[2016] QCA 227

COURT OF APPEAL

PHILIP McMURDO JA

Appeal No 7681 of 2016
SC No 5241 of 2016
SC No 6557 of 2015

JOHN ANDREW WILSON **Applicant**

v

CHRISTINE STRZELCYKOWSKI
LIONEL STRZELCYKOWSKI
GEORGE STRZELCYKOWSKI **Respondents**

BRISBANE

FRIDAY, 9 SEPTEMBER 2016

JUDGMENT

PHILIP McMURDO JA: These two applications arise from litigation between the applicant Mr Wilson, and his siblings, about their late father's estate and a house which is co-owned by the applicant, each of the three respondents and the father's estate in equal one-fifth shares.

There are two proceedings in the trial division from which the present applications come. In BS5241 of 2016 orders were made on 6 June 2016 for the appointment of trustees for sale. The property has not yet been sold; Mr Wilson continues to live in the house as he has for many years.

The other case – BS6557 of 2015 – concerns the validity of the father's will dated 17 January 2012 under which the residue of the estate was given to Mr Wilson. On 3 July 2015 the

respondents commenced this solemn form proceeding contending that it was a will which was made in 2000 under which the estate was given to Mr Wilson and the respondents in equal shares which was the last valid will of the deceased.

Although that case was on foot, Mr Wilson applied for probate of the 2012 will and through the registry a grant was made to him in common form in September 2015. On 6 June 2016 the same judge who made the orders for the sale of the house made interlocutory orders in the solemn form proceeding. It was ordered that – amongst other things – Mr Wilson should bring into the registry the common form grant of probate and that until further order there be no further steps in the administration of the estate. There were other orders made for interlocutory steps such as pleadings, affidavits and a mediation.

In the solemn form proceeding there is an application now to the Court of Appeal seeking a stay of those orders. That application was filed on 18 August beyond the appeal period. There is no application for an extension of time to appeal. There is presently no appeal to this court and there is therefore no basis for this court to grant a stay. In any case there is nothing in Mr Wilson's material or in what he has said which suggests any basis for an appeal and there were no circumstances suggested by him which would warrant a stay of any of these orders pending an appeal. Indeed, one of those orders – namely that for a mediation – is an order which Mr Wilson wishes to have performed by the parties but it is presently resisted by the respondents who say that they are without funds to attend a mediation. For these reasons the application in proceedings 6557 of 2015 must be refused.

In the other proceeding – that for the sale of the house – Mr Wilson filed an application in the Court of Appeal on 28 July 2016 seeking an extension of time to appeal and for a stay of the orders. The present question is whether the orders should be stayed. His application for an extension of time to appeal, if it is to be prosecuted, should be heard in the normal way before a court constituted by three judges.

Again, until there is an appeal there is no basis for this court to grant a stay. And again, in this case, his material and arguments suggest no tenable ground of appeal. The nature of a court's

discretion under s 38(1) of the *Property Law Act* 1974 is confined in that ordinarily the discretion will be ordered in favour of the appointment of trustees for sale, essentially because the remedy under s 38 is a valuable ingredient of a co-owner's proprietary interest. In *Goodwin v Goodwin* [2004] QCA 50, Justice McPherson with the agreement of the other members of the court, said:

> "It is well settled that to an application under s 38 of the *Property Law Act*, as this is, there is practically speaking no defence, and none has been suggested or was suggested at the hearing before the District Court in Kingaroy. The judge who hears an application of this kind has nominally a discretion whether to make an order under the section, but there was nothing before his Honour to activate the discretion in this case in such a way as to require or lead the learned Judge to refuse the order that was sought and which he made."

