

# SUPREME COURT OF QUEENSLAND

CITATION: *Hope Island Resort Holdings P/L & Anor v Jefferson Properties (Qld) P/L & Ors* [2005] QCA 42

PARTIES: **HOPE ISLAND RESORT HOLDINGS PTY LTD**  
ACN 091 967 921  
(plaintiff/first defendant/first appellant)  
**McROSS DEVELOPMENTS PTY LTD**  
ACN 001 176 263  
(second defendant/second appellant)  
v  
**JEFFERSON PROPERTIES (QLD) PTY LTD**  
ACN 003 729 851  
(first defendant/first plaintiff/first respondent)  
**MARK McIVOR**  
(second defendant/second respondent)  
**MM PROPERTIES PTY LTD (formerly JEFFERSON PROPERTIES PTY LTD)**  
ACN 010 860 821  
(second plaintiff/third respondent)

FILE NO/S: Appeal No 1086 of 2005  
SC No 9926 of 2000  
SC No 10887 of 2000

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 28 February 2005

DELIVERED AT: Brisbane

HEARING DATE: 28 February 2005

JUDGE: McMurdo P

ORDER: **1. Application for stay of execution dismissed**  
**2. The appellants pay the respondent's costs of this application after, but not including, 18 February 2005 on the standard basis**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – where judgment entered against appellants in Supreme Court in favour of first respondent – where appellants requested order be included in

final judgment staying its enforcement or that first respondent secure judgment sum in some way pending outcome of appeal – where no order made – where first respondent did not offer to secure judgment sum and failed to produce any financial statements – where application made by appellants under r 761 *Uniform Civil Procedure Rules* 1999 (Qld) for stay of execution of judgment – where respondents concede first respondent is without assets – where second and third respondents undertake to repay judgment sum if appeal successful – where undertaking suitable to appellants – whether stay of execution of judgment should be granted

*Uniform Civil Procedure Rules* 1999 (Qld), r 761

*Cronney v Nand* [1999] 2 Qd R 342, applied  
*J C Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255, applied

COUNSEL: R I M Lilley for the applicants  
D G Clothier for the respondents

SOLICITORS: Deacons for the applicants  
Tucker & Cowen for the respondents

THE PRESIDENT: This is an application under UCPR r 761 for the stay of execution of the judgment entered in S 10877 of 2000 in the Supreme Court of Brisbane of 7 February 2005 ordering the appellants, Hope Island Resort Holdings Pty Ltd ("HIRH") and McRoss Developments Pty Ltd ("McRoss"), to pay the first respondent, Jefferson Properties (Qld) Pty Ltd ("Jefferson") \$535,705.67 and that HIRH and McRoss pay Jefferson's costs of the proceeding, including reserved costs, except that Jefferson and the third respondent MM Properties Pty Ltd ("MM Properties") (formerly Jefferson Properties Pty Ltd) pay the appellants' costs incurred after 6 December 2001 thrown away solely by reason of the abandonment of the claim for the amount of \$182,150.

The appeal relates not only to S 10877 but also S 9926, which is not the subject of this application and in which HIRH's claim against Jefferson and Mark McIvor was also dismissed. Orders in both S 10877 and S 9926 were delivered on 12 November 2004. The learned primary Judge invited the parties to agree on appropriate orders before entering final judgment.

On 19 November 2004, the appellants' then solicitors wrote to the respondents' solicitors advising it was likely the appellants would appeal. They requested either that an order be included in the final judgment staying its enforcement pending the outcome of that appeal or that the respondents provide up to date financial statements for the first respondent Jefferson to establish Jefferson's capacity to repay the judgment sum should the appellants be successful. The respondents' solicitors replied that they would further consider the request when the appellants had filed and served a notice of appeal. By fax of 3 February 2005 the appellants' present solicitors again wrote to the respondents' solicitors requesting up to date financial statements from Jefferson, which they believed had no assets so that if the appeal were successful, by the time it was heard and judgment given, Jefferson may have dissipated the judgment sum rendering the appeal nugatory. The appellants again asked for a consent order in the judgment staying its enforcement pending the outcome of the appeal. Alternatively, they requested that the respondents secure the judgment sum in some way pending the outcome of the appeal. The respondents' solicitors replied

that if the appellants sought a stay of enforcement of the judgment they should make an appropriate application.

Jefferson has not provided any financial statements and has not itself offered to secure the judgment pending the outcome of the appeal. All available public searches, which can no longer disclose a company's annual returns or other financial information, have not demonstrated whether Jefferson has sufficient assets to ensure the proceeds of the judgment will not be dissipated and will be able to be repaid in the event of a successful appeal. In any event, the respondents now concede that Jefferson is without assets.

This application was filed on the 18th of February, the appeal itself having been filed on the 10th of February. The solicitors for the second respondent to the appeal, Mr McIvor, indicated to the respondents' solicitors at the time of the court hearing on the 7th of February when the primary judge made the orders the subject of the appeals that Mr McIvor would be prepared to undertake personally to repay the judgment sum if the appeal was successful. There is no contest that Mr McIvor is a person of substance. Mr McIvor through his solicitors repeated that offer in writing to the appellants' solicitors on the 18th of February, 2005.

This morning, an undertaking including Mr McIvor's undertaking and an undertaking from MM Properties Pty Ltd has been handed to the Court in a form which, as amended, is suitable to the appellants.

Both actions and the appeals from them concern the interpretation of a Development Deed relating to the development of land on Hope Island Resort at the Gold Coast executed by Jefferson, Hope Island Resort Development Corporation ("HIRDC") and Mr McIvor, who controls Jefferson. The Deed facilitates Jefferson's divestiture of interests in the land. On 30 June 2000, HIRDC assigned its rights under the Deed to HIRH and McRoss guaranteed the performance by HIRH of its obligations under the Deed. The case turns on a construction of the Deed. The appellants contend that the trial judge erred in his construction of the Deed.

For the purposes of this application, it is not necessary to delve too deeply into the prospects of success of the appeal other than to conclude, as I do, that the appellants seem to have an arguable case.

To succeed in this application, the appellants must demonstrate some reason justifying the granting of the stay: *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd* (No 2) [1983] 2 QdR 255, and *Cronney v Nand* [1999] 2 QdR 342.

The Jefferson's paucity of assets is conceded, but in the light of the amended undertakings given to the Court this morning and filed by leave, the appellants have not discharged their onus in demonstrating some reason making the case an appropriate one in which to grant a stay. I would dismiss the application.

The next issue is the costs of this application. In the light of the undertaking offered in writing by the respondent's solicitor on behalf of Mr McIvor on the 18th of February, I would order, as far as costs are concerned, that the appellants pay the respondents' costs of this application after, but not including, 18 February 2005 on the standard basis.

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