SUPREME COURT OF QUEENSLAND

CITATION:	*Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255
PARTIES:	**YVONNE RASCHILLA AND STEVE RASCHILLA** (respondents/applicants/appellants) **v** **WESTPAC BANKING CORPORATION** ABN 33 007 457 141 (applicant/respondent)
FILE NO/S:	Appeal No 9987 of 2010 SC No 9441 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	22 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2010
JUDGE:	Fraser JA
ORDERS:	**1. Application refused;** **2. Applicants to pay the respondent's costs of and incidental to the application on the ordinary basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN REFUSED – where the Chief Justice made an order pursuant to s 78(2)(c) *Land Title Act* 1994 (Qld) requiring the applicants to deliver up vacant possession of a property to the respondent – where Applegarth J stayed the order temporarily – where the applicants applied to this Court for a further stay of the order – where the respondent obtained a registered mortgage over the property as security for a loan to Ralacom Pty Ltd – where one of the applicants was the sole director of Ralacom – where Ralacom defaulted and the respondent appointed a receiver – where the applicants continued to occupy the property – where the Chief Justice held that an order made by consent on 9 June 2010 deprived the applicants of any right to occupy the property – where the applicants argued they were disadvantaged as self represented

litigants, that the receiver was not validly appointed, that the respondent had unreasonably and unjustly frozen their accounts and did not require vacant possession to maximise the sale price of the property – where the applicants also argued that the Chief Justice was biased and had denied them procedural fairness in refusing their request for an adjournment – whether the applicants showed good reason for a stay to be granted – whether the applicants had a prospect of succeeding on appeal – whether a further stay should be granted

Land Title Act 1994 (Qld), s 78(2)

Elphick v MMI General Insurance Ltd & Anor [2002] QCA 347, applied

COUNSEL:	The applicant/appellants appeared on their own behalf B O'Donnell QC for the respondent
SOLICITORS:	The applicant/appellants appeared on their own behalf Gadens Lawyers for the respondent

FRASER JA: Mr and Mrs Raschilla have appealed against an order made by the Chief Justice in the trial decision on 9 September 2010 that they deliver up possession to the respondent bank, Westpac, as registered mortgagee of Lot 8 on a certain building unit plan, otherwise described as Unit 10, within seven days of that order.

On the 16 September 2010 Applegarth J stayed that order until 4 pm today. Mr and Mrs Raschilla have now appeared before me seeking a further stay of the Chief Justice's order, presumably until after determination of their appeal.

In *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347 Jerrard JA referred to earlier decisions of this Court in support of this proposition:

> "To succeed on an application for a stay the applicants must show good reason for the stay to be granted and that it is an appropriate case in which to grant a stay. Those authoritative decisions in this Court established that an applicant should demonstrate:
>
> - A good arguable case on appeal.
> - That the applicant will be disadvantaged if a stay is not ordered.
> - That competing disadvantage to the respondent should the stay be granted

> does not outweigh the disadvantage suffered by the applicant if the stay not be granted."

I have omitted footnote references from the quote.

The principal ground upon which Westpac opposes the application is its contention that Mr and Mrs Raschilla do not have a good arguable case on appeal. If that is demonstrated, then it is clear that the Court should not grant a stay since such an order is designed to ensure a successful appeal will not merely be a hollow victory.

The Chief Justice made the order for delivery of possession pursuant to s 78(2) of the *Land Title Act* 1994 (Qld). That subsection, in paragraph (c), empowers a registered mortgagee upon default by the mortgagor to obtain possession of the mortgaged lot by proceeding in a court of competent jurisdiction. The Chief Justice held that: the mortgagor of Unit 10 was Ralacom Pty Ltd, a company of which Mrs Raschilla was the sole director; it owned the lot and had mortgaged it to Westpac as security for a loan; Ralacom defaulted in May 2010; Westpac appointed one Ms Williams as receiver and manager of Ralacom; Ralacom failed to comply with Westpac's demand for payment of the loan; and on 9 June 2010 Atkinson J ordered by consent that Ralacom deliver up possession of its assets to the receiver.

I note that a letter dated 9 June 2010 from Ralacom's solicitors to Westpac's solicitor, which was tendered at the hearing before the Chief Justice, stated that Ralacom's solicitors were instructed to abandon further opposition to the relief sought by the receiver and to apologise for the conduct of Ralacom's office bearers following appointment of the receiver, which was borne out of ignorance.

The Chief Justice held that the evidence established that Mr and Mrs Raschilla occupied Unit 10 and that so much was common ground at the hearing before his Honour. Because any entitlement they had to occupy Unit 10 derived from Ralacom and because Ralacom had been deprived of any right to occupy Unit 10 by the Court's order of 9 June 2010 Mr and Mrs Raschilla had no lawful entitlement to occupy the unit as against Westpac.

Mr and Mrs Rachilla's challenges to the order for possession may be dealt with in categories.

In the first category, Mr and Mrs Raschilla contend that the receiver was not validly appointed, or perhaps was appointed for reasons other than those given by the Chief Justice, or perhaps should not have been appointed as a matter of fairness. They argue that the receiver was appointed only because the body corporate committee terminated Ralacom's appointment as manager rather than for a monetary default, but Westpac's affidavit evidence established that the May payment default had occurred, and that was uncontradicted. Mr and Mrs Raschilla's argument that Westpac knew that the reason why Ralacom had insufficient money to pay was that the body corporate failed to pay money that it owed to Ralacom merely confirmed that Ralacom in fact did default under its mortgage.

