

COURT OF APPEAL

McMURDO P

Appeal No 5973 of 2006

QUINN VILLAGES PTY LTD
(ACN 000 776 189)

Respondent/Plaintiff

and

HENRY DESMOND MULHERIN

Applicant/Defendant

as trustee for
THE HD MULHERIN FAMILY TRUST No.4

Applicant/Defendant

BRISBANE

..DATE 03/08/2006

ORDER

MR A J H MORRIS QC, with him MR I ERSKINE (instructed by Gateway Lawyers), for the applicant

MR S COUPER QC (instructed by Plastiras Lawyers) for the respondent

THE PRESIDENT: This is an application for a stay from part of an order given by Mr Justice Chesterman in the trial division on 5 July 2006. The stay now relates only to paragraph 2 of the order that the applicant within 30 days provide to the respondent a release of mortgage in registrable form together with all such documents as are necessary to effect release of the mortgage granted by the respondent in favour of the applicant over the land described as lot 41 on RP 151487 County of Canning, Parish of Maroochy, title reference 15776181.

The parties have agreed to do all they can to expedite the hearing of the appeal. The original action was on the trial division's commercial list.

The onus is on the applicant/appellant to justify why the stay should be granted. The applicant contends that if the mortgage is released he will not be protected so that, if the appeal is successful, he will lose his priority as creditor over the sole asset of the respondent company and as a result the appeal would be rendered nugatory.

The respondent contends that there are no real prospects of the appellant being successful in the appeal in respect of order 2 of the primary judge. I am not prepared, for the purposes of this application, to accept that the applicant has

no prospects of success on that point in the appeal, despite some apparent merit in Mr Couper's arguments.

I am also finally persuaded that there is a prospect, albeit somewhat remote, that if order 2 is not stayed it is possible that the applicant/appellant's interests in the land the subject of that order could be unprotected, that is, that if the applicant/appellant is successful in the appeal in respect of para 2 of the order subject to appeal and the mortgage is set aside, he may lose a priority over the sole asset of the respondent company rendering his success in the appeal nugatory.

For that reason I am prepared to grant the stay in respect of paragraph 2 of the primary judge's order. I order that paragraph 2 of the primary judge's order of 5 July 2006 is stayed until the determination of the appeal or further order.

...

THE PRESIDENT: The costs of and incidental to this application are costs in the appeal.

...

THE PRESIDENT: The respondent's undertaking that the respondent is prepared to give to the applicant's solicitors 14 days notice of any intention to encumber or dispose of the land the subject of the mortgage is noted. That undertaking is the reason for the applicant/appellant no longer pursuing a

stay in respect of paragraph 1 of the primary judge's order
the subject of the appeal.

Liberty to apply on two clear days notice to the other side.
