COURT OF APPEAL

JERRARD JA

Appeal No 7093 of 2006
DC No 651 of 2006

AY (respondent/plaintiff)

v

MAR (applicant/defendant)

BRISBANE

..DATE 26/09/2006

JUDGMENT

MR L M DOLLAR (instructed by Baker O'Brien Toll) for the respondent

APPLICANT conducted his own case

JERRARD JA: This proceeding is an application for a stay of orders made in the District Court on 25 July 2006. Very briefly, the background to those orders is as follows. The applicant today, MAR, was the defendant in proceedings in the District Court brought by his ex de facto partner, one AY.

Those two people had lived in a de facto relationship for some seven years from 1996 until 2003 and they have a child. The proceedings in the District Court were substantially concerned with the orders that should be made about the ownership of a house in Bundaberg.

MAR had bought that house in September 1998, paying some 58 per cent of the total purchase price in one lump sum which largely came from a compensation settlement in his favour following a personal injury. He had been, and still does, paying the remaining mortgage debt on the property on a monthly basis.

The order made by the Court on 25 July of this year was the second order made in settlement of that dispute. The first order was made on 5 June and that ordered that MAR vacate the house, give the keys to his ex-partner's solicitors and that that be done on or before 30 June of this year. Those orders then required and authorised her to sell the property and at

that time it was ordered that the parties each receive 50 per cent of the net proceeds of sale.

However, an application was subsequently brought on and heard on 25 July by the same Judge. The information put before that Judge was that on or about 29 or 30 June the house had been substantially damaged by the removal of most of its external and some of its internal walls and its value had been diminished by at least $105,000. The value had previously been estimated at about $175,000.

MAR was not present on the occasion of that second hearing on 25 July and his appeal against the orders made on that day is principally on the ground that he had not been served with the documents giving him notice that the hearing was being brought on.

The applicant/plaintiff's claim, heard on 25 July, was essentially that MAR was probably responsible for the damage to the house and that therefore the orders that were made on 5 June should be varied in her favour.

The learned Judge hearing the application was persuaded by an affidavit of service, filed the day before from the applicant/ plaintiff's solicitor, that he had been sent on 18 and 19 July, both to his mother's address in New South Wales and to his address for service at the premises in Bundaberg, notice of the proceedings. The Judge accordingly proceeded to hear the matter.

The Judge came to the conclusion that in the circumstances it was highly probably that MAR was responsible for damaging the house and said that in the proceedings heard by the Judge in June, MAR had been "recalcitrant, uncooperative and unrealistic in the outcomes that he sought."

The Judge recorded that MAR had urged that his ex-partner receive nothing from the property settlement. I mention, in the interests of fairness, that MAR has told me today that he had not read those reasons for judgment until last night when they were served on him and accordingly he's had no opportunity to reply by way of affidavit material to the finding that it was wholly probable he caused the damage.

Continuing with the narrative, the learned Judge accordingly amended the order previously made, exercising the powers given by section 334 of the *Property Law Act 1974* (Qld) and ordered that all of the residue of the proceeds of sale should go to the applicant/plaintiff. The Judge did so on the grounds that having found MAR responsible for the damage already done to the value of the property, MAR had diminished its value by a larger sum than what would have gone to MAR had the property been sold.

The Judge also ordered that MAR pay the cost of the application heard on 5 June and the costs of the application heard on 25 July on an indemnity basis. MAR has filed a notice of appeal against the orders made on 25 July, and on 1

September he filed an application for, amongst other things, a stay of those orders.

His notice of appeal makes clear that he has assumed that if the matter continues through litigation, ultimately orders will be made that the property be sold. He said in argument today that he does not contest, or will not contest, a proposition that the net benefit, after repayment of the approximately $50,000 debt still owing to the bank, should go to the applicant/plaintiff.

What he wants is the right to participate in the sale itself. He makes a point that he bought the property, he remains liable for the mortgage debt and liable for the rates. The local Council communicates with him as owner and held him responsible for the final demolition of the unsafe structure which remained after it was damaged on or about 30 June.

In the circumstances his general position on all of that is not unreasonable for the reasons that he's given, but the issue is whether or not he has shown a sufficiently good reason to stay the order made on 25 July and whether he has established that this is an appropriate case for the exercise of a discretion in favour of the stay.

I have taken that test from the judgment of the New South Wales Court of Appeal in the often quoted decision in *Alexander v Cambridge Credit Corporation* (1985) 2 NSWLR 685 where a test in those terms is stated at page 693. Two of the

Judges, who then presided in that Court, became Justices of the High Court.

The simple position is that it is agreed between the two of them that ultimately the property will be sold if they cannot settle the matter by mediation between them and I think it is significant that this morning MAR advanced, what seemed to me to be, the realistic suggestion that perhaps he may be able to find what would be the difference between the debt to the bank, and the probable sale price, and pay that to the applicant/plaintiff and then remain in legal ownership of the premises.

That may be a sensible solution achievable by negotiation as he says he wishes to do. That would leave him in the position of lawful owner of the premises and it would save a good deal of legal expenses. However, coming back to the matter in hand, the issue is whether or not the learned Judge's orders should be changed and whether good reason has been shown for doing that.

In my opinion it has not for the simple reason that if the plaintiff is responsible for a sale, which ultimately has to happen, she has an interest in getting as high a price as she can.
To date, MAR has been unwilling to acknowledge that she has a legitimate beneficial claim to any part of the proceeds of the sale and he has therefore no interest in getting anything above the debt to the bank and whatever rates are owing.

For that reason the balance of convenience does not lay in satisfying his desire to have an authority in the sale of the house and for that reason I dismiss the application for a stay.

I do suggest that the plaintiff - that the parties attempt to negotiate the matter. Mr Dollar, do you have any other applications?

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HIS HONOUR: Yes, I order that the unsuccessful applicant, MAR, pay the costs of the respondent, to be assessed on the standard basis. That is the costs of and incidental to this application.

Okay, Adjourn the Court.
