SUPREME COURT OF QUEENSLAND

CITATION:	*Elphick* v *MMI General Insurance Ltd & Anor* [2002] QCA 347
PARTIES:	**JASON DREW ELPHICK** (plaintiff/respondent) **v** **MMI GENERAL INSURANCE LIMITED** ACN 000 122 850 (first defendant/applicant) **GRAHAM JOSEPH ELLIOT** (second defendant)
FILE NO/S:	Appeal No 7316 of 2002 SC No 22 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	6 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2002
JUDGE:	Jerrard JA
ORDERS:	**1. That further enforcement of the orders made by His Honour Justice Dutney on 27 June 2002 be stayed conditioned upon:** **(a) the applicant MMI General Insurance Limited making application within seven days of the date hereof for an order setting off the amount of $40,000.00 of the damages it was ordered on 27 June 2002 to pay to the respondent and the respondent's costs it was ordered on 9 July 2002 to pay against its costs the respondent was ordered on 9 July 2002 to pay; and** **(b) further conditioned upon the applicant prosecuting that application without delay.** **2. The stay ordered herein be in force until judgment on the application described herein.** **3. That the applicant pay the respondent's costs of and incidental to this application such costs to be assessed on the standard basis.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where applicant appeals against judgment of Supreme Court which refused application for stay of execution – where applicant originally brought application for stay pursuant to r 761(2) or r 800 *Uniform Civil Procedure Rules* 1999 (Qld) – where applicant conceded during hearing that neither rule could apply and that inherent jurisdiction of this Court would suffice – where applicant/defendant amended application during hearing to request an order staying execution of the orders of the learned trial judge conditioned upon the prompt application for an order setting off its assessed costs payable by the respondent/plaintiff against the sums it is required to pay the respondent/plaintiff

Rules of the Supreme Court 1900 (Qld), O 91 r 11
Uniform Civil Procedure Rules 1999 (Qld), r 761(2), r 800, Ch 9 Pt 5

Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd [1999] 2 Qd R 458, considered
Edwards v Hope (1885) 14 QBD 922, cited
JC Scott Consturctions v Mermaid Waters Tavern Pty Ltd (No.2) [1983] 2 Qd R 255, followed
Pringle v Gloag (1879) 10 Ch D 676, considered
Puddephatt v Leith (No.2) [1916] 2 Ch 168, cited
Reid v Cupper [1915] 2 KB 147, cited

COUNSEL: FG Forde for the applicant
G Deihm for the respondent

SOLICITORS: McMahons National Lawyers for the applicant
Biggar & Maguire for the respondent

[1] **JERRARD JA:** This matter was an application by MMI General Insurance Limited for an order staying the enforcement of a judgment of His Honour Justice Dutney dated 27 June 2002. The respondent was the successful plaintiff in an action for damages for personal injuries, in which His Honour gave judgment for the plaintiff on 27 June 2002 in the amount of $97,008.24. On 9 July 2002 His Honour ordered that the applicant/defendant pay the respondent/plaintiff's costs of and incidental to the action on the District Court scale until 25 October 2001, and that the respondent/plaintiff pay the costs of the first and second defendants of and incidental to the action from that date onwards.

[2] The respondent/plaintiff may well be one of those apparently increasingly large groups of persons who have the misfortune to succeed in an action for damages for personal injuries. I say this because the reason for the present application is that the applicant/defendant estimates that the plaintiff's costs it will be required to pay will be in the range of $10,000.00 to $15,000.00. It estimates this on the basis that the respondent/plaintiff's solicitor has sworn to a calculation that the solicitor and own client costs of the plaintiff will be approximately $20,000.00 as at the date 25

October 2001; and all up a total amount of about $84,000.00. The applicant calculates the plaintiff's party and party costs up to 25 October 2001 of $10,000.00 to $15,000.00 by reference to the plaintiff's calculated solicitor and own client costs in that same period.

[3] Assuming those costs are $15,000.00 the applicant will be required to pay the plaintiff a total of $112,008.24. The plaintiff's success in the action has resulted in his having a liability to pay a HIC refund of $1,974.20, and a refund to Centre Link of $14,683.20. Adding those two amounts to the plaintiff's solicitor and own client costs, (calculated by those solicitors at $84,394.02) gives a total of $101,051.42. This will leave the plaintiff with $10,956.82 from the amount the applicant is obliged by orders to pay the plaintiff, and the applicant assesses its likely party and party costs for the period 25 October 2001 to the date of judgment to be in the region of $50,000.00 to $60,000.00. If that assessment is correct, the plaintiff's success in his action will leave him with a net overall debt, to the applicant for its costs, of between $40,000.00 and $50,000.00.

[4] It is that apprehended net debt which underlies this application. The applicant applied on 26 July 2002 to Dutney J for an order staying execution of his judgment given one month earlier, pending an assessment of costs. After referring to the power to stay a judgment granted by Rule 800 of the UCPR 1999 and to the terms of that order, the learned judge dismissed the application. He observed that even if the plaintiff was presently impecunious, that did not mean that he was going to remain so for the indefinite future. No application was made to His Honour on that date or at any other time for an order setting off the damages and costs the plaintiff was awarded against the applicant's costs which the plaintiff was ordered to pay.

[5] The applicant filed an entirely uninformative notice of appeal on 12 August 2002, against the order made 26 July 2002 dismissing the application for a stay. The orders the applicant asks this court to make on appeal are that "enforcement of the judgment of His Honour Justice Dutney QC dated 27 June 2002 be stayed." The application, as worded, would appear to be for a permanent stay of the order. This is despite the fact that the applicant's outline of argument informs the court that it has paid a total of $57,008.24 pursuant to that order to the respondent/plaintiff, that being $16,6057.40 by way of statutory refunds plus a further amount of $40,351.08. $40,000.00 remains unpaid. It appears that the applicant estimates that the costs ordered in its favour will exceed the costs order made in the plaintiff's favour by that amount. That estimate is not reflected in any order the applicant asks this court to make if its appeal succeeds.

