

SUPREME COURT OF QUEENSLAND

CITATION: *Mier & Anor v F N Management Pty Ltd & Ors* [2005] QCA 149

PARTIES: **GERARD JOHN MIER**
(first respondent/first applicant)
ANTHONY JAMES JOHNSON
(second respondent/second applicant)
v
F N MANAGEMENT PTY LTD ACN 094 226 829
(first appellant/first respondent)
WILLIAM ANDERSON NASON & JANNINE MARGARET NASON
(second appellants/second respondents)

FILE NO/S: Appeal No 3345 of 2005
SC No 367 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED EX TEMPORE ON: 11 May 2005

DELIVERED AT: Brisbane

HEARING DATE: 11 May 2005

JUDGE: Jerrard JA

ORDER: **1. By consent the enforcement of the whole of the orders made by Jones J in this matter on 22 April 2005 be stayed until the determination of the appeal or until further order**
2. Respondents pay the costs of and incidental to preparation and filing of the applicants' affidavit in support of the stay, the stay application itself and the costs of taking out the order made today
3. Applicants pay the respondents' costs agreed or taxed on the standard basis of and incidental to the appearance by the respondents on this hearing today

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – applicants notified respondents of appeal – respondents refused to give undertaking that they would not enforce the judgment

allowing them to sell the applicants' land – applicants lodged a caveat over land – prior to the stay application hearing the respondents stated they would agree to a stay but would not pay costs or have them reserved – applicants persisted with claim for costs – whether costs should be reserved – whether applicants should bear costs of application and hearing

COUNSEL: M Bland for the applicants
M Jonsson for the respondents

SOLICITORS: Hillhouse Burrough McKeown for the applicants
Williams Graham Carman for the respondents

JERRARD JA: This has been a hearing of an application for an order for a stay which has not been opposed and an application for the costs of obtaining that order which has been opposed.

Very briefly, the history of the matter is that the applicants for the stay were the first and second respondents in proceedings heard by his Honour Justice Jones in Cairns in which judgment was delivered on 22 April 2005. The effect of that judgment is that the present respondents to the stay application were declared to have liberty to sell land owned by the two of the current applicants for the stay.

Subsequent to the publication of the orders of Jones J there was correspondence between the parties about the intention of the current applicants to appeal to this Court and to apply for a stay. The parties successful before his Honour, the current respondents, were somewhat coy in their own correspondence as to their attitude to the application for a stay and made it clear that they would not commit themselves until instructions had been received which would occur at the latest by 4.00 pm last Friday.

Understandably enough the present applicants were concerned at the possibility of their prospects of success on a stay application dimming, as time passed, and also the absence of any undertaking in express terms not to take any action adverse to the interest of the current applicants until the outcome of a stay application. That undertaking had been sought but not given.

Instead what was offered was a promise to take no action until 4.00 pm on Friday at which time the current respondents would inform the current applicants of the respondents' position about a stay.

In my opinion the current applicants were justified and were acting reasonably in the steps that they took, namely filing an application for an order for a stay and lodging a caveat. At the stage at which the stay application was filed, together with a supporting affidavit, the applicants did face the risk that at 4.00 pm on Friday action could be taken which would be potentially adverse to their interests.

But the position changed on Friday. On that date the current respondents informed the applicants that they would consent to an order for a stay. They also said they would not agree to pay the costs nor would they agree to an order that the costs be reserved. The applicants have persisted with their claim to an order that the costs of the application for a stay be reserved, saying that this order is one normally made and one to which they are entitled.

In my respectful opinion that overlooks that the nature of an order for a stay is a discretionary decision by a judge of this Court and that the current applicants had obtained the necessary protection for their clients when they obtained agreement that the respondents would not oppose an application for a stay, by which time of course they had lodged a caveat which would remain in force until they withdrew it or an order of the Court compelled its removal. That would be the position simply because the party lodging the caveat was a registered owner.

I consider that in those circumstances the commercially sensible position and the reasonable one for the applicants would have been to recognise that the price they were paying for winning the agreement of the respondents, that the respondents would not enforce the judgment they had won, was the cost of preparation of their affidavit of filing the application and the cost of obtaining the order by consent. Instead they have insisted that there be a contested hearing about the issue of whether or not costs should be reserved.

Having said all that I now make the following orders. The reasons for them should be clear enough from the remarks I have made. I have read the judgment of His Honour and am prepared to make an order for a stay. The application has been made promptly and the applicants for the stay would be in a position of losing the fruits of a successful appeal if the stay were not granted.

The applicants have at least some prospects of success on appeal. I order by consent that the enforcement of the whole of the orders made by Jones J in this matter on 22 April 2005 be stayed until the determination of the appeal or until further order.

I further order that the respondents pay the costs of and incidental to preparation and filing of the applicants' affidavit in support of the stay, the stay application itself and the costs of taking out the order made today.

I order that the applicants pay the respondents' costs agreed or taxed on the standard basis of and incidental to the appearance by the respondents on this hearing today.
