[2015] QCA 64

COURT OF APPEAL

HOLMES JA

Appeal No 10232 of 2014
SC No 9012 of 2006

SALVATORE CONDO
MARIA CONDO **Applicants**

v

TIEN NGUYEN
TUOI DANG **Respondents**

BRISBANE

THURSDAY, 23 APRIL 2015

JUDGMENT

HOLMES JA: The applicants seek a stay of a judgment given for equitable compensation arising out of what the trial judge found to be an agreement between them and the respondents, by which the applicants were to transfer a half interest in their property at Esk to the respondents in exchange for their undertaking the running of the property, establishing a vineyard on it and committing the sum of $140,000 to improvements and maintenance.

The parties had compromised parts of their claims, each agreeing by deed not to require the other to account for moneys received and profits made from the sale of agricultural produce from the land. The trial judge struck out a paragraph of the amended defence and counterclaim which included an allegation by the applicants that the respondents had not

accounted to them for income generated from their use of the property, on the ground that it was the subject of the deed of compromise.

The trial judge preferred the evidence of the respondents, and found that they had proved expenditures totalling some $217,000 made by them in reliance on the applicants' assurance that they would transfer a one-half share in the property to them. She awarded equitable compensation in that amount, with interest. The judgment is appealed on the grounds which are, that the trial judge erred in failing to have proper regard to evidence going to the proper measure of equitable compensation and that she erred in applying the principles of equitable compensation in calculating the compensation to be paid. Other grounds of appeal have previously been abandoned.

In February this year, the respondents sought security for the costs of the appeal. They had by that stage served bankruptcy notices with which the applicants had failed to comply. On the hearing of the security for costs application before Gotterson JA, it emerged that three of the five grounds of appeal were abandoned and that the live issue was whether the trial judge should have ordered compensation of $217,000 (the amount expended in reliance on the assurance) or $140,000 (the amount the subject of the agreement to transfer the half interest in the property).

I should say, however, that Mr Hall here today argued that there may still be a surviving argument in respect of the $140,000, that the compromise would not preclude an accounting of the profits that the respondents had made on the farm, in order to set it off against the $140,000. He distinguishes between taking an account of profits for that purpose, and taking an account in order to confer a separate remedy. I am unconvinced that that argument has any prospect of success, and it does not seem, I must say, particularly consistent with the way matters were put before Gotterson JA.

At any rate, Gotterson JA observed that the observations of the majority of the High Court in *Sidhu v Van Dyke* (2014) 251 CLR 505, left open the question of whether equitable compensation could exceed the value of the land where a promise to transfer was unfulfilled.

Gotterson JA, however, regarded it as significant that the respondents conceded a liability to pay $140,000, together with interest, as he understood matters, but had paid no part of it. He made an order for security for costs in an amount of $10,000. The respondents, I should say, have since filed creditors' petitions against the applicants which are presently adjourned to 29 April 2015.

In *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, Justice Keane made the following points with which the other members of the court agreed. Judgments of the trial division are not to be treated as provisional, and a successful party is entitled to the fruits of its judgment. Courts will not be disposed to delay the enforcement of court orders. The fundamental justification for doing so is to ensure that the orders which might ultimately be made are fully effective. And the question on a stay is whether the applicant would be irretrievably prejudiced if the stay were not granted and the appeal ultimately upheld. The prospects of success may weigh significantly in the balance of relevant considerations.

In *Cook's Construction*, the argument was that the failure to stay the judgment would lead to the receivership or liquidation of the appellant company. In that respect, the court observed that the receiver or liquidator could pursue any right the appellant had, if it assessed the prospects of appeal favourably. Similarly, in a Victorian Court of Appeal case, *Bresam Investments Pty Ltd v Shmee Pty Ltd* [2008] VSCA 251, the court did not accept the contention that an appeal would be rendered nugatory by the appellant's bankruptcy, because the trustee could elect to pursue it nonetheless, and it would also be open to the appellants to seek an extension of time for compliance with the bankruptcy notice.

I accept that the appeal, so far as it argues that compensation should not have been assessed in excess of the amount of $140,000, may have merit. It is also, in my view, certainly a powerful consideration in the balance of convenience that bankruptcy is likely to diminish the prospects of the appeal proceeding considerably. If the appeal concerned only the amount of judgment which exceeded $140,000 and the interest on that component, I would be

strongly disposed to stay the judgment pending appeal. But I cannot see any proper basis for a stay which extends to the entirety of the judgment.

The argument that some account of profits should be taken which would not in some way breach the compromise agreement so as to diminish the 140,000, which does seem previously to have been conceded to have been a proper amount for the judgment, is, in my view, so unconvincing as not to weigh in the balance of things at all.

A stay of the judgment in part would not prevent the bankruptcy proceedings continuing in relation to the balance of the judgment in excess of $140,000. That means that there really is no utility in a stay, and it means that the balance of convenience weighs against the granting of a stay. I refuse the application.

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HOLMES JA: The respondents should have their costs of the application.