

# SUPREME COURT OF QUEENSLAND

CITATION: *Amos v Amos* [2004] QCA 490

PARTIES: **LEONARD RALPH AMOS as co-executor of the will of CHARLES EDWARD AMOS late of Wynnum in the state of Queensland, deceased**  
(plaintiff/applicant)  
v  
**EDWARD AMOS**  
(defendant/respondent)

FILE NO/S: Appeal No 10686 of 2004  
SC No 4763 of 2000

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 17 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 17 December 2004

JUDGES: McMurdo P

ORDER: **Application for stay of execution refused with costs to be assessed**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN REFUSED – applicant unsuccessfully sought order below that deed of settlement entered into concerning Will be declared invalid – deed of settlement included clause allowing demolition of property – applicant seeks order granting stay of execution until appeal heard – where material suggests appeal will be heard before any demolition of property – whether balance of convenience favours granting the stay

*JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 1)* [1983] 2 Qd R 243, applied  
*JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255, applied

COUNSEL: The applicant appeared on his own behalf  
C Jennings for the respondent

SOLICITORS:           The applicant appeared on his own behalf  
                          Ian K Fry & Co for the respondent

HER HONOUR:   Mr Charles Amos died on 23 February 1999.   The applicant, Mr Edward Amos, and the respondent, Mr Leonard Amos, are co-executors of their late father Mr Charles Amos's will.  His estate includes a property at 58 Melville Terrace, Wynnum.  Disputes arose between the deceased's three children, (Messrs Edward and Leonard Amos and Mrs Frances Williams), as to the estate and they commenced litigation over it.

On 15 September 2004 the deceased's three children entered into a deed of settlement, compromising the actions between Mr Leonard Amos and Mr Edward Amos.  The deed's provisions included that the trustees of the estate would pay up to \$52,000 to Frances Williams and Leonard Amos in advance of their respective entitlements as beneficiaries, subject to moneys being retained to pay for expenses of the estate relating to the Wynnum property; the Wynnum property would be sold by the agreed agent of the executors, Mr Ian Kennedy Fry, solicitor; Mr Leonard Amos and Mr Edward Amos would do all things necessary and conducive for the sale of the Wynnum property, the net proceeds of which would be divided in equal thirds amongst the beneficiaries, subject to adjustment for any advances, and that on breach of the deed Mr Leonard Amos would be at liberty to bring enforcement proceedings.

Mr Leonard Amos's legal representatives have indicated to this Court that the solicitor, Mr Fry, has now been instructed to

retain the moneys due to the beneficiaries under the deed for the purpose of meeting expenses of the deceased estate.

Mr Leonard Amos contends that Mr Edward Amos did not comply with his obligations under the deed of agreement and brought an application to the primary Judge for directions. The learned primary Judge ordered that Mr Edward Amos sign all necessary documents to give effect to clause 2 of the settlement deed within seven days, failing which the Registrar of the Supreme Court be directed to sign on his behalf a declaration that, on the true construction of the settlement deed, the solicitor for Mr Leonard Amos is entitled to engage town planners to obtain a demolition consent for the property situated at 58 Melville Street, Wynnum; that Mr Edward Amos sign all necessary documents to obtain a demolition consent as may be presented to him by Mr Leonard Amos's solicitor within seven days of being so presented, failing which the Registrar of the Supreme Court is directed to sign the documents; and that Mr Edward Amos pay the costs of and incidental to that application.

Mr Edward Amos filed a notice of appeal from that decision on 7 December 2004. He has raised objection with the Registrar of the Supreme Court to signing documents forwarded by the Registrar for execution by the solicitor acting on behalf of Mr Leonard Amos. The Senior Deputy Registrar of the Supreme Court indicated to the parties that, consistent with the primary judge's order, he will sign the documents on behalf of Mr Edward Amos on 17 December 2004, today, unless the orders

of the primary Judge are stayed. On 10 December 2004 Mr Edward Amos brought this application for a stay of the judgment of 22 November 2004.

Mr Edward Amos filed originating proceedings in the Supreme Court on 18 November 2004, seeking an order that the deed of settlement be declared invalid on grounds including illegality, lack of good faith and uncertainty. Nothing has been placed before this Court to demonstrate that the deed of settlement was anything other than what it appears to be, that is, a consent order freely entered into by the parties. Mr Edward Amos's appeal is likely to be heard by this Court, in the ordinary course, in about May next year. If either party can establish grounds for expediting the hearing, it could be heard as early as March 2005.

A Judge of Appeal has an unfettered discretion under UCPR 761 to grant a stay of the enforcement of all or part of a decision subject to an appeal. A stay will only be granted if the applicant demonstrates some circumstances warranting it: *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1983] 2 QdR 243 and 255. This is because a plaintiff or applicant, having succeeded in the Court below, is entitled to the fruits of its judgment unless good reason is shown to the contrary. Relevant considerations include whether the refusal to grant a stay of judgment will render the appeal, if successful, nugatory; whether the applicant has an arguable case on appeal; and whether the balance of convenience favours the granting of a stay.

Material before the primary Judge indicated that it may take up to four months to obtain the relevant development approval so that demolition of the Wynnum house is certainly not imminent. It is unlikely to occur before the hearing of the appeal and certainly not before any expedited hearing of the appeal. In any case, there is nothing before me to show that the house is so important to Mr Edward Amos that its demolition would render the appeal nugatory.

The agreed agent of the executors, the solicitor, Mr Fry, as I have mentioned, has instructions to retain the moneys due to the beneficiaries under the deed of settlement to meet expenses of the deceased estate, so there is no merit in Mr Edward Amos's suggestions that the assets of the estate will be wasted prior to the hearing of this appeal. Many of the 21 grounds of appeal sought to be argued relate to procedural irregularities which are unlikely to affect the correctness of the orders made at first instance. It is sufficient to say for the purposes of this application that, on its face, the deed of settlement appears clear and unambiguous in its terms and is entirely consistent with the learned primary Judge's reasons, conclusions and resulting orders. Whilst I am not presently prepared to say the applicant's grounds of appeal are unarguable, but in my opinion they are not promising.

I am not persuaded that Mr Edward Amos will suffer any particular prejudice if the stay is not granted. The order appealed from does not prevent him objecting to the demolition

of the dwelling on the Wynnum property under town planning policies and laws, and the material before the primary Judge suggests that this appeal can be expected to be heard before any demolition occurs.

He has not demonstrated any reason justifying the grant of the stay. It should be refused.

Mr Leonard Amos asks for costs on an indemnity basis because Mr Edward Amos has refused to abide by an order of the Court and has brought an appeal and application without merit. I am not prepared, at this stage, to finally determine that the appeal is so lacking in merit as to justify the inference that this application effectively constitutes an abuse of process. The Court at the hearing of the appeal can be expected to be better placed to make that decision. On the other hand, Mr Edward Amos claims he is, at least effectively, acting as a trustee in this litigation, although that does not immediately appear to be correct. The appropriate order is that the applicant pay the respondent's costs of this application on the ordinary basis.

The order is the application is refused with costs to be assessed.

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