SUPREME COURT OF QUEENSLAND

CITATION:	*St George Bank – a division of Westpac Banking Corporation v Thomas* [2012] QSC 403
PARTIES:	**ST GEORGE BANK – A DIVISION OF WESTPAC BANKING CORPORATION** (plaintiff/respondent) v **MATTHEW EDWARD THOMAS** (defendant/applicant)
FILE NO:	9772 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	14 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2012 and 25 October 2012
JUDGE:	Peter Lyons J
ORDER:	**1. The judgment of this Court dated 28 September 2012 be stayed until the determination of appeal CA 5488/12 from that judgment, upon the defendant undertaking to prosecute that appeal with all due diligence;** **2. The costs of this application be reserved to the Court of Appeal**
CATCHWORDS:	**APPEAL AND NEW TRIAL – APPEAL– PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL –** where plaintiff obtained judgment for $11,113,810.31 against defendant – where defendant has filed Notice of Appeal – where appeal is pending – where enforcement of judgment would likely cause defendant to become bankrupt – whether stay should be granted *Uniform Civil Procedure Rules* 1999 (Qld), ss 374, 667, 668, 761 *Cook's Constructions Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322, considered *Kalifair Pty Ltd v Digi–tech (Australia) Ltd* (2002) 55 NSWLR 737, considered *McMahon v National Foods Milk Ltd* [2008] VSCA 237, considered *Osborne Boral Resources (NSW) Pty Ltd* [2011] NSWCA

379, considered
Phoenix Constructions (Qld) Pty Ltd v McCracken [2011] QCA 259, considered

COUNSEL: The defendant/applicant appeared in person
D Savage SC with P Ahern for the plaintiff respondent

SOLICITORS: The defendant/applicant appeared in person
Gadens Lawyers for the plaintiff/respondent

[1] On 27 September 2012 the plaintiff obtained judgment against the defendant for the sum of $11,113,810.31, with costs. The defendant has appealed against that judgment. The defendant has applied for an order staying the enforcement of the judgment and for some other relief.

[2] The plaintiff submitted that this is not an appropriate case for ordering a stay of the enforcement of the judgment pending the determination of the defendant's appeal; and that the other relief sought by the defendant is not available to him.

Background

[3] It is convenient to commence with some reference to the allegations made in the pleadings. The plaintiff's action was brought against the defendant as the guarantor of the obligations of Wardell St Investments Pty Ltd as borrower under two facility agreements entered into in November 2007. Each was for an amount of approximately $3.8 million. They were due to be repaid on 30 October 2009. The plaintiff has alleged that as at 26 October 2011, the amount owing under one of the facility agreements was $4,963,522.68; and under the other it was $4,947,777.23; and that interest continued to accrue[1].

[4] The statement of claim alleged that, pursuant to the terms of the facility agreements, the plaintiff's General Standard Terms applied.

[5] Paragraph 2(b) of the defence alleged that the document relied upon by the plaintiff was a Facility Offer, and not a facility agreement; and that an agent of the plaintiff did not give to the defendant a copy of the General Standard Terms. Paragraphs 11 and 12 of the defence alleged that the guarantee relied upon by the plaintiff was made void by reason of an unspecified breach of the Code of Banking Practice. By a request for particulars dated 9 May 2012, the plaintiff sought particulars of the allegations found in pars 2(b), 11 and 12 of the defence.

[6] Paragraph 13 of the defence alleged that document referred to in paragraphs 20, 21 and 22 of the statement of claim were void upon the acceptance of the facility offer extension dated 28 August 2009.

[7] On 8 August 2012, an order was made that the defendant provide further and better particulars of the defence which had been requested by the plaintiff, and produce documents referred to in the defence, within seven days.

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1 Statement of claim, CFI 1

[8] The plaintiff then bought an application under r 374 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*), on the basis that the defendant had not complied with the order made on 8 August 2012. The relief sought by the plaintiff included judgment in the action. The application came on for hearing on 27 September 2012.

[9] At the hearing, correspondence between the solicitors for the parties was placed before the court. On 25 September 2012, the solicitor then acting for the defendant wrote (by email) to the plaintiff's solicitors stating that he was out of Australia until 1 October 2012. His email enclosed a letter dated 24 September 2012 to the plaintiff's solicitors, stating that the defendant was currently out of the State and would not available to provide instructions until about 1 October 2012. That letter sought an adjournment of the application. On 25 September 2012, the defendant's solicitor wrote a further email, stating he would be back in Australia on 1 October 2012, again requesting an adjournment, and stating that he understood that the defendant would be able to provide the requested material early the following week. The solicitors for the plaintiffs responded on the same day, stating that they were instructed to proceed with the application on 27 September 2012.

[10] The defendant's solicitor again communicated with the plaintiff's solicitors by email on 26 September 2012. He asserted that the application for judgment was without merit. He also stated that the plaintiff's solicitors had been provided "with that request for particulars on 17 August 2012". This appears to have been intended to assert that the particulars had been supplied on that date. The email also referred to the absence of the defendant's solicitor, and difficulties of communication. The defendant's solicitor again requested an adjournment of the hearing. The plaintiff's solicitors replied later in the afternoon of 26 September. Their letter said that if the email from the defendant's solicitor had intended to state that the particulars had been provided, that was denied; and that their instructions were to proceed with the application.

