SUPREME COURT OF QUEENSLAND

CITATION:	*Denning v Jet Development Pty Ltd & Anor* [2006] QCA 544
PARTIES:	**ROYALIN MARGARET DENNING** (respondent/applicant) **v** **JET DEVELOPMENT PTY LTD** ACN 107 913 762 (first applicant/first respondent) **FERNVALE PROJECT PTY LTD** ACN 119 408 767 (second applicant/second respondent)
FILE NO/S:	Appeal No 10779 of 2006 SC No 4879 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2006; 15 December 2006
JUDGE:	Keane JA
ORDER:	**Upon the applicant giving the usual undertaking as to damages, and the undertaking in Annexure A initialled by me, the order of Mr Justice Chesterman of 5 December 2006 in BS 4879 of 2006 be stayed pending the determination of the appeal the subject of these proceedings** **Costs, including previously reserved costs, are reserved to the determination of the appeal.** **I direct:** • **The applicant/appellant to provide Outline of Argument on or before 22 December 2006** • **The respondent to provide Outline of Argument on or before 19 January 2007** • **The applicant/appellant to provide any reply on or before 25 January 2007** • **The respondent to provide any reply to the applicant/appellant's reply on or before 31 January 2007** • **Parties to deliver draft index to record books on or before 31 January 2007 together with an advice that the parties agree on the contents**

- **Applicant to file and deliver record books on or before 7 February 2007**
- **Lists and photocopies of authorities to be provided 2 days prior to the hearing**
- **The appeal be heard 23 February 2007**
- **The parties to follow the Registrar's directions in addition to these directions.**

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - STAY OF PROCEEDINGS - learned primary judge ordered specific performance of a contract for the sale of land - applicant-vendor seeks stay of execution until appeal is resolved - respondent-purchaser intends to use land for shopping centre - whether planning approval process or development process realistically requires purchaser to be legal owner of the land - applicant's son operates saw mill on the land - applicant offered certain undertakings related to respondents' use of the land - whether stay should be granted

Alexander & Ors v Cambridge Credit Corporation Ltd (Receivers Appointed) (1985) 2 NSWLR 688, cited
Colefax v Piggins [2001] QCA 427; Appeal No 6877 of 2001, 5 October 2001, cited

COUNSEL: P J Favell for the applicant
J W Peden for the respondents

SOLICITORS: Morgan Conley for the applicant
Flower & Hart for the respondents

KEANE JA: On 5 December 2006, the learned trial judge made orders for the specific performance of a contract for the sale of land at Fernvale. The applicant is the vendor and the second respondent is the purchaser. Under the order of 5 December 2006, completion of the contract was due to take place on 12 December 2006. On 8 December 2006, the applicant filed a notice of appeal against the orders of the trial judge and on 12 December 2006 an application for a stay of those orders came before me.

ORDER

On that date, I granted a temporary stay and adjourned this application until 15 December 2006. That was done to enable the second respondent to place further evidence, if any, before the Court with a view to showing that the second respondent would be at risk of irremediable prejudice if the stay were granted, until the determination of the appeal. No such evidence has been forthcoming.

The respondents' opposition to the application for a stay pending appeal is based on the risk that the grant of the stay might disadvantage the second respondent in its application to the local authority for approval to develop the land as a shopping centre.

There is a rival application for the development of a shopping centre at Fernvale and the second respondent is apprehensive lest delay in the pursuit of its application may result in approval of the rival application.

Because Fernvale is unlikely to be able to support two shopping centres, if the rival application were to be approved, the second respondent's application would be unlikely to be approved and, in that event, the second respondent would lose the profit associated with the proposed development and the value of the land might also be reduced.

At the hearing on 12 December, the applicant offered, in addition to the usual undertaking as to damages, to undertake to execute any document required by the second respondent to

progress its development application. The applicant also offered an undertaking to allow the second respondent's consultants access to the land for that purpose.

On this basis, the applicant contends that the second respondent's position will be adequately protected against the prejudice which it might otherwise suffer if the stay were to be granted.

Notwithstanding the opportunity afforded by the adjournment of the hearing of this application, the second respondent has not been able to demonstrate that the pursuit of its development application over the next six months requires that it be the legal owner of the land. At least, that is so if the applicant honours the undertakings which she has proffered to the Court.

I refer to the period of six months because the likelihood is strong that the applicant's appeal can be heard and determined within that time frame.

On the applicant's behalf it is said that should the transfer of the land be completed in accordance with the exigencies of the orders of 5 December 2006, the applicant and her son, who operates a saw mill on the land, may be irrefutably prejudiced because of the temporary closure of the sawmill. I would not regard this possibility as significant for the purposes of the outcome of the stay application.

ORDER

The contract in question expressly provided that there were to be no leases upon the land at completion. If the contract is enforceable at all, it is, and always has been, part of the applicant's obligation to give vacant possession of the second respondent, at least by the end of December 2006. The terms of the applicant's son's tenancy are not in evidence.

