

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Sommers v Bycroft* [2019] QCATA 130

PARTIES: **MARY LYNNE SOMMERS**
(applicant/appellant)

v

DANIEL PETER BYCROFT
(respondent)

APPLICATION NO/S: APL187-19

ORIGINATING APPLICATION NO/S: MCDT713-19 (Southport)

MATTER TYPE: Appeals

DELIVERED ON: 30 August 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Browne

ORDERS:

- 1. The application to stay the decision dated 21 June 2019 in Minor Civil Dispute MCDT713-19 (Southport) is refused.**
- 2. The Warrant of Possession issued on 21 July 2019 is re-instated to take effect on 30 September 2019 and remain in effect for 14 days, to expire at 6:00pm on 14 October 2019.**
- 3. The warrant is to be executed as soon as reasonably practicable after taking effect.**
- 4. Entry under the Warrant shall be between the hours of 8:00am and 6:00pm only.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where tenancy terminated on grounds of excessive hardship – where warrant of possession ordered to issue –where application to stay the order made in the minor civil disputes jurisdiction – where interim stay granted until the application to stay is determined – whether a stay should be granted until the application for leave to appeal or appeal is determined

Queensland Civil and Administrative Tribunal Act 2009

(Qld), s 145

Alexander v Cambridge Credit Corporation Ltd (1985) 2
NSWLR 685

Berry v Green [1999] QCA 213

REPRESENTATION:

Applicant: Self-represented

Respondent: Daniel Bycroft represented by Bell Legal Group

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act')

REASONS FOR DECISION

- [1] Mary Lynne Sommers has been living in a property the subject of these proceedings for several years. The property belonged to Ms Sommers' mother who passed away some ten years prior. The property along with other assets form part of the deceased estate. Ms Sommers is one of three beneficiaries to benefit from the deceased's estate.
- [2] The respondent filed an application in the Tribunal's minor civil disputes jurisdiction for a termination order on the grounds of excessive hardship and a warrant of possession. One of the contentions raised by the respondent at first instance and in support of the application was that local Council may resolve to sell the deceased's property by public auction pursuant to local government regulation due to the length of time that the water and rates charges have remained overdue.
- [3] On 21 June 2019, an Adjudicator sitting in the minor civil disputes jurisdiction found that there is a residential tenancy agreement concerning the property between the parties and terminated the agreement as from midnight on 20 July 2019 on the grounds of excessive hardship. The Tribunal also ordered that a warrant of possession issue to give vacant possession of the property to the respondent.
- [4] Ms Sommers applied for leave to appeal the Tribunal's decision. Ms Sommers also applied for a stay of the learned Adjudicator's decision until the determination of the application for leave to appeal or appeal.
- [5] The Appeal Tribunal made an interim order effectively staying the operation of the warrant of possession until a decision is made on the application to stay a decision.
- [6] The start of an appeal against a decision does not affect the operation of the decision or prevent the taking of action to implement the decision.¹ I must now determine whether the discretion to grant a stay should be exercised in Ms Sommers' favour.² I

¹ QCAT Act, s 145(1).

² Appeal Tribunal directions dated 24 July 2019.

am required to consider in all of the circumstances the balance of convenience and the competing rights of the parties.³

