

SUPREME COURT OF QUEENSLAND

CITATION: *J Wright Enterprises Pty Ltd (In Liquidation) v Port Ballidu Pty Ltd (No. 2)* [2010] QSC 214

PARTIES: **J WRIGHT ENTERPRISES PTY LTD
(IN LIQUIDATION) ACN 116 328 170**
Plaintiff

v

PORT BALLIDU PTY LTD ACN 010 820 185
Defendant

FILE NO/S: BS 11916 of 2007

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 15 June 2010

JUDGE: White J

ORDERS:

- 1. The plaintiff recover possession of the property described as Lot 1 on Plan 112591 County of Stanley, Parish of South Brisbane being all of the Land contained in Certificate of Title reference 14022138 situated at 17 Manning Street South Brisbane.**
- 2. It is declared that the bill of mortgage registered number 709818322 secures the debt the subject of the Loan Agreement dated 28 July 2006 listed in Clause 6 of the Form 2 mortgage dated 1 August 2006.**
- 3. It is declared that the defendant is not bound by the Loan Agreement dated 28 July 2006.**
- 4. It is declared that the defendant is not bound by the Variation of Loan Agreement.**
- 5. Caveat No. 713145150 lodged by the plaintiff over the defendant's property being Lot 1 on Plan 112591 County of Stanley, Parish of South Brisbane being all of the land contained in Certificate of Title reference 14022138 situated at 17 Manning Street, South Brisbane be removed.**
- 6. The defendant pay the plaintiff's costs of and incidental to the proceedings to be assessed on the standard basis.**
- 7. The monies paid into court as security for the**

defendant's costs by the plaintiff be paid out to the plaintiff.

- 8. The application for a stay of execution be dismissed and the defendant pay the plaintiff's costs of and incidental to that application to be assessed on the standard basis.**

CATCHWORDS: FORM OF ORDERS – where parties invited to make submissions about the orders that should be made following reasons

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – construction of loan agreement – whether interest payable at higher rate on amount owing after repayment date

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – FAILURE IN PORTION OF A CASE – where plaintiff unsuccessful in relation to a portion of the case – whether the authority issue was a “particular question” in the proceeding for which the court could make a separate order for costs under r 684 of the *Uniform Civil Procedure Rules*

PROCEDURE – COURTS AND JUDGES GENERALLY – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PAYMENT INTO AND OUT OF COURT – where plaintiff paid monies into court as security for defendant's costs – whether monies paid into court should be paid out to the plaintiff

PROCEDURE – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST PROPERTY – OTHER MATTERS – where defendant applied for stay of execution pursuant to r 895 of the *Uniform Civil Procedure Rules* pending an order for compensation under the *Land Title Act 1994* – whether stay should be granted

Land Title Act 1994, s 188, s 188B

Uniform Civil Procedure Rules, r 681(1), r 684, r 895(1)

BHP Coal Pty Ltd v O&K Orenstein & Koppel AG (No. 2) [2009] QSC 64, applied

Colburt v Beard [1992] 2 Qd R 67, cited

Cretazzo v Lombardi (1975) 13 SASR 4, cited

Gel Custodians Pty Ltd v RQ Consultants Pty Ltd & Ors [2010] QSC 173, considered

JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No. 2) [1983] 2 Qd R 255, followed

J Wright Enterprises Pty Ltd (in liquidation) v Port Ballidu

Pty Ltd, unreported, White J, SC No. 11916 of 2007, 17 May 2010, related

Osaka Enterprises Pty Ltd v Seaview Pacific Ltd (No. 2) [2010] QSC 186, considered

Perpetual Trustees Victoria Ltd v Tsai (2004) 12 BPR 22,281; [2004] NSWSC 745, cited

Royalene Pty Ltd v Registrar of Titles & Ors [2008] QSC 64, considered

Thiess v TCN Channel Nine Ltd (No. 5) [1994] 1 Qd R 156, cited

Todrell Pty Ltd v Finch (No. 2) [2008] 2 Qd R 95; [2007] QSC 386, considered

Waters v PC Henderson (Australia) Pty Ltd [1994] NSWCA 338, cited

Willemse Family Co Pty Ltd v Deputy Commissioner of Taxation [2003] 2 Qd R 334; [2002] QSC 292, considered

