

SUPREME COURT OF QUEENSLAND

CITATION: *Remely v O'Shea & Ors* [2007] QCA 369

PARTIES: **OTTO REMELY**
(applicant/applicant)
v
LEANNE O'SHEA
(first respondent/first respondent)
GEOFF & LARAINÉ VANDENBERG
(second respondent/second respondent)

FILE NO/S: Appeal No 8395 of 2007
SC No 1 of 2006

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Bundaberg

DELIVERED ON: 23 October 2007

DELIVERED AT: Brisbane

HEARING DATE: 23 October 2007

JUDGES: Holmes JA

ORDER: **1. The application is dismissed**
2. The applicant is to pay the second respondents' costs of the application

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN GRANTED – where the applicant applied to the Supreme Court for judicial review of a decision of the first respondent sitting as the Small Claims Tribunal – where the application for judicial review was dismissed – where the applicant seeks a stay of the costs order resulting from that decision – whether the balance of convenience favours granting a stay of execution

COUNSEL: The applicant appeared on his own behalf
R G March (*sol*) for the first respondent
R B Dickson for the second respondent

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the first respondent
Payne Butler Lang Solicitors for the second respondent

HOLMES JA: The applicant seeks a stay of a decision dismissing his application for judicial review or more accurately of the costs order resulting from that decision.

...

HOLMES JA: Mr Remely had sought judicial review of the decision of the first respondent sitting as the Small Claims Tribunal concerning a notice to leave a caravan park; some charges which he alleged were illegally levied by the second respondents; and their failure to lodge a bond with the Residential Tenancy Authority.

The applicant has a number of grounds of appeal. Some of them concern the fact that the male second respondent did not appear before the Tribunal. They include the first instance Judge's refusal to issue a subpoena to compel the male second respondent's attendance at the judicial review application. I think there are some misapprehensions involved in that ground: first, that the respondent's presence in either jurisdiction would have made him available for cross-examination and second, that the calling of evidence as to the merits was appropriate on a judicial review. There are also, I think, some other grounds which turn on the refusal of the learned Judge below to make findings on the merits.

But there are three remaining grounds which concern his Honour's views, firstly, that the applicant was not aggrieved within the meaning of the Judicial Review Act by

the referee's permitting the respondent's son to appear as agent, when he took a non-active role; secondly, that the applicant was not aggrieved by a refusal to determine an issue as to electricity charges as to which there was evidence of refund; and thirdly, that there was no breach of the rules of natural justice consequent on the failure to provide the applicant with copies of affidavits.

The first and third of those grounds, I must say, seem on such examination as I have had the opportunity to make, not strong. The second is difficult to assess because the evidence in relation to the refund is, the applicant says, disputed and it is not possible to reach any view about that here. I must say, however, that there is not an obviously strong case at this point for appeal.

In any case, the applicant had ceased to reside at the caravan park well before the judicial review application was heard. The only identified damage to him in the absence of the stay was the effect of the costs order against him. He says in his affidavit he has a small income, being on a disability support pension. There is no evidence at all about any assets. He has received a letter which became an exhibit. In it, the second respondents seek payment of their costs before proceeding to assessment. There is no indication that enforcement proceedings are under way but no doubt the applicant can canvass any difficulties in those that he has about payment.

The respondents make the point, validly, that the applicant will have no difficulty in recovering costs from the second respondents should they now be paid and he ultimately be successful on an appeal. In the circumstances, I consider that the balance of convenience does not favour the making of a stay. The application for stay is dismissed.

...

HOLMES JA: I order that the applicant pay the second respondents' costs of the application for a stay.

...

APPLICANT: I also seek an order.

HOLMES JA: What's that order?

APPLICANT: That the \$5,000 be held in a trust account somewhere rather than paid over to the Vandenberg, perhaps either in a fidelity fund or with the Registrar.

HOLMES JA: All right. No, I'm not going to make an order like that and it doesn't seem that there is any real concern that the respondents don't have the means of making repayment if necessary. So far as the making of the costs order now do I understand your position to be that you consider the \$2600 a little high and in your view it ought to go to assessment?

APPLICANT: Your Worship, I would like to go away and study the scale.

HOLMES JA: In the circumstances, I do not have a detailed breakup of the costs arrived at by the solicitor. I will not make that order but I will order that you pay the second respondents' costs of the application.
