SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ATKINSON J

No 2959 of 2005

KAZUKO YOSHIDA	Applicant
and	
NAOMASA ISHIKAWA	First Respondent
and	
MAINRIVER PTY LTD	Second Respondent
and	
FUJI SAWIKAKYOGO	Third Respondent

BRISBANE

..DATE 17/05/2007

JUDGMENT

HER HONOUR: This is an application for a stay of an order made by me on 8 March 2007, or, at least, paragraph 1 of that order. That order was that in relation to the assets held by the respondent, including any company or trust with which he was associated which are held in Japan, the following shall apply:

"(a) Grant Murdoch of Ernst & Young be engaged as a joint expert to undertake evaluation of each such asset provided that, should Grant Murdoch consider it prudent and appropriate, then he shall be entitled to engage and employ the services of any other suitably qualified professional whose advice and/or opinion is necessary so as to provide evidence to the Court concerning the value of the assets held by the respondent and any associated entity in Japan;

(b) the respondent shall do all acts and things lawfully within his power as are necessary to provide to the said Grant Murdoch and any other professional engaged by him pursuant to this order full and unrestricted access to the following:

i the books and records of his business interests and those of any company and/or trust with which he is associated;

ii the records, including source documents, held by his accountants or advisers in Japan or Australia;

iii the real estate premises, including land and buildings or any company or trust with which he is associated as an interest;

iv the plant, equipment, vehicles, machinery, storage units/facilities and any other item or place to which the said Grant Murdoch or those engaged by them may reasonably request access;

v the bank investments records of the respondent and any company or trust with which he is associated;

vi any document file or other paper in writing to which the said Ernst & Young or those engaged by them may reasonably request access;

(c) that in relation to the various appointments of single expert witnesses, the costs of such valuation be initially borne by the first respondent provided that the issue of the costs and proportionate responsibility for the same be an issue reserved to the trial Judge."

In respect of paragraphs (a) and (b), the contest between the parties on the hearing before me was which of two experts should be engaged, Grant Murdoch of Ernst & Young or Norbert Calabro. In argument, it was conceded by counsel on behalf of the first respondent, who is the applicant before me for the stay, that there is no issue whether it be Mr Murdoch or Mr Calabro, that they were both qualified and capable of performing the task. As is clear from the transcript of the argument, the decisive factor in my mind was that Mr Murdoch is part of a multi-national firm which has an office in Japan whereas Mr Calabro does not have that advantage. Given that the order of the Court related to the Japanese assets of the first respondent that matter was obviously decisive. In any event, it was a discretionary decision made on an interlocutory application.

The second matter concerned the question of who should initially bear the costs. There were a number of factors that were considered by me during the hearing of that matter. The argument was that orders had been made by this Court in favour of the applicant so that she had moneys out of which to pay the costs of running the litigation but, as can be seen from the application for those costs, they did not include the costs of the expert in Japan. The costs awarded to her by another Judge did not include the costs of the expert in Japan.

Also relevant to the exercise of my discretion was the fact that Fryberg J had ordered on 20 September 2006 that within

three months the first respondent provide to the applicant a report in English or translated into English by Shigeru Fujima of CPA Fujima Account Office with the address given in Japan in Yokohama or, if he were not available, a similarly qualified accountant who was familiar with the respondent's business, detailing and explaining the net worth of the first respondent and supported by all relevant documentation by way of full and frank disclosure of his financial circumstances.

The first respondent failed to comply with that order, as appeared in the submissions before me on the 8th of March. The time for compliance was extended by Philippides J on 23 January 2007 to 9 February 2007. A report was delivered, however it was conceded in the affidavit material from the first respondent's solicitor that it did not comply with the order and was hopelessly inadequate. It was for that reason that this application was relisted before me.

It is clear on the evidence before me that the applicant does not have the means apart from orders of this Court to raise the money to engage in the litigation.

Those were the matters taken into account by me. Those matters were referred to by me in the transcript of the hearing before me exposing my reasons for making the interlocutory order I made. No request for formal reasons was received by me and, in fact, when I said to counsel for the first respondent that if they were sought I would give them,

no response has been made to that. No such offer has been taken up.

The grounds of appeal are:

(A) Her Honour failed to give reasons for appointment of Grant Murdoch of Ernst & Young as a joint expert;

(B) Her Honour failed to give reasons for her order that the cost of the expert report be initially borne by the first respondent;

(C) Her Honour erred in the appointment of Grant Murdoch of Ernst & Young as an expert as that appointment was not justified by the evidence;

(D) Alternatively to (c), if an appointment of an expert was justified on the material before her Honour, her Honour erred in the appointment of Grant Murdoch rather than Norbert Calabro;

(E) In ordering the first respondent to initially pay the costs of the expert report her Honour erred in that she failed to take into account that by order of Fryberg J made on 20 September 2006 the respondent to this appeal (the applicant) was entitled to receive the sum of $266,000 on account of the anticipated costs in the proceedings;

(F) Her Honour erred because she failed to take into account that the respondent (the applicant in these proceedings) had not disclosed or explained why she could not pay for the costs of an expert report out of the $266,000 [sic] ordered to be paid to her on account of her costs of the proceedings.