- [7] Ms Sommers says that she has been living in her mother's house since about 1970 and from 1999 to 2009 was her mother's full time nurse and unpaid carer until her mother passed away. Ms Sommers says that she feels a sense of peace surrounded by her mother's precious belongings and all of her beautiful memories of the happy time they shared.⁴ Ms Sommers says that she has always planned to buy the property and can afford it with her inheritance.⁵
- [8] In support of the application to stay, Ms Sommers contends that if she is granted a stay of the termination order and warrant of possession she will be able to prove that there was no excessive hardship, the local Council were not considering any proposal to auction her mother's property at the time of the hearing on 21 June 2019, she will be able to call credible witnesses to provide solid evidence to substantiate her claims, she will be able to expose the real motives behind the opposition's desire to evict her; and she will be able to demonstrate how skilfully the opposition deliberately deceived the adjudicator.⁶
- [9] Further, Ms Sommers contends that she can only prepare and present her case if she is allowed to remain in her mother's house until the hearing of the application for leave to appeal or appeal takes place. In support of this submission, Ms Sommers refers to the house being filled with her mother's belongings gathered over the past 40 years and her lack of funds to move anything. Ms Sommers also says that she does not have any place to go to stating that 'I could try to live on the streets, with my name on the waiting lists for emergency accommodation, however, because of my weak heart and lungs I would not survive for more than 1 or 2 days'.⁷
- [10] After careful consideration of Ms Sommers' submissions, I am not persuaded that the balance of convenience favours the granting of a stay until the determination of the application for leave to appeal or appeal. The respondent is entitled to the fruits of his judgment.⁸ I have also considered whether success on appeal would be rendered nugatory were a stay not granted. Here, a refusal of the stay and re-instatement of the warrant of possession will require Ms Sommers to vacate the property and find alternative accommodation. Ms Sommers has filed no material to support her contention that she has, as stated, 'no funds to move anything' if a stay is refused; and for health reasons is unable to find alternative accommodation. On the other hand, Ms Sommers submits that she has always planned to buy her mother's property and, as stated, 'can well afford it with her inheritance'. Indeed Ms Sommers is one of the three beneficiaries who will benefit from her deceased mother's estate.
- [11] I am not persuaded that Ms Sommers will be somehow disadvantaged by reason of the refusal to grant a stay and the re-instatement of the warrant of possession in the preparation of her case for the application for leave to appeal or appeal. Ms Sommers has had an opportunity to present relevant evidence in the hearing before

³ *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685, 694-5.

⁴ Submissions filed 25 July 2019.

⁵ Submissions filed 4 August 2019.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Berry v Green* [1999] QCA 213, [2].

the learned Adjudicator at first instance. Ms Sommers will be given an opportunity to prepare and present her submissions and contentions in support of the application and present relevant evidence subject to her applying for leave (and leave being granted) to rely upon fresh evidence, if she so desires, in the determination of the application for leave to appeal or appeal.

- [12] Here, the issue before the learned Adjudicator at first instance was whether a termination order on the grounds of excessive hardship should be made and a warrant of possession issued. Although I am not required to consider the merits of the application for leave to appeal at this present time, I observe that the learned Adjudicator made a number of findings critical to the decision to terminate the residential tenancy agreement. Relevantly, the Adjudicator found that the administrator of the deceased's estate cannot finalise the estate because he cannot get vacant possession of the property to sell it for the benefit of the three beneficiaries that includes Ms Sommers.⁹ Further, the Adjudicator found that there is ongoing accrual of estate expenses for which, ultimately, the beneficiaries of the deceased's estate have to pay.¹⁰ Relevantly, the Adjudicator found that the unsatisfied expenses such as a significant amount for council rates effectively dilute the net value of the property in terms of the amount for which the beneficiaries including Ms Sommers may receive after the property is sold.¹¹ The learned Adjudicator also observed that there is no income from the property due to the fact that Ms Sommers has paid no rent.¹² Further, the learned Adjudicator observed that Ms Sommers is the owner of a property in Queensland.¹³
- [13] The Tribunal's record of proceedings show that Ms Sommers attended the hearing at first instance in person. Ms Sommers has had the benefit of hearing the learned Adjudicator's reasons for his decision at the hearing on 21 June 2019 and has (since 21 June 2019) had an opportunity to make arrangements to find suitable alternative accommodation following the learned Adjudicator's decision made, which she now seeks to challenge on appeal. In the event that the deceased's property is sold by the administrator for the deceased's estate, Ms Sommers will, as will any interested person or entity, have an opportunity to make an offer to purchase the property or place a bid at public auction.
- [14] I find that the balance of convenience does not favour the granting of a stay and I make the following orders:
1. The application to stay the decision dated 21 June 2019 in Minor Civil Dispute MCDT713-19 (Southport) is refused.
 2. The Warrant of Possession issued on 21 July 2019 is re-instated to take effect on 30 September 2019 and remain in effect for 14 days, to expire at 6:00pm on 14 October 2019.
 3. The warrant is to be executed as soon as reasonably practicable after taking effect.

⁹ Transcript of proceedings in MCD T713-19 (Southport), T1-8.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid, T1-9.

¹³ Ibid, T1-11.

4. Entry under the Warrant shall be between the hours of 8:00am and 6:00pm only.