

SUPREME COURT OF QUEENSLAND

CITATION: *Tingalpa Tyre & Mechanical Pty Ltd v Onza Industries Pty Ltd* [2021] QCA 50

PARTIES: **TINGALPA TYRE & MECHANICAL PTY LTD**
ACN 091 681 542
(appellant/applicant)
v
ONZA INDUSTRIES PTY LTD
ACN 603 227 229
(respondent)

FILE NO/S: Appeal No 1079 of 2021
SC No 10492 of 2016

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 7 January 2021
(Bowskill J)

DELIVERED EX TEMPORE ON: 22 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 22 March 2021

JUDGE: Morrison JA

ORDERS: **1. Pursuant to rule 761 of the *Uniform Civil Procedure Rules 1999 (Qld)*, enforcement of the orders made on 7 January 2021 by Bowskill J be stayed pending the determination of the appeal or earlier order of the Court.**
2. The costs of the hearing on 22 March 2021 be reserved for determination on the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN GRANTED – where the applicant was ordered to take steps to deliver title so as to vest real property in the name of the respondent – where the applicant has not taken those steps and applies for a stay of those orders – where the respondent contends that the rental income from the property subject to the order be redirected to the trust account of a solicitor pending outcome of the appeal – where the applicant contends that the rental income is his only income – where there is no real prejudice to the respondent if the stay is granted pending outcome of the appeal – whether a stay should be granted

Uniform Civil Procedure Rules 1999 (Qld), r 761

COUNSEL: The applicant appeared on his own behalf
J K Meredith for the respondent

SOLICITORS: The applicant appeared on his own behalf
Lewis & McNamara Solicitors for the respondent

- [1] **MORRISON JA:** This is an application by the appellant, Tingalpa Tyre & Mechanical Pty Ltd, as well as by its director, Mr Ira Plath, effectively, for a stay pending resolution of the appeal. The appeal is against the orders made by Bowskill J on 7 January 2021. By those orders, a certain property at Aberdeen in New South Wales is to be vested in Onza Industries Pty Ltd as trustee for the Plath Family Discretionary Trust. That property is currently held, in terms of title, in the name of Tingalpa Tyre & Mechanical Pty Ltd.
- [2] The second order made by her Honour was that Mr Ira Plath, as the director of Tingalpa Tyre & Mechanical Pty Ltd, take all such necessary steps as are required to deliver title so as to vest the property at Aberdeen in the name of Onza Industries Pty Ltd as trustee. No such steps have been taken and Mr Ira Plath resists doing so pending the resolution of his appeal in respect of which he says that he has good prospects.
- [3] Those prospects cannot be assessed by me with any precision at the current time. The trial was not lengthy, but it was complicated by the way in which evidence was adduced and her Honour's findings which, effectively, split credit findings as between Mr Ira Plath and his brother, Mr Ondra Plath. Therefore, at the moment, I am prepared to proceed upon the basis that Mr Ira Plath and Tingalpa Tyre & Mechanical Pty Ltd have some prospects of success on the appeal, though those prospects cannot be assessed as being at one end of the spectrum or the other.
- [4] The respondent to this application contends through Mr Meredith of counsel that enforcement of the orders can be stayed pending determination of the appeal or further order of this Court, and they propose that as one order to which they are prepared to consent. The second order that they seek to impose is that until further order of the Court, the rental income from the property situated in Aberdeen should no longer be directed towards Mr Ira Plath but, rather, into the trust account of the solicitors for the respondent to the appeal, Lewis & McNamara Solicitors, to be held pending the outcome of the appeal.
- [5] The material filed shows that the lease agreement in respect of the property is with a lessee called All Seasons Irrigation. The period of the lease is for 12 months from 17 September 2020 and the rental of \$1,550 per calendar month is to be paid into the bank account of Mr Ira Plath. Mr Plath submits that this rental income is essentially his only income and without it, he will be hamstrung in preparing the appeal. There is some reason to think that submission might be right given that he has had to recently sell a vehicle in order to try and raise the funds to meet the lawyers' fees to assist him. Not surprisingly, the lawyers' assistance comes at some cost which it is possible he may not be able to bear.
- [6] During the hearing on 22 March 2021, I raised with the respondent the fact that the orders made by Bowskill J on 7 January 2021 contained a third provision, namely

that the property, once it is vested in the name of Onza Industries Pty Ltd as trustee for the Plath Family Discretionary Trust, will be held subject to a lien securing Tingalpa Tyre & Mechanical Pty Ltd's equitable right of indemnity for expenses paid while it was trustee of the property. Those expenses were effectively outlaid by Mr Ira Plath in his work on the property by way of renovation and building.

- [7] That entitlement was not quantified by Bowskill J. However, there were findings made on the last occasion at the end of the trial which indicates that the contribution could be more than \$100,000. In my view, the possible prejudice to the respondent by reason of the rental income currently going to Mr Ira Plath as remaining as going to Mr Plath pending the appeal is not real for the reason that whatever the amount, it can be adjusted as against the declared entitlement that Mr Ira Plath and Tingalpa Tyre & Mechanical Pty Ltd eventually have which is to be borne by the property itself. Once that is understood, the amount will not be irretrievably lost if it continues to flow to Mr Ira Plath pending the appeal.
- [8] For these reasons, I make the following orders:
1. Pursuant to rule 761 of the *Uniform Civil Procedure Rules 1999* (Qld), enforcement of the orders made on 7 January 2021 by Bowskill J be stayed pending the determination of the appeal or earlier order of the Court.
 2. The costs of the hearing on 22 March 2021 be reserved for determination on the appeal.
- [9] The applicant has undertaken to the Court to pursue the appeal with diligence.