COUNSEL: J Peden for the plaintiff
G Sheahan for the defendant

SOLICITORS: Frews Solicitors for the plaintiff
Mullins Lawyers for the defendant

- [1] When I published my findings and reasons¹ I invited the parties to make submissions about the orders that should, as a consequence, be made. Counsel appeared and made submissions on 15 June 2010. On that day the defendant also sought leave to file an application pursuant to r 895(1) of the *Uniform Civil Procedure Rules* to stay the execution of any orders which might be made in favour of the plaintiff pending the outcome of an application for compensation pursuant to sections 188 and 188B of the *Land Title Act 1994*. There was no objection to abridging time and leave was given to file that application, although the plaintiff opposed granting of that relief.
- [2] I will not repeat the facts which are set out in the principal judgment except the summary of findings which will be relevant to the orders:²
- “1. Trevor O’Rourke held a valid power of attorney on behalf of Port Ballidu.
 2. The directors, Mr Rory Burns and Mr Paul Burns, did not actually authorise Port Ballidu to enter into the security and loan agreement.
 3. Trevor O’Rourke did not have actual implied authority or ostensible authority to bind Port Ballidu to the loan agreement and the security over the property at 17 Manning Street, South Brisbane.
 4. Port Ballidu has not acquiesced in the mortgage and loan agreement by authorising the variation of the loan agreement and security in November 2006.

¹ *J Wright Enterprises Pty Ltd (In Liquidation) v Port Ballidu Pty Ltd*, unreported, White J, SC No. 11916 of 2007, 17 May 2010.

² *Ibid* at [99].

5. The fraud exception to the indefeasibility of the plaintiff's registered bill of mortgage has not been established such that the defendant is not entitled to the relief it seeks on the counterclaim.
6. The mortgage secures the debt the subject of the loan agreement with the plaintiff."

The orders

- [3] The parties agree that I should order that:

"The plaintiff recover possession of the property described as Lot 1 on Plan 112591 County of Stanley, Parish of South Brisbane being all of the Land contained in Certificate of Title reference 14022138 situated at 17 Manning Street South Brisbane."

The parties also agree that the following orders should be made on the counterclaim:

1. A declaration that the defendant is not bound by the Loan Agreement dated 28 July 2006.
2. A declaration that the defendant is not bound by the Variation of Loan Agreement."

The parties also agree that the caveat lodged by the plaintiff over the defendant's property at 17 Manning Street be removed.

- [4] The plaintiff seeks an order in general terms that the bill of mortgage secures the debt the subject of the Loan Agreement dated 28 July 2006 while the defendant seeks a declaration that that mortgage secures the specific sum of \$215,545.50.³
- [5] There are three issues in contention about the appropriate judgment orders:
- (i) What the mortgage secures;
 - (ii) How the costs should be borne for the claim and counterclaim; and
 - (iii) The disposition of the money paid into court by the plaintiff to secure the defendant's costs of the trial.
- (i) What the mortgage secures**
- [6] The plaintiff seeks a declaration that the bill of mortgage secures the debt the subject of the Loan Agreement consistent with the finding made at trial. The defendant, on the other hand, seeks a declaration that a specific sum is secured on the basis that the amount secured is limited to the balance of the monies lent to Port Ballidu which remained outstanding after the refinancing by Challenger with no obligation to pay interest.
- [7] The starting point to resolve this dispute is the bill of mortgage.⁴ The bill of mortgage states in item 5 that it secures the Loan Agreement dated 28 July 2006 between the mortgagor, Port Ballidu Pty Ltd, and the mortgagee, J Wright Enterprises Pty Ltd. The covenants are expressed in item 6 to be in terms of the

³ In the submissions the defendant contended for \$268,845.50 but revised that figure to take account of the lower rate of interest at four per cent per annum in the Loan Agreement.