Mr and Mrs Raschilla also argued that Westpac had in any case frozen Ralacom's bank account, but there is no evidence or submission that it was not entitled to do so under its securities. They argue that Westpac refused a tender of the May payment on 31 May 2010, but there was no evidence of that before the Chief Justice and nor is there any evidence of it before me. They also argue that in view of Ralacom's good payment record it was unreasonable and unjust for Westpac to move, but that argument discloses no basis in law, even if it be correct, as to which I make no comment, for overlooking the default. There is no evidence that Westpac in fact did act unreasonably, unjustly or otherwise than in conformity with its legal rights.

Mr and Mrs Raschilla also argued in this category that Westpac does not require possession in order to maximise the sale price, but the evidence before the Chief Justice was against that proposition and *prima facie* established that vacant possession was required to maximise the sale price. Mr Raschilla repeated before me an argument that had appeared in Mr and Mrs Raschilla's written submissions that their equity, presumably Ralacom's equity, in the management rights business was such as to entitle Ralacom and, derivatively I presume, Mr and Mrs Raschilla to remain in the unit pending the sale. But

such an argument is in contradiction with the rights of Westpac as registered mortgagee to possession. Mr and Mrs Raschilla put oral arguments under this category challenging Westpac's conduct in the way it went about obtaining possession of the unit from Ralacom, but the fact that Ralacom lost any entitlement to possession of the unit was finally decided by the 9 June 2010 order referred to by the Chief Justice. Ralacom consented to that order; it did not appeal against that order; and none of the arguments in this category disclose any basis for overlooking it.

Mr and Mrs Raschilla argued that the Chief Justice denied them procedural fairness by denying their application for an adjournment, particularly in light of their obviously disadvantageous position as unrepresented litigants. Reference was also made in the written submissions to a statement put before the Chief Justice that Mr Raschilla suffered from narcolepsy and had a diminished capacity to represent himself. However, that statement was put in submissions to the Chief Justice only to explain why Mrs Raschilla wished to read out their lengthy submission. It was not submitted to the Chief Justice that it called for an adjournment. The Chief Justice refused the application for an adjournment, so far as it was based on the late service of affidavits, on the ground that the new affidavits which were served on the morning of the hearing were designed substantially to demonstrate that Lot 8 was the same property as Unit 10, a matter that was not in dispute. I add that so much had in fact been recited in paragraph 7 of Mr Meagher's affidavit filed on the 2 September 2010.

Mr and Mrs Raschilla also argued that the documents served late upon them corrected an earlier statement in a document also served late that only Mr Raschilla was to attend the hearing. The latter documents required Mrs Raschilla also to attend. The evidence before the Chief Justice included, however, three notices dated 21 June 2010 to vacate the units addressed severally to the occupiers, Mrs Raschilla and Mr Raschilla. Each of those notices stated that those tenants must vacate the premises by 23 August 2010. The original application by Westpac sought orders for possession against Mr and Mrs Raschilla, and Mr Raschilla accepted service of it for himself and for his wife some

six days before the hearing. That was a reasonable time despite Mr and Mrs Raschilla's obvious difficulties in representing themselves.

Mr and Mrs Raschilla made a further complaint at the hearing before the Chief Justice about what were submitted to be related proceedings, a mediation, and complaints they had made against Westpac and the receiver's conduct. But there was no evidence that any of these matters sought to establish or could have established, contrary to the 9 June 2010 order, that Ralacom retained a legal right to possession of the unit.

In a different category of complaint Mr and Mrs Raschilla argued before me, although not before the Chief Justice, that his Honour had a conflict of interest arising out of a long association with Westpac. They submitted that his Honour had been on a retainer and had represented Westpac at several hearings. I have no way of knowing whether or not those submissions are correct but, if in fact his Honour was on a retainer from Westpac and had represented it, that must have been about a quarter of a century ago at least, because his Honour left the Bar to join the Supreme Court in 1985. It could not conceivably give rise to an apprehension of bias which could be described as reasonable. Mr and Mrs Raschilla also submitted in their written submissions that they "understood" that the Chief Justice had substantial shareholdings in Westpac which of course his Honour had not declared. There is, however, no basis whatever in the evidence before me to justify them making that assertion.

Mr and Mrs Raschilla referred to feeling overborne by the substantial disparity between their resources and those of Westpac and their inability to obtain legal aid, as compared with Westpac's extensive and apparently highly competent legal representation. I see no reason to doubt the sincerity of what Mr and Mrs Raschilla had to say about that issue, and their absence of legal aid, which is the case in most civil matters, is a legitimate topic of concern. However, there is no basis for thinking that legal representation would have assisted Mr and Mrs Raschilla in discovering any defence to Westpac's claim.

On the evidence before the Chief Justice and before me, Mr and Mrs Raschilla have no worthwhile prospect of succeeding in their appeal. Accordingly, I refuse the application.

Westpac has applied for costs of the application. In circumstances in which I have refused the application on the ground that there is no substance in the appeal it seems to me that Westpac's application must succeed.

I order that the applicants/appellants pay the respondent's costs of this application to be assessed on the ordinary basis.