It can be difficult for a Judge who has made an order to determine whether or not there are prospects of success on appeal. Obviously, a Judge who makes an order only makes it because the Judge believes it is the correct order to make. However, even taking account of that, it appears to me that the grounds of appeal are unarguable except perhaps for the ground of the failure to give reasons. However, those grounds of appeal were, it was said to me on the last occasion, written before the parties had access to the transcript. It appears to me that the transcript does reveal the reasons for the appointment of Mr Murdoch rather than Mr Calabro, a matter which was of so little moment to the first respondent on the application that his counsel did not even provide written submissions and, as I have said, he quite properly conceded that Mr Murdoch was qualified and capable of producing the report. It seems to me to be unarguable that it was a proper exercise of discretion to appoint in those circumstances Mr Murdoch, who had access to officers in Japan, rather than Mr Calabro, who did not.

This is, therefore, I think, one of those rare cases where there is no good arguable case on appeal.

The first respondent is wealthy and has previously been made subject to findings by other Judge of this Court that indemnity costs should be awarded against him. That was done in the hearing of the question of whether or not there was a de facto relationship. Byrne J said on that occasion:

> "Now ... what frankly is concerning me about this question of indemnity costs is this: Quite apart from the circumstances of the applicant about which her financial circumstances I know nothing, it seems that you client didn't ever have a genuine or fairly arguable basis for resisting a contention concerning the subsistence of some de facto relationship.
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> It was always going to be difficult for anyone, I would think, in view of what he said to the Commonwealth authorities and that he's fathered six of her children and that, as a general proposition, I think that Courts exist to determine points which are genuinely in dispute.
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> It rather looks as though what your client has said and done where the conduct involves an applicant it would be regarded as an abuse of the process of the Court and so I'm wondering why I should not make an order for indemnity costs on the footing that you client must've known that he never had any prospect of resisting a declaration that a de facto relationship existed for the requisite two years and ought therefore never to have resisted the claim."

His Honour did make an order for indemnity costs. Those indemnity costs have been taxed and, as I understand it, the first respondent sought a review of those and so has not yet paid them.

The applicant argues that he will be disadvantaged if a stay is not ordered. Relevant to the question of that disadvantage is the length of time that he has taken to request the stay. The order was made on the 8th of March 2007 and the expert was served with that order on the 23rd of March 2007 in which time

he should be expected to be complying with it. An attempt was made by the applicant in the matter to get joint instructions to the expert but that was resisted. On the 4th of April a notice of appeal was filed. That, of course, as the first respondent would well know, does not act as a stay. The stay application was not filed until almost a month later on the 2nd of May 2007, during which time one would expect that the expert appointed by the Court has been undertaking his duties.

The matter might well have been different if a stay was sought on the day the order was made or if the stay were sought shortly after the order were made or even immediately upon the filing of the appeal, but that is not the case here. True it is that if the stay is not granted Mr Murdoch will be undertaking his work and that will cost money but, as I have said, I think it is unarguable that it was the correct exercise of discretion to appoint Mr Murdoch, particularly in view the concessions made by counsel on behalf of the first respondent and who is the applicant for the stay.

On the other hand, one should consider the disadvantage to the respondent, which is yet more delay, in the determination of the matter particularly in the circumstance where the expert which the first respondent wanted produced a report late which was hopelessly inadequate. The first respondent was given the opportunity by the Court to produce a report as to his Japanese assets. He failed to take advantage of that opportunity. There should, in my view, be no further unnecessary delay in this litigation.

Those are the factors which were referred to by Chesterman J in Asia Pacific International Pty Ltd v Peel Valley Mushrooms Limited [1999] 2QdR 458 at 463 at [10] where his Honour held:

> "The considerations to which a Court will have regard when deciding whether to grant a stay of execution were discussed by this Court in J C Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2) [1983] 2QdR 255, and in the context of applications for special leave to appeal to the High Court by Brennan J (as his Honour then was) in Jennings Construction Limited v Burgundy Royale Investments Pty Ltd [No 1] (1986) 161 CLR 681. Neither of these cases is concerned with an application to stay an interlocutory judgment which give rise, I think, to a different concern from those which arise when a stay is sought for the final judgment.
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> Adapting what was said in both those cases, it would seem to me that an applicant for stay of an interlocutory judgment pending appeal should show:
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> (a) there is a good arguable case on appeal;
> (b) the applicant will be disadvantaged if a stay is not ordered; and
> (c) whether there is some competing disadvantage to the respondent should the stay be granted which outweighs the disadvantage suffered by the applicant if the stay is not granted."

As I have said, I am not satisfied there is good arguable case on appeal. It is true that there will be a disadvantage to the applicant if the stay is not granted but there is a competing disadvantage to the respondent to the stay application if the stay is granted which outweighs the disadvantage suffered by the applicant. In those circumstances, I refuse the application for a stay.

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HER HONOUR: The respondent to this application, who is the applicant in the matter, has been entirely successful in

resisting the application and therefore is entitled to have the costs of and incidental to this application which I fix at $7,000.