⁴ *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12BPR 22,281; [2004] NSWSC 745.

attached schedule. By cl 3 of the schedule, the mortgagor covenanted to pay the “Secured Money” in full, to or as directed by the mortgagee, as and when agreed. By cl 4 the mortgagor charged the mortgaged property in favour of the mortgagee as security for the payment and discharge of the secured money. “Secured Money” is defined in cl 1 to mean “all amounts which the Mortgagor owes to the Mortgagee at any time”. The definition sets out, in the widest possible terms, “all amounts which at any time the Mortgagee has advanced or paid ... at the ... request of the Mortgagor”.⁵ By cl 13.2 the mortgagor indemnifies the mortgagee

“... against and must pay to the Mortgagee on demand all losses, costs, claims and expenses which the Mortgagee may sustain or incur or suffer as a result of any payment of the Secured Money or any part of the Secured Money being made to the Mortgagee on a day other than the due date for payment.”

By cl 28 the mortgagor “must pay or reimburse the Mortgagee on demand for all costs and expenses of the Mortgagee in relation to” a number of broad enumerated circumstances, including legal costs and expenses on a full indemnity basis.

- [8] Mr G Sheahan, for Port Ballidu, submitted that the loan monies were not for the benefit of Port Ballidu. However, by cl 2, Port Ballidu acknowledged incurring the obligation which gave rights to the mortgagee which were for valuable consideration and the definition of “Secured Money” includes all amounts advanced or paid at the request of the mortgagor. The loan for whatever its purpose is secured against the land.
- [9] The second submission by Mr Sheahan requires a consideration of the Loan Agreement. In its third amended defence Port Ballidu pleaded:

“12A Further or alternatively, according to its terms and true construction the loan agreement did not require the borrower to pay any interest after the Repayment Date as defined in the Loan Agreement.

12B If which is denied as pleaded herein any sum is owing to the plaintiff pursuant to the loan agreement or mortgage then only simple interest is payable on such sum from the Repayment Date as defined in the Loan Agreement at a rate the court thinks fit.”

Mr Sheahan submitted that the provision for the payment of interest did not extend beyond the due date for payment, that is, after two months.

By cl 4.1.1 of the Loan Agreement:

“Interest shall accrue on the Advance at the Higher Interest Rate and will be calculated each month on the maximum monthly balance of the loan.”

By cl 4.2.1:

“Interest for the term of the Loan shall be paid to the Lender, in advance.”

⁵ The definition is set out more fully in the reasons for judgment at [96].

And by cl 4.3.1:

“If no event of default has occurred and the Borrower pays interest at the lower interest rate then the Lender will accept interest at the lower interest rate instead of at the higher interest rate.”

By the Loan Agreement the parties agreed that the plaintiff would make an advance to Port Ballidu in the amount shown in the schedule. The amount in the schedule is \$445,000. By cl 6 of the Loan Agreement Port Ballidu agreed to repay and finally discharge the loan on or before the repayment date. The repayment date in the schedule is two months from the date of the advance, that is, 28 September 2006. Clause 6 continues:

“The Borrower must also pay any interest accrued and payable on the Loan and not then paid, and all other amounts payable under this Agreement and unpaid, to the Lender on or before the Repayment Date ...”

The “Higher Interest Rate” is specified in the schedule to mean six per cent per month. The “Lower Interest Rate” is specified in the schedule to be four per cent per month. Clause 7.2 describes events of default. Relevantly, in cl 7.2.1.1:

“If the Borrower fails to repay the Loan on the Repayment Date or fails to pay any instalment of interest when due ...”

By cl 7.1.1:

“If any of the events described in Clause 7.2 occurs, the Loan together with all interest accrued on the Loan and not then paid ... shall ... become due and payable ...”

- [10] Mr Sheahan points to the Variation of Loan Agreement, which gave Perpetual Trustee Company Ltd priority over the plaintiff’s mortgage and made “other minor amendments” to the Loan Agreement, to strengthen the argument that the Loan Agreement made no provision for interest after the repayment date. The Variation of Loan Agreement clearly provides for interest after the repayment date in cl 2.2 by providing that in the event that Port Ballidu did not repay the monies owing at the repayment date

“... the Mortgagor shall pay interest from the repayment date on all outstanding monies at the higher rate... until all monies outstanding have been fully paid to the mortgage.”

