execution of the judgment. The applicant claims ill health and she has produced an affidavit by a medical practitioner swearing to her low blood pressure, fatigue and dizziness. She says that this has affected her in preparing her case in opposition to the bank.

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The facts, however, are, it seems to me, simple. She owes the bank more than \$170,000. The only asset capable of satisfying that debt is the property over which the mortgage has been granted. The bank are entitled to the judgment which they have. I cannot see that the applicant can have any defence.

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DAVIES JA: I have already indicated there is little prospect of success, even on an application for leave to appeal, but as Mr Jacobs has pointed out in any event, it may well be that an application for a stay of execution in these circumstances is incompetent. Whether that is so or not, it seems to me it should plainly fail.

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On the other hand I think that the respondent's application for security for costs must succeed, not only because of the poor prospects of success facing the applicant but also because, if she loses, it is unlikely on the albeit sketchy evidence before me, that she will be able to pay the respondent's costs. The respondent has estimated those at something over \$10,000. That seems somewhat high. I propose to make an order for security in a lesser sum.

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I therefore make the following orders:

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1. dismiss the application by the applicant for a stay of enforcement of the judgment dated 31 May 2002;

2. order the applicant to provide security for costs of her proposed appeal within 14 days by paying into Court or otherwise securing to the satisfaction of the Registrar the sum of \$7,000, failing which any application for leave to appeal and any appeal will stand dismissed with costs;

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3. the costs of these applications will be costs in the appeal.

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