[6] The applicant at first argued that the order for a stay sought from this court could be made pursuant to either Rule 761(2) or Rule 800 of the *Uniform Civil Procedure Rules* 1999 (Qld). However, counsel for the applicant conceded in his submission that neither rule could apply. He submitted that the inherent jurisdiction of the court would suffice to allow an order preventing what he submitted was the injustice which would result from the applicant effectively paying all the solicitor and own client costs of the respondent/plaintiff, when the applicant had taken the steps necessary to protect itself pursuant to the formal offer provisions in Chapter 9 Part 5 of the UCPR. It had made an offer which the respondent/plaintiff had not accepted and the respondent did not obtain a judgment more favourable to him than that offer. For that reason the judge ordered that the plaintiff pay the applicant's costs after the date of the offer. The applicant's central submission was that the steps it

took pursuant to the rules, to protect its position and to bring the plaintiff to the bargaining table, would be defeated unless the plaintiff's liability to it for its costs could be set off against the plaintiff's damages (and costs).

[7] Counsel for the respondent made the point that there had never been any application made for any such order setting off those amounts, when ascertained. The respondent's counsel accepted that this court does have the inherent jurisdiction to make such orders for set off. That jurisdiction was identified and described in cases cited by the applicant, including *Reid v Cupper* [1915] 2 KB 147 at 152, *Edwards v Hope* (1884 – 85) 14 QBD 922 at 926 and *Puddephatt v Leith (No. 2)* [1916] 2 Ch 168 at 178; and was described and exercised by Jessel MR in *Pringle v Gloag* (1878-79) 10 ChD 676 at 679-680. The inherent jurisdictions to make such orders established in those cases, and conceded by the respondent, is not affected by the fact that the provision previously Order 91 Rule 11 of the *Rules of the Supreme Court* 1900 (Qld) was not reproduced in the UCPR. That order had the effect that a set off of sums to be paid by order by each party occurred without any further order for that purpose being necessary, whereas the absence in the UCPR of such a rule has the result that the previous inherent jurisdiction applies. Exercise of that jurisdiction does require an order setting off those amounts.

[8] To succeed on an application for a stay the applicants must show good reason for the stay to be granted[1] and that it is an appropriate case in which to grant a stay.[2] Those authoritative decisions in this court establish that an applicant should demonstrate:

- A good arguable case on appeal.
- That the applicant will be disadvantaged if a stay is not ordered.
- That competing disadvantage to the respondent should the stay be granted, does not outweigh the disadvantage suffered by the applicant if the stay not be granted.

[9] An applicant is usually required to show that its success on appeal will be rendered nugatory if the order appealed from not be stayed in the interim. In this matter, if the applicant has good arguable prospects of success in its appeal against the judgment of Dutney J refusing to stay his own order, then success on the appeal would be rendered nugatory if no interim stay were ordered. It seems unlikely that if the applicant's estimates of its costs are correct the respondent will have any funds with which to pay those costs. This is because the respondent's solicitors seem not to have revised the estimate of the solicitor and own client costs they will seek from the respondent.

[10] The applicant has not demonstrated a good arguable case on appeal. The respondent's solicitor filed an affidavit on 25 July 2002 and read before Dutney J, in which that solicitor calculated the applicant's costs after 25 October 2001 and until judgment as being the amount of $15,663.00. That very precise calculation has not been challenged in reply by any affidavit evidence filed by the applicant. This means that the critical fact on which the applicant relies (the amount of its own costs) may not exist. Whether it does is a matter in dispute. It being disputed weakens any case the applicant has for a stay.

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1 *J.C. Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255.

2 *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd* [1999] 2 Qd R 458.

[11] What the applicant really seeks is an order for a set off of its assessed costs payable by the plaintiff against the sums it is required to pay him. At the end of his submission counsel for the applicant asked for an order staying execution of the orders of 27 June 2002 for a limited period, within which the applicant would apply to Dutney J for an order setting off various amounts. The applicant accepted it should pay the respondent's costs of and incidental of the hearing before myself. Counsel for the respondent acknowledged that a stay conditioned upon a prompt application for an order for set off, and in force only until that application was either dismissed or allowed and accompanied by the order for costs, would not disadvantage the respondent.

[12] I consider I should make that order on this amended application. This is because it allows the applicant to seek the order it ought to have sought in the first place, which if granted would produce the result approved in *Pringle v Gloag* (supra). The respondent did not consent to that order, but did not really oppose it. I am satisfied that in the circumstances it is the appropriate order to make. The stay ordered will require the applicant to prosecute the application for a set off with promptitude. I am satisfied that if the application for a set off be dismissed the stay should be extinguished. This is because the applicant has simply not demonstrated an arguable case for anything other than an order for a set off, and certainly not for its prospects of success on the instant appeal.

[13] **I order:**

1. That further enforcement of the orders made by His Honour Justice Dutney on 27 June 2002 be stayed conditioned upon:
   (a) the applicant MMI General Insurance Limited making application within seven (7) days of the date hereof for an order setting off the amount of $40,000.00 of the damages it was ordered on 27 June 2002 to pay to the respondent and the respondent's costs it was ordered on 9 July 2002 to pay against its costs the respondent was ordered on 9 July 2002 to pay; and
   (b) further conditioned upon the applicant prosecuting that application without delay.
2. The stay ordered herein be in force until judgment on the application described herein.
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