- [11] Mr Sheahan referred to *Royalene Pty Ltd v Registrar of Titles & Ors*⁶ as an example of secured monies not providing for interest at the expiration of the term of the loan. The term of the loan there was two months from the date of the mortgage and by cl 2 of the mortgage the mortgagor acknowledged:

“... that the moneys hereby secured include an amount of \$10,000.00 to pay interest at the rate of 10% per month for the first two (2) month of the term of this loan.”

⁶ [2008] QSC 64.

That was the only express covenant to pay interest in the mortgage. Daubney J found that the mortgage otherwise was silent as to the interest payable to the mortgagee after the initial term of two months and ordered simple interest at 10 per cent per annum.⁷

[12] Although the bill of mortgage is in the widest possible terms it is the Loan Agreement which provides for the payment of interest. Clause 4 of the Loan Agreement provides for the lower rate of interest to be paid if there is no event of default. That interest was paid in advance out of the total amount advanced. By cl 4.1.1 the parties agreed that interest would accrue on the advance at the higher interest rate and would be calculated each month on the maximum monthly balance of the loan. That can only be construed as an agreement to pay interest on the outstanding amount owing after the repayment date and at the higher rate of interest. There was no pleading that the higher rate of interest constituted a penalty.

[13] There is, therefore, no basis for limiting the amount secured by the bill of mortgage in the manner contended for by Port Ballidu.

(ii) How the costs should be borne for the claim and counterclaim

[14] Mr Sheahan contends that since the plaintiffs succeeded only on the question of indefeasibility and not on the question of Mr O'Rourke's authority, it should not be entitled to all of its costs. The general rule about costs contained in r 681 is that:

“(1) Costs of a proceeding ... are in the discretion of the court but follow the event, unless the court orders otherwise.”

Port Ballidu relies on none of the recognised exceptions to that general rule,⁸ to avoid a general costs order in favour of the plaintiff but calls in aid r 684. It provides:

“(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.

(2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceedings to which the order relates.”

That rule is in similar terms to the former RSC O 91 r 3 but is recognised as giving a wider discretion because the previous rule was limited to awarding costs on separate “issues”, with all the difficulties of that expression.⁹

[15] The approach which had commended itself in applying r 684 is “units of litigation” as discussed by Thomas J (as his Honour then was) in *Colburt v Beard*¹⁰ and approved by the Full Court in *Thiess v TCN Channel Nine Ltd (No. 5)*.¹¹ Examples of fractional costs made under r 684 are *Todrell Pty Ltd v Finch (No. 2)*;¹² *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No. 2)*¹³ and *Osaka*

⁷ Ibid at [68] and [70].

⁸ For example, *Tyler v Custom Credit Corp Ltd* [2000] QCA 178; *Barron River Foods Pty Ltd v National Australia Bank Ltd* [2005] QSC 138; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2000] QCA 172.

⁹ See, *Todrell Pty Ltd v Finch (No. 2)* [2008] 2 Qd R 95; [2007] QSC 386 at [13] per Chesterman J.

¹⁰ [1992] 2 Qd R 67 at 70.

¹¹ [1994] 1 Qd R 156 at 208.

¹² [2008] 2 Qd R 95; [2007] QSC 386.

¹³ [2009] QSC 64.

Enterprises Pty Ltd v Seaview Pacific Ltd (No. 2).¹⁴ In *Todrell*, a successful defendant was ordered to pay the plaintiff's costs in respect of an entirely baseless defence and, correspondingly, the plaintiff was ordered to pay only the costs for one day of a four day trial. Those circumstances were said by Chesterman J to be "exceptional". In *BHP Coal*, a very lengthy and complex case, McMurdo J was able to identify a definable and separable question in respect of which the plaintiff was unsuccessful. His Honour accommodated this by ordering the defendant to pay 90 per cent of the plaintiff's costs, recognising that r 684 will only be applied in exceptional circumstances.¹⁵ In *Osaka*, McMurdo J refused an application for a fractional costs order.

