SUPREME COURT OF QUEENSLAND

CITATION:	*CNT v GAC* [2013] QCA 200
PARTIES:	**CNT** (applicant) **v** **GAC** (respondent)
FILE NO/S:	Appeal No 6694 of 2013 SC No 2630 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	25 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2013
JUDGE:	Fraser JA
ORDERS:	**1. Application for a stay pending determination of the appeal refused.** **2. The execution of the warrant be stayed until 9.00 am on Monday 29 July 2013.** **3. The applicant to pay the respondent's cost of and incidental to the application.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant and respondent had entered into a separation agreement – where the applicant had been in possession of the respondent's property and had not been paying the agreed amount of rent – where the agreement for the rental was made in the separation agreement – where an enforcement warrant was issued – where a judge of the Trial Division made an order staying the execution of the warrant – where the applicant filed an extension of time within which to appeal and an application to stay the execution of the warrant pending appeal – whether a stay should be granted *GAC v CNT* [2013] QSC 127, related *Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 17, cited

COUNSEL:	The applicant appeared on her own behalf S W Sheaffe for the respondent
SOLICITORS:	The applicant appeared on her own behalf McKays Solicitors for the respondent

FRASER JA: On 22 July 2013 the applicant filed an application for a stay on an order made in the Trial Division on 15 April 2013 after a five day trial that the applicant vacate the respondent's house property on 15 May 2013. It appears that the applicant had been in possession of the house for many years and for some considerable period had not been paying the agreed rental of $1,000 per week. That agreement for the rental was made in a separation agreement between the applicant and the respondent in relation to a previous de facto relationship. An enforcement warrant was issued on 20 May 2013. On 20 June 2013 a judge of the Trial Division made an order staying execution of the warrant until 19 July 2013. At the hearing of that application, the applicant told the judge that she needed the stay because of her medical state – she abused alcohol and drugs following the breakdown of her relationship with the respondent and she experienced significant mental health problems – and she needed time to find alternative housing.

The judge raised with the applicant the difficulty that her evidence did not indicate that her position would be any different in four weeks time and observed that the probability was that she would be in exactly the same position then. The applicant told the judge that this was not the case. She assured the judge that in four weeks time she would be prepared and able to move out of the house and in the meantime to find alternative housing. In granting the stay, the judge referred to what he regarded as the realities of the situation, that the applicant would have nowhere to go except perhaps a women's shelter and that the respondent would have to pay the cost of the furniture removalist to take the applicant's household goods and store them for an indefinite period.

The judge relied upon the applicant's statements to him in extending the warrant. The judge said that the applicant had, in his opinion, a clear understanding of the nature of the proceedings and, although she was unrepresented, was quite capable of acting in her own interests and was alert to the issues which arose. The judge found that he was prepared to

accept the truth of what the applicant said to him that she would not be seeking any further extension after four weeks. The judge added that he should make it clear that were that to change for any reason which was then capable of anticipation, he would look very askance should she change her position and he would expect other judges to do the same. The judge regarded that as an answer to the fear expressed on behalf of the respondent that the respondent would be back in another four weeks facing the same problem.

The applicant did not vacate the premises. On 6 July 2013 an enforcement officer served the enforcement warrant at the respondent's house. The warrant required the applicant to vacate the premises by 26 July 2013 and gave notice that if she did not vacate she would be compelled to vacate on 28 July 2013.

Notwithstanding this history, the applicant has now applied for an extension of time to appeal and for a stay of the enforcement warrant pending the proposed appeal. Relevant considerations on this application for a stay notably include the applicant's prospects of succeeding in the proposed appeal and the balance of convenience in granting or refusing the stay. The grounds of the proposed appeal are set out in a draft notice of appeal provided by the applicant. They contend, in summary, that:

1. The trial judge erred in not offering the applicant an adjournment in circumstances in which the trial judge should have found that the applicant's ability to give evidence was compromised by reason of her psychological state, as was reflected, the applicant contends, in her conduct and demeanour at the trial: grounds 1 to 3 of the draft notice of appeal.

2. The trial judge erred in holding that the applicant had capacity to enter into the settlement agreement because the trial judge did not have access to medical evidence which has since come into existence that the applicant has been diagnosed as being manic: ground 4 of the draft notice of appeal.

As to the first contention, I have had regard to the detailed submissions and evidence presented by the applicant concerning her perception and her mother's perception of her

mental state at the trial, what took place at the trial, and what was submitted to be a manifest requirement for an adjournment. A significant obstacle, though, in the way of this contention is that the applicant was represented by solicitors and counsel at the trial, and the respondent contended, and there was no reliable evidence to contradict the contention, that there was no application for an adjournment. Furthermore, a weakness in the applicant's evidence in this respect is the absence of any affidavit by her solicitor or counsel in support of her and her mother's contentions about their perceptions of the need for an adjournment.

The applicant's former treating psychiatrist, Dr Richardson, wrote a report dated 4 April 2013 in which he expressed the opinion that the applicant was of sound mind and capable of attending court, she understood the current case that existed with the property settlement, and she was capable of giving instructions to her solicitors.

My strong provisional view on the evidence before me is that there is no sufficient ground for a challenge to the trial judge's finding that "I did not detect any indication her psychological state interfered with the process of actually giving evidence in any material way": see *GAC v CNT* [2013] QSC 127 at 1-10.

