

COURT OF APPEAL

WHITE JA

**Appeal No 2705 of 2011
SC No 1645 of 2009**

**MBL
(Also known as MBL)**

Appellant

v

JP

Respondent

BRISBANE

DATE 28/04/2011

EX TEMPORE JUDGMENT

WHITE JA: The applicant filed an application on 11 April 2011 seeking a stay of the orders of Justice Applegarth dated 21 March 2011, pending the hearing and determination of his appeal from his Honour's decision.

The principal order made by his Honour which concerns the applicant was an order that certain property at Smithfield in New South Wales of which he is the registered proprietor was declared by his Honour in making a property adjustment order pursuant to part 19 of the *Property Law Act 1974* to be property which he holds on trust for the respondent.

The further order made by his Honour was to the effect that if the applicant failed to execute a transfer of the Smithfield property to the respondent within 14 days, then, on the production of an affidavit sworn by the respondent, the Registrar of the Supreme Court was authorised to do so.

The applicant declined to execute the transfer when it was presented to him and, as a consequence of the further order of his Honour, the Registrar of the Court did so on 11 April.

On that day, the applicant filed his application for the stay but, in a sense, by then, the horse had bolted because the transfer was under way. It is presently lodged with the appropriate officials in New South Wales to perfect the transfer.

The notice of appeal, which was filed on 31 March, seeks to have fresh evidence introduced into the appeal, it being evidence that, although available, was not presented to the Court, according to the grounds of appeal, because of the manner in which the applicant's then legal representatives conducted his defence to the application. He also challenges the manner in which the primary Judge approached the division of property pursuant to part 19 and that his Honour failed to take into account a certain alleged child support payment.

The respondent was out of the jurisdiction during the recent school holidays and became aware of the application for the stay quite lately. She swore an affidavit yesterday. In paragraph 14 she deposes that she had no intention of selling or encumbering the Smithfield property and undertook that she would not sell or encumber it pending the determination of the appeal. She adds, "Had the appellant made that inquiry of me before making the application for a stay, I would have advised him accordingly." She deposes that she intends to use any rental income received from the property to support their son and herself.

No doubt, in light of that undertaking proffered in the affidavit, the parties have reached agreement that this application for stay need not proceed to a hearing and determination.

There is one other matter, however, that needs to be considered, and that is that the applicant is a person to whom part 7 of the *Public Trustee Act 1978* applies. He does not presently have the consent of the Public Trustee to pursue the appeal. Whether or not the application for

a stay falls within the definition of bringing or defending any action of a property nature, as Mr Hackett who appears for the respondent has submitted, it is an application in substantive proceedings for which he does not have that consent. Mr Fraser who appears for the applicant has tendered a letter written by the applicant's present solicitors to the Public Trustee seeking the Public Trustee's consent to pursue the appeal.

It is also true that the legislation dealing with part 7 and the administration of the property of prisoners envisages that it will, from time to time, be overlooked that the Public Trustee's consent is required. So that in s 96(3) the following appears: "The consent of the Public Trustee is then taken to have been given when the action was brought or defended" referring to s 96(2) where the written consent needs to be obtained after proceedings have commenced. There is no reason to suppose that that consent will not be forthcoming since there is no request for the Public Trustee to be in any way required to produce funds for the appeal, and that is the issue for my decision, that is, the question of costs.

It is plain that until the Public Trustee does give his consent, the application and the appeal are strictly irregular but perhaps, more importantly, had the applicant signified his concerns to the respondent or her solicitors, then the undertaking would clearly have been given because it does not appear to be the respondent's intention to dispose of the Smithfield property, at least in the immediate future. It therefore is available, should the applicant be successful in his appeal, to be sold so that any order might be satisfied.

For the reasons that I have outlined, I am of the view that the application for stay ought not to have been brought without the Public Trustee's consent but, more particularly, without notice to the respondent, so that she has been put to the expense of defending the application unnecessarily, and I would make the order that the costs thrown away as a consequence of this application be paid by the applicant to the respondent, to be assessed on the standard basis.