

# SUPREME COURT OF QUEENSLAND

CITATION: *Murdoch v Lake* [2014] QSC 142

PARTIES: **MALCOLM ALEXANDER STEPHEN MURDOCH**  
(applicant)

**v**

**STEPHEN MAURICE LINTON LAKE**  
(respondent)

FILE NO/S: BS9994/14

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 26 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 19 June 2014

JUDGE: Alan Wilson J

ORDER: **The order of the court is that, upon the undertaking of the defendant, by the defendant's counsel, the amount of the costs order made by the Registrar on 16 May 2014:**

- 1. will be paid into HopgoodGanim's trust account to be invested in an interest bearing account in the names of the plaintiff and the defendant;**
- 2. not be paid out until 14 days after the determination of the appeal in proceedings no 10070/13 in the Queensland Court of Appeal; and**
- 3. when paid out, be paid out to the party entitled to it following the determination of the appeal in proceedings no 10070/13 in the Queensland Court of Appeal together with any interest accrued thereon at that time.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – OTHER MATTERS – OTHER CASES – where the applicant and respondent have been engaged in complex litigation since 2010 based on events that occurred in 2003 – where the applicant brought a number of applications to amend pleadings – where upon bringing the third application the application was refused and the applicant's claim was

dismissed – where costs have been assessed and judgment entered for the defendant – where the applicant is in the process of appealing that decision in the Court of Appeal – where the applicant has also given instructions to have the costs assessment reviewed – where the applicant seeks a stay on the enforcement of that costs judgment pending the decision on appeal or the outcome of the costs review – whether a stay should be granted pending the outcome of either the appeal or the costs review

*Uniform Civil Procedure Rules 1999 (Qld)* r 738, r 740, r 741, r 742, r 761, r 800

*Cook's Construction Pty Ltd v Stork Food Systems Australia Pty Ltd* [2008] 2 Qd R 453

*Cronney v Nand* [1999] 2 Qd R 342

*Murdoch v Lake* [2013] QSC 268

*Murdoch v Lake (No 2)* [2013] QSC 279

*Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349

COUNSEL: Dr A J Greinke for the applicant  
M R Hodge for the respondent

SOLICITORS: Morgan Conley Solicitors for the applicant  
HopgoodGanim for the respondent

- [1] **Wilson J:** These proceedings relate back to 2003, and events that happened in a company called GBST Holdings Pty Ltd. Mr Murdoch says he was a director and shareholder of the company who was wrongfully induced to resign his directorship and relinquish his shares for a significant undervalue and that Mr Lake, the CEO, was instrumental in that.
- [2] Mr Murdoch had brought an action<sup>1</sup> claiming oppression as a shareholder, and for damages for wrongful dismissal. It was settled by a deed of 20 September 2004. Mr Murdoch received money for his shares based upon them being ‘non-marketable’, and paid by the company itself.
- [3] Later, he says, he discovered that Mr Lake and board members of GBST had reached a secret understanding before the deed was signed to, in the commonly used expression, take the company public via an IPO.<sup>2</sup> Had he known this, Mr Murdoch alleges, he would not have signed the deed. This wrong, he says, led him to relinquish his shares under the deed for many millions of dollars less than their true value.
- [4] He began this action in 2010. His original statement of claim was amended twice. An attempt to amend it a third time (i.e., to deliver a fourth amended statement of claim) was rejected by Margaret Wilson J last year, her Honour going so far as to dismiss the Mr Murdoch’s claim altogether: *Murdoch v Lake* [2013] QSC 268. On 15 October 2013 Wilson J also ordered that Mr Murdoch pay Mr Lake’s costs of the proceeding on the standard basis: *Murdoch v Lake (No 2)* [2013] QSC 279.

---

<sup>1</sup> BS 5402/03.

<sup>2</sup> Initial Public Offering.