[11] At the hearing on 27 September 2012, no one appeared on behalf of the defendant. Judgment was given in favour of the plaintiff for the amount of $11,113,810.31. The defendant has appealed to the Court of Appeal.

Defendant's application

[12] The defendant is no longer legally represented. His application seeks to have the judgment set aside, pursuant to r 667(2)(a), (b) and (d) of the *UCPR*; or that the judgment be stayed under r 668(2) and (3) of the *UCPR*. The application for a stay also relied on r 761(2) of the *UCPR*.

[13] The defendant's submissions have recognised that, by virtue of r 374(8) of the *UCPR*, the judgment of 27 September 2012 could only be set aside by way of appeal.

[14] Accordingly, the principal focus of the application became the application for a stay of the judgment under r 761. However, in support of that application the defendant relied upon r 667 and r 668, intending to invoke them in the Court of Appeal. The submissions also sought a variation of the order under r 667.

Application for stay under r 761

[15] For the plaintiff it was submitted that the parties were agreed on the test to be applied; and the considerations relevant to the present case. The test was said to be whether the defendant had demonstrated that the present case was a proper case for a stay. The relevant considerations in the present case were said to be whether the plaintiff would suffer prejudice if the stay were granted; whether the defendant would suffer prejudice if the stay were not granted; and the prospects of success on appeal. The plaintiff's submission seems to me, broadly speaking, correctly to identify the position between the parties.

[16] It is nevertheless convenient to refer to some statements which appear in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd*[2] (*Cook's Construction*). There Keane JA (as his Honour then was), with whose reasons the other members of the court agreed, accepted that it was not necessary for an applicant for a stay pending appeal to show "special or exceptional circumstances" which warrant a stay. Nevertheless, a stay will not be granted, unless a sufficient basis is shown "to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation in entitled to the fruits of its judgment"[3]. His Honour also considered whether a refusal of the stay might render the appellant's appeal nugatory[4]. His Honour also identified the question of prejudice, relevant in that case, as being whether the appellant "would be irremediably prejudiced if the stay were not granted and its appeal were ultimately to be upheld"[5].

[17] The primary prejudice relied upon by the defendant was that, if the stay were not granted, it was likely that he would become bankrupt, and would thus be unable to pursue the appeal. He drew attention to a letter from the plaintiff's solicitor of 4 October 2012, to the solicitor who had then been acting for him, giving notice of the judgment. The letter demanded payment of the sum of $11,113,810.31 within seven days, "failing which the Bank will issue bankruptcy proceedings against Mr Thomas without further notice to you"[6].

[18] The plaintiff has not indicated that it would not attempt to bankrupt the defendant while his appeal is pending. However, it made a number of submissions about the significance of this consideration.

[19] Attention was drawn to the fact that the defendant has not gone into evidence to demonstrate his assets and liabilities. The intention may have been to suggest that the defendant has not demonstrated his inability to meet the judgment. However, the plaintiff's own submissions refer to the defendant's "parlous financial state"[7]; and further submitted that if a stay were granted, the plaintiff would be put to further costs that would irrecoverable[8]. The defendant explained the fact that he did not appear at the hearing on 8 August 2012 by reference to his "financial constraints"[9]. In the circumstances, and bearing in mind the amount of the

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2 [2008] QCA 322.
3 *Cook's Construction* at [12].
4 *Cook's Construction at* [16] – [17].
5 *Cook's Construction* at [15].
6 CFI44, ex MET10.
7 Plaintiff's submissions of 16 October 2012, par 25.
8 Ibid par 26.
9 CFI44, par 12.

judgment, it is not difficult to conclude that the defendant does not have the means to meet it, and thereby avoid bankruptcy.

[20] The plaintiff submitted that, if the defendant became bankrupt, that did not necessarily adversely impact on the conduct of his appeal. It was submitted that the trustee in bankruptcy could consider whether the appeal should be pursued. The defendant's submissions referred to *McMahon v National Foods Milk Ltd*[10] (*McMahon*), a decision of two members of the Victorian Court of Appeal. There a stay was granted, a significant consideration being the prospect that the appellant might be made bankrupt. Maxwell P, who delivered the Court's judgment, said:

> "On several occasions recently, the Court has accepted that the prospect of an individual appellant being bankrupted by the judgment creditor if a stay is not granted may constitute special circumstances for this purpose[11]. Ordinarily, of course, a party which succeeds at trial is entitled to enjoy the fruits of its judgment. Different considerations come into play, however, where the appellant/judgment debtor is insolvent. In those circumstances, to allow the process of execution to proceed – in the case of an individual appellant, to bankruptcy or, in the case of a corporate appellant, to winding up – has obvious and significant implications for the capacity of the appellant to prosecute the appeal. In the case of an individual, the making of a sequestration order has significant long-term implications, in reputational and other respects, which may well mean that, in the event of the appeal succeeding, the individual could not be restored 'substantially to his or her former position'".