As to the second contention, concerning the applicant's capacity to enter into the agreement, her defence to the claim made against her by the respondent that she should be required to vacate the house property under the separation agreement was that her entry into the relevant agreement was vitiated by the effect of her psychological disorders. She pleaded that the result of her disorders was that she was unable to fully understand the true meaning and effect of the settlement agreement and therefore lacked legal capacity to execute it: see *Gibbons v Wright* (1954) 91 CLR 423 at 427. The trial judge referred to the evidence of the applicant's treating psychiatrist, Dr Richardson, and to the evidence of the psychiatrist, Dr Chalk, called by the respondent, and found that on the whole of the evidence, whilst there would have been some degree of impairment of the applicant's capacity to understand the detail of what was occurring when she entered into the agreement, the applicant was nonetheless capable of understanding the general nature of

what she was agreeing to, see *GAC v CNT* [2013] QSC 127 at 1-38. The trial judge referred also to the fact that the applicant's mother and her sister would have been well placed to give evidence of any want of understanding by the applicant but they were not called and the failure to call them was not explained.

Before me, the applicant relied upon medical reports obtained after the trial. Dr Tran provided a report dated 17 July 2013 certifying that the applicant had been suffering from depression, anxiety, obsessive compulsive disorder, alcohol and benzodiazepine withdrawal, and recent symptoms suggestive of mania. Dr Tran was prepared to say about the history of the mania, only that the applicant "might have had episodes of mania while giving evidence in court." That is obviously not persuasive evidence that she suffered from this mania at the time of the trial.

On 13 June 2013 Dr Faulks prepared a report "to provide information about her current mental state." Dr Faulks referred to the applicant's anxiety about the deadline to vacate the house premises and her concern that the stress in the move would trigger a relapse of manic symptoms and alcohol drug misuse. Whilst Dr Faulks accepted that the applicant demonstrated severe levels of anxiety and stress, and that high stress was a known precipitant for manic episodes, and that relocating from home without assistance with the symptoms she has suffered "would be an impossible task" (so that he supported her request for an extension of the deadline). Dr Faulks expressed no opinion whether the applicant had suffered from her then current symptoms either at the time of the trial or when she entered into the separation agreement.

In a further report on 17 July 2013 Dr Faulks noted that the applicant "reported" suffering from depression followed by periods of mania during the last five to six years. Dr Faulks did not express any opinion upon the accuracy of the applicant's report. Again, this is not persuasive evidence that the applicant suffered from these more severe conditions at the time of the trial or at the time of the agreement. Another psychologist, Dr Young, reported on 18 July 2013 that the applicant "believes" that her alcohol and Xanax

intoxication impacted upon the trial judge's decision, but Dr Young did not express any opinion upon the validity of that belief.

That the applicant's mental state may have been made worse after judgment was delivered is consistent with her own statement in an affidavit filed on the 22nd of July 2013 that "after the trial, as I was so stressed with the proceedings and legal matters and was so devastated by the judgment, I was admitted to the Princess Alexandra Hospital psychiatric ward due to a manic episode of alcohol and drug abuse which ultimately turned to self harm." Whilst I have no difficulty in accepting that the applicant very unfortunately suffers from serious psychological conditions, these reports, whether taken individually or collectively, do not amount to persuasive fresh evidence capable of falsifying the trial judge's conclusions about the applicant's psychological state either at trial or when she entered into the agreement.

On the necessarily incomplete state of the evidence before me, my strong provisional view is the applicant has very poor prospects of succeeding in her proposed appeal.

As to the balance of convenience, the respondent deposed that at the end of May 2013 he owed nearly $1 million on a mortgage of his house property and was required to make payments in excess of $5,000 per month. He deposed that the payment of the mortgage was a significant financial burden. He had to borrow money from relatives to finance the litigation and to make the necessary mortgage payments. Understandably, he wished to take possession of the property so that he could sell the property and discharge the mortgage debt.

As to the applicant's position, it is a matter of great concern and regret that in her obviously vulnerable position she has been unable to find appropriate accommodation and is or may be at risk of being left on the street, or at best in a women's shelter. However, although the applicant contends that she will be obtaining work to pay for the mortgage each month and to pay for the arrears owing since January this year, the evidence does not allow for any confidence in this prediction.

Having regard to the very significant delays which have occurred to date, the applicant's unconditional assurances to the applications judge that she would vacate the property before now, my provisional view that the applicant has very poor prospects of success in the appeal, and the very substantial past and potential disadvantage to the respondent of granting a stay in circumstances in which his legal entitlement to possession was vindicated at a trial, there is in my opinion no substantial case for extending the stay.

I would therefore refuse the application for a stay pending determination of the appeal.

...

I perhaps should have said in my reasons that you did refer to your argument that the judge owed you a duty of care. A difficulty with that is that a judge must remain completely impartial as between the parties and to say that a judge owed a duty of care to one party would destroy that impartiality. The system works on the basis that the parties' lawyers represent their interests at the trial.

...

The respondent has asked for costs of the application. It seems most unlikely that the costs will be recoverable in view of Ms CNT's straitened financial circumstances. I see no basis for declining to make the order. I order the applicant to pay the respondent's costs of and incidental to the application.