- [5] Both decisions have been appealed. The appeal was heard on 23 April 2014, and the decision is still reserved.
- [6] Meanwhile Mr Lake's costs have been assessed and, on 16 May 2014, he entered judgment for the assessed amount of \$280,567.57.
- [7] Mr Murdoch has apparently given instructions to have the costs assessment reviewed by the Court under *UCPR* r 742, but his solicitor says he cannot do so until the assessor provides written reasons under r 738. Certainly, without the reasons the review could not proceed: r 742(3). There is, as will be seen, some skirmishing around Mr Murdoch's request for reasons and whether he has to pay the assessor's costs of providing them.
- [8] In this application Mr Murdoch seeks to stay enforcement of the costs judgment pending the later of the decision in the appeal, or the costs review. He offers, by his counsel, to pay what he says is the undisputed portion of the assessed costs (\$80,000) into court and to undertake not to encumber his real property. Mr Lake has counter-proposed that the full amount of the assessed costs be paid into his solicitor's trust account and not disbursed pending the outcome of the appeal.
- [9] There are a number of rules touching Mr Murdoch's application. Rule 740(3) relates to the judgment for costs, and provides that the court may stay enforcement pending the review. Rule 761 says that an appeal does itself act as a stay, but gives both the Court of Appeal and Trial Division judges power to order one. Finally, r 800 allows the court to stay the enforcement of all or part of "money order".<sup>3</sup>
- [10] The discretion arising under each rule (and the court's inherent jurisdiction to grant a stay) is unfettered. The applicant bears the onus of showing that it is an "appropriate" case for a stay to be granted.<sup>4</sup> As Keane JA (as his Honour then was) said of the discretion under r 761:<sup>5</sup>
- "... [I]t will not be appropriate to grant a stay 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 is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders."*
- [11] His Honour went on, in that case, to consider some of the factors relevant to the test: prospects of success in the appeal; whether enforcement of the order would render the appeal nugatory; and, the risk of irremediable harm to the applicant.
- [12] Keane JA disavowed the proposition that an applicant for a stay pending appeal must show *special or exceptional circumstances*,<sup>6</sup> but, in another decision of the Court of Appeal under r 800 the President spoke of a test, in those terms.<sup>7</sup> It seems to me, with respect, that the use of the phrase by the President involved no more than an emphasis upon the heavy burden facing an applicant who is attempting to

---

<sup>3</sup> Which would include the judgment for costs here: see, definition of 'money order': *Supreme Court of Queensland Act 1991*, Schedule 2.

<sup>4</sup> *Croney v Nand* [1999] 2 Qd R 342 at 348.

<sup>5</sup> *Cook's Construction Pty Ltd v Stork Food Systems Australia Pty Ltd* [2008] 2 Qd R 453 at 455.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349.

persuade the court that, in the words of Keane JA, a successful party is not entitled to the fruits of its judgment.

- [13] It is said, for Mr Murdoch, that the factors which warrant the exercise of the discretion in his favour include his prospects in the appeal; the probability that the delay, in respect of both the outcome of the appeal and the costs review, will be short; and, the hardship he will suffer if he is required to pay the whole amount now.
- [14] It was also suggested in the course of argument that he has reasonable prospects of success in the review of the costs assessment, and that Mr Lake (or his solicitors) added to his burdens by entering judgment for the costs assessment on 16 May 2014 but not serving that judgment until 2 June.
- [15] On the first point, Mr Murdoch's solicitor deposes to his opinion that the cost assessor has made at least two fundamental errors: failing to appreciate the basis upon which costs are assessed, and failing to give proper weight to some 200 pages of objections lodged against the costs on Mr Murdoch's behalf during the process of assessment. It is impossible to form any useful view about that dispute. An error of the first kind by an assessor would be surprising; and, it is reasonable to assume the objections were taken into account. The history of the matter in the court, with its long duration and many applications, suggests that the costs would be substantial. Mr Murdoch has not produced persuasive evidence that the assessment is likely to be significantly reduced on review.
- [16] As to the second point, the judgment for costs was not enforceable until 14 days after it had been taken out (r 741(3)); and, of course, Mr Murdoch had already had the costs assessor's certificate since 7 May.
- [17] In the face of that complaint by Mr Murdoch it is material that he has not acted speedily to pursue the review of the costs assessment which, he says, he will seek. He had 21 days after receipt of the costs assessor's certificate to ask for reasons from the assessor, and waited until the 20th day to do so. There has also been some correspondence, fairly described as desultory, between his solicitors and the costs assessor about payment of the assessor's reasonable costs of preparing the reasons: r 738(3).
- [18] It is material to the discretion that, for the purposes of this application, Mr Lake accepts that Mr Murdoch had an arguable case on appeal. In light of the fact the appeal has been heard, and the decision reserved, any other contention would be surprising.
- [19] The matter which is really central to, and most vivid in, Mr Murdoch's application is the hardship he says he will suffer if he is ordered to pay all the costs now. On any view the costs judgment amount is substantial, but the question of hardship has to be considered in light of the observation of Keane JA in *Cook's Construction* that the "... power to grant a stay should not be exercised merely because immediate compliance with orders of the court is inconvenient for the party which has been unsuccessful in the litigation".<sup>8</sup>