One must therefore be sceptical of the assertion of the applicant's son's rights with prejudice by the completion of the contract in any event, to the extent that the applicant's son has any rights as tenant in respect of the land, those rights may be exercisable against the second respondent: to the extent that such rights are not so enforceable this Court should not, by the granting of a stay, create rights in favour of the third party which did not otherwise exist.

There is more force, in my opinion, in the applicant's argument that her appeal would be rendered nugatory if the land were transferred to the second respondent, and it was then even mortgaged or transferred to a third party so as to be beyond the reach of an order for re-transfer of the land in the event that the applicant's appeal were to be upheld.

In this regard it is to be noted that the second respondent did not seek to suggest that there was no real prospect of such further dealings by - with the land prior to the determination of the appeal.

I turn then to consider whether the pending appeal affords a sufficient basis to protect the applicant from this apprehended prejudice. The contract upon which the second respondent relied before the learned Trial Judge was made to a deed described as a "put and call option" dated 24 June 2005, between the applicant and the first respondent.

The first respondent nominated the second respondent as purchaser on 27 April 2006 and the second respondent on that date purported to exercise the option to purchase the land as the first respondent's nominee under the put and call option.

The applicant's principal contention is that under the terms of the put and call option deed the nomination and exercise of the option could not be effected simultaneously. In this regard, clause 4.1 of the deed provided, "the Buyer may at any time before the Buyer exercises the...Option by written notice to the Seller nominate a person to exercise the Call Option."

Accordingly, the applicant contends that the option was not exercised by the second respondent in conformity with the strict terms of the put and call option deed. The applicant's contention was described by the learned trial judge as "nonsense". See Jet Development Proprietary Limited and Another v Denning [2006] QSC 357 at [27].

The second respondent argues that his Honour was correct in this regard, and that, on this footing, the applicant can

suffer no prejudice in being denied the opportunity to seek the opinion of the Court of Appeal on this contention.

On an application for a stay pending appeal, the Court will not usually be in a position to come to a firm view of the prospects of success of the appeal. See for example, Colefax v Piggins [2001] QCA 427. It is obviously desirable if possible to leave a determination of the merits of the appeal to full argument before a duly constituted appellate court.

In the present case the applicant's arguments on appeal may not be so strong as to warrant exposing the second respondent to the losses which might ensue from stalling its pursuit of its development application.

But on the other hand they may not be so demonstrably insubstantial as to justify a complete denial of a meaningful right of appeal to the applicant. See for example, Alexander and Others v Cambridge Credit Corporation Limited (Receivers Appointed) (1985) 2 NSWLR 688 at 695.

The undertakings which the applicant has offered mean that it is not necessary to determine whether the applicant's prospects of ultimate success on appeal are sufficiently strong to warrant exposing the second respondent to the effective loss of its development project.

I consider that, by virtue of the undertakings offered by the applicant, the second respondent can be adequately protected

against the untoward consequences of the grant of a stay which, in my opinion, should be granted so as to preserve to the applicant a meaningful right of appeal.

For these reasons I make the following orders. Upon the applicant providing the usual undertaking as to damages and the undertaking in Annexure A hereto, initialled by me, the order of Mr Justice Chesterman of the Supreme Court of 5 December 2006 in proceeding number BS4879 of 2006 be stayed, pending the determination of the appeal, the subject of these proceedings.

Next, I order that the costs be reserved. I make that order on the footing that the application for the stay was necessitated by the exigencies of his Honour's order and dependency of the appeal.

Next, I note that the respondent sought that paragraphs 1, 4 and 5 of the applicant appellant's notice of appeal be struck out. I don't propose to make those orders. The arguments that arise by reference to those paragraphs may or may not be pursued and if they are pursued irresponsibly then that can be dealt with by an order for costs.

I direct that the appellant provide an outline of argument to the respondents on or before 22 December 2006. I direct that the respondents provide an outline of argument to the applicant/appellant on or before 19 January 2007.

I direct the applicant/appellant provide a reply to the respondent's outline of argument on or before 25 January 2007. I direct the respondents to provide a reply to the applicant/appellant's outline of argument on or before 31 January 2007.

I direct that the parties deliver to the Registrar, on or before 31 January 2007, a draft index to the record book for approval together with an advice that the parties agree on the contents. I direct that the applicant/appellant file and deliver to the record book on or before 7 February 2007.

I direct that the parties deliver a list of authorities and photocopies two days prior to the hearing date. I direct that the appeal be heard on 23 February 2007 and that the parties follow the directions of the Registrar, in addition to the directions made here by to that end.
And finally, I order that the costs of this application, including reserved costs, are reserved to the determination of the appeal and I will mark the form of undertaking with the initial "A" and direct that it be kept with the papers.