Moreover, Mr Wilson conceded, when appearing before the primary judge, that such an order should be made. He was without legal representation but it appears that he did have some advice about the matter. He provided to the primary judge a note setting out his position which her Honour placed on the file. In that note he wrote:

> "Each of us – his children – will have a one-fifth interest in the property and I know I can be forced to sell the home so that my sister and my brothers can have their share in cash. I am a pensioner, presently 69 years of age and don't want to leave my home of all these years. My father left his one-fifth share to me and I would like to purchase the other three-fifths interest in place of my sister and my brother's subject to my obtaining finance."

So Mr Wilson wishes to retain the house and obtain finance to purchase the interest of his siblings. That can be done notwithstanding the appointment of the trustees but of course his practical difficulty is likely to be the dispute about the estate and therefore about the ultimately ownership of the one-fifth share which belonged to his late father. That dispute ought not to delay the realisation of the property as most of the co-owners sought by this proceeding.

For these reasons the application to stay the orders made in proceeding 5241 of 2016 must be refused. As I have said that will leave for further determination if necessary, the application in that proceeding, for an extension of time in which to appeal.

The orders are that the applications for a stay in each of these proceedings be refused.

…

PHILIP McMURDO JA: The remaining questions concern the costs of these applications. The trustees are entitled to their reasonable costs and expenses incurred in relation to their appointment as trustees to be paid from the proceeds of sale, according to the orders made by the primary judge. Today the trustees seek an order that their costs in this application be their costs within paragraph 2 of those orders.

It was submitted for the other respondents to that application, that is, that in 5241 of 2016, that this would be unfair without a further order that those costs be effectively borne by Mr Wilson; however, for reasons which I'm about to express in relation to the costs in the other proceeding, I am not persuaded to make such a further order in their favour. Therefore, in 5241 of 2016, the order will be that the costs of the trustees of this application shall be recoverable as costs and expenses according to paragraph 2 of the order made on 6 June 2016, and that otherwise there be no order for costs of that application.

Turning to proceeding 6557 of 2015, it is obvious to say that the application for a stay was without merit, and ordinarily, the respondent to such an application would be given its costs. However there are particular circumstances in this case which have led me to conclude that that could result in an injustice and that a different order is warranted. This is, on any view, a relatively small estate, and the amount which is likely to be in dispute, in a practical sense, as a result of the contest about the 2012 will is likely to be low compared with the high costs of litigation in the Supreme Court. The case is one which is eminently suited to alternative dispute resolution. The Court has made an order on the 6th of June for a mediation. As I mentioned in my earlier reasons, that is amongst the orders for which Mr Wilson sought a stay, although in his oral argument, he made it clear that he wished to engage in the mediation and complained that it had not occurred. I was informed by counsel for the respondents to the application in that proceeding that there were essentially two reasons why the mediation, which was ordered to take place on or before 26 August 2016, had not occurred.

The first was a complaint that Mr Wilson had not complied with paragraph 2 of the orders of the primary judge, whereby he was to file and serve an affidavit in certain respects. I'm in no

position to determine whether he has complied with that order, but in any case, the order for mediation was not made conditional upon his compliance with that order. It might be said that a mediation would be assisted by such compliance if it has not yet occurred; but the fact is that the parties are presently in breach of the order requiring that mediation.

The other explanation from the respondents' counsel was that his clients are impecunious, such that they are unable to afford the mediator's fee. That was disputed as a matter of fact by Mr Wilson. Again, I'm unable to determine that question. But the order was made for mediation in terms that the mediator's cost would be paid from the estate, and if there was this practical impediment to a mediation occurring before the dispute as to the estate was resolved via settlement or otherwise, the respondents ought to have informed the primary judge.

It does seem to me at present that it is the respondents who have, in a practical sense, resisted the conduct of a mediation to this point, and that there is more than a theoretical possibility that had the mediation occurred as ordered, the present applications would have been unnecessary. In those circumstances, in my view, it would be unjust to visit the applicant, Mr Wilson, with the costs of the applications, and the better course is to order, as will be ordered, that the costs of the parties in the application in 6557 of 2015 be in each case that party's costs in the proceeding.