---

<sup>8</sup> *Cook's Construction Pty Ltd v Stork Food Systems Australia Pty Ltd* [2008] 2 Qd R 453 at 455.

- [20] Mr Murdoch has not given any detailed information about his financial circumstances, or why payment into the defendant's solicitor's trust account would cause him hardship. The limited evidence advanced for him suggests inconvenience, rather than actual hardship: he says, shortly, that to pay \$280,000 would require him to obtain either "*secured borrowing*", or sell his house in a Brisbane suburb. He only raised that matter, however, very late in the events which followed the entry of judgment for costs.
- [21] On 10 June 2014, five days after he filed his application for a stay, his solicitors argued that the stay was justified on the basis that Mr Lake lived overseas and that recovery might prove next to impossible if he elected not to return to Queensland. It was at that point that Mr Lake offered to have the money paid into an interest bearing trust account. It was not until the afternoon before the hearing that Mr Murdoch advanced the submission, through his solicitor, that he did not have sufficient cash available to pay the judgment and would need to arrange a mortgage over his home, or sell it; and that this would cause him significant cost and inconvenience.
- [22] That is different from what had been said by his solicitor in an earlier letter of 5 June 2014 - that Mr Murdoch was "... *a person of substance, owning real property in the State of Queensland with sufficient equity to well and truly meet an eventual costs order*".<sup>9</sup>
- [23] These contradictory submissions, in combination with the lack of any detailed information about Mr Murdoch's financial circumstances, leave the question of hardship and the possible prejudice which might flow from it vague, and uncertain.
- [24] In light of the principles set out in the decisions of the Court of Appeal mentioned earlier and the substantial burden resting upon an applicant for a stay, it cannot be said that Mr Murdoch has met the onus upon him of showing that this is a case in which one is warranted, or necessary. Mr Murdoch had to show something more than a risk of inconvenience, or some other factor making enforcement inappropriate in this case, to attract the discretion.
- [25] Nor has he shown that the circumstances warrant an order that the competing interests of the parties should be addressed by an order of the kind he proposes - i.e., that he should be obliged to pay something around one-quarter of the assessed costs, and no more, as a form of security while other events are awaited. That would be, in effect, a temporary stay of a substantial part of the judgment when, again, there are no compelling grounds for a stay at all.
- [26] That said, any risk or disadvantage he might be said to face while he awaits the outcome of the appeal, and the review of the costs assessment, can be adequately addressed by an order of the kind proposed by the defendant: i.e., that the amount of the assessed costs be paid into an interest bearing trust account held by the defendant's solicitors, in the names of the plaintiff and the defendant, not to be paid out until 14 days after the determination of the appeal to the party entitled to it after the judgment of the Court of Appeal is delivered.

---

<sup>9</sup> Affidavit J H Pitman sworn 11 June 2014, exhibit JHP8.