[21] Consistently, in *Osborne v Boral Resources (NSW) Pty Ltd*[12] (*Osborne*) Campbell JA said:

> "When there is imminent bankruptcy, it is clear that there is a prospect the refusal of a stay would cause the appellant prejudice or damage that would not be redressed by a successful appeal."

[22] In *Cook's Constructions*, Keane JA did not consider that the prospect that the appellant would be wound up warranted the grant of a stay. His Honour took into account the prospect that the liquidator might pursue the appeal[13]. In other jurisdictions, greater weight has been placed on the prospective liquidation of an appellant if a stay is not granted: see *McMahon*: see also *Kalifair Pty Ltd v Digi-tech (Australia) Ltd*[14]. In the case of a company, the considerations referred to in *McMahon* relating to bankruptcy do not arise. In the present case, in my view, the prospect of the defendant's bankruptcy is a significant factor for that reason. Recognising that the trustee in bankruptcy might pursue the appeal, I would

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10 [2008] VSCA 237.

11 *Orrong Strategies Pty Ltd v Village Road Show Pty Ltd* [2007] VSCA 320; *Chen v Chan*, unreported, Supreme Court of Victoria, Court of Appeal, Maxwell P & Dodds-Streeton JA, 21 December 2007; *Li v Herald Weekly Times Pty Ltd* [2008] VSCA 201; *Narain v Euroasia (Pacific) Pty Ltd* [2008] VSCA 195.

12 [2011] NSWCA 379, at [15].

13 *Cook's Construction* at [16] – [17].

14 (2002) 55 NSWLR 737 at [21] – [22].

nevertheless give some weight to the fact that the trustee might be less likely to do so than would the defendant.

[23] The plaintiff's submissions also made reference to *Phoenix Constructions (Qld) Pty Ltd v McCracken*[15] (*Phoenix*). In that case an application for a stay was refused, notwithstanding the risk of bankruptcy. That was on the basis that, even without the litigation the subject of the appeal, the appellant's financial position was "parlous"[16].

[24] In the present case, it does not follow from the fact that the defendant cannot pay the amount of the present judgment, that his financial position is otherwise parlous.

[25] The plaintiff's evidence included the results of a court registry search which showed that there are on foot four actions in this Court in which the defendant is a defendant to money claims. While a little troubling, this evidence, in my view, does not establish that there is a real prospect that the defendant would become bankrupt even if the judgment in the present proceedings were stayed pending the appeal.

[26] The plaintiff submitted there were a number of respects in which it would be prejudiced, if the stay were granted. One was, simply, that it would not be able to enforce its judgment immediately. Another was that creditors might immediately get the defendant's assets, presumably with the consequence that they would not be available to the plaintiff. A third was that a grant of the stay would result in the incurring of more costs, which would not be recovered. A fourth was that the plaintiff is prejudiced by the fact that the defendant had not yet provided proper particulars, in accordance with the order of 8 August 2012.

[27] It will inevitably be a consequence of an order for a stay of proceedings, that a judgment cannot be enforced immediately. That, of itself, cannot be a factor warranting refusal of an application for a stay, for a stay would otherwise never be granted.

[28] The other actions against the defendant appear to be contested. The plaintiff's submissions did not identify creditors, apart from the plaintiffs in those actions, to whom the defendant's assets might be transferred once a stay is in force. In the circumstances, it does not seem to me that this consideration is one of significant weight.

[29] Where a stay has been granted because of the prospect that the appellant would otherwise become bankrupt, it seems to me inevitable that, if the appeal fails, the respondent will not recover its costs of the appeal. This appears to have been recognised in *Osborne*, but was not regarded as a bar to granting a stay[17].

[30] The submission relating to prejudice occasioned by the fact that the defendant has not yet provided particulars, it seems to me, is not prejudice relevant to the application for a stay. If the plaintiff suffers prejudice for that reason, that is the same whether or not the stay is granted.

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15 [2011] QCA 259.

16 *Phoenix*, 10.

17 See *Osborne* at [16].

[31] Extensive submissions were made in respect of matters relevant to the defendant's prospects of success in the appeal. Ultimately, the position to which the plaintiff came was that the appeal was arguable; but that the prospects of success were not of such strength as to be of significance in determining whether to grant a stay. It may be doubted whether the fact that an appellant has good prospects is a significant matter in determining whether to order a stay of a judgment[18]. However, it seems to me that the defendant's prospects of success are not sufficiently strong to make it necessary to pursue that question.

[32] It seems to me therefore that a matter of particular weight is the fact that the defendant faces the threat of bankruptcy by reason of the enforcement of the judgment, unless it is stayed. While the plaintiff might not recover its costs of the appeal if the defendant is unsuccessful, nevertheless it does not seem to me to be a factor of such weight as to warrant refusal of the application. The other matters which have been advanced do not seem to me to be of particular significance in the present case.

Conclusion

[33] I propose to grant the defendant's application for a stay. I shall hear submissions as to the form of order to be made, and as to costs.

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[18] See *Cook's Construction* at [14].