- [16] There is good reason to limit r 684 to exceptional cases. In *Waters v PC Henderson (Australia) Pty Ltd*¹⁶, a decision referred to by Chesterman J in *Todrell*, Mahoney JA referred to the notes to the equivalent provision in the New South Wales Supreme Court Rules:

"Where the proceedings involve multiple issues the application of the rule that costs follow the event may involve hardship where a party succeeds on some issues and yet fails on others. Particularly is this so where, for example, a defendant succeeds on issues that occupied the bulk of the time taken by the proceedings. Nevertheless unless a particular issue ... is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed."

The same sentiment was earlier discussed by Jacobs J *Cretazzo v Lombardi*:¹⁷

"... trials occur daily in which the party, who in the end is wholly ... successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to a decision of the case."

- [17] Mr Sheahan submitted that much of the trial was taken up with the question of Mr O'Rourke's authority on which the defendant was successful. Without counting transcript pages, it is not possible to say how much time was devoted to this issue. In fact, many of the issues were intertwined in the narrative. It is not correct to say, as Mr Sheahan submitted, that the plaintiff was successful only on the narrowest of points – indefeasibility. The plaintiff was also successful on the question of the power of attorney granted to Mr O'Rourke by Port Ballidu. There are no exceptional circumstances demonstrated to depart from the general rule that costs follow the event. Neither is there any basis for making a separate costs order on the counterclaim. The declarations obtained by Port Ballidu are merely a reflection of those questions in respect of which Port Ballidu successfully defended.
- [18] The order should be that Port Ballidu pays the plaintiff's costs of and incidental to the proceedings to be assessed on the standard basis.

¹⁴ [2010] QSC 186.

¹⁵ *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No. 2)* [2009] QSC 64 at [7].

¹⁶ [1994] NSWCA 338.

¹⁷ (1975) 13 SASR 4 at 16.

- [19] The plaintiff paid \$35,000 into court as security for Port Ballidu's costs in the event that it obtained a costs order in favour of it in the trial. Mr Sheahan submitted that there were costs orders in favour of Port Ballidu in the summary judgment application which would be greater than the sum paid in. He could produce no assessment and, in any event, in light of the costs order to be made in respect of the trial proceedings it would be inappropriate to separate out those earlier costs. The plaintiff should have the monies paid into court paid out to it.

Stay of execution

- [20] Port Ballidu has applied for a stay of the execution of the orders for possession of 17 Manning Street, South Brisbane by the plaintiff pursuant to r 895. It provides:

“(1) A court may, on application by a person liable to comply with a non-money order –

- (a) stay the enforcement of all or part of the order, including because of facts that arise or are discovered after the order was made; and
- (b) make the orders it considers appropriate.

(2) The application must be supported by an affidavit stating the facts relied on by the applicant.

(3) ...”

- [21] Port Ballidu seeks the stay so that it can obtain an order for compensation against the Registrar of Titles and the State pursuant to ss 188 and 188B of the *Land Title Act* 1994. On 10 June 2010 Port Ballidu's solicitors wrote to the Registrar of Titles seeking compensation as a consequence of the findings in these proceedings and included, apart from a synopsis of the matters which gave rise to that claim, the reasons for and findings in the proceedings. At the time of the hearing on 15 June 2010, there had been, not surprisingly, no response.

- [22] Mr John Godwin, a director of Port Ballidu, has deposed to the facts and circumstances which would support a stay of the order for possession of 17 Manning Street. Mr Godwin deposes that should there be a sale, Port Ballidu will incur the costs associated with that sale and suffer likely irreparable damage to the current landlord and tenant relationship. The building has two tenants according to Mr Goodwin and the exhibited valuation. The tenant on level 1, a firm of architects, has signed an expression of interest to lease. It has not yet exercised its option to renew its lease and may not do so if there were uncertainty about the future of the property. The order for possession would trigger a default under the first mortgage and Perpetual Trustee may exercise its rights to enforce the mortgage. This, Mr Godwin deposes, may impact upon Port Ballidu's credit rating and ability to secure finance in the future. Of the latter contention, as the evidence revealed, Port Ballidu does not trade. It is the registered proprietor of the land and rents the premises. Any equity in the land has been used from time to time to raise funds for the Seatem companies. A recent valuation of the land and building puts it at \$2,000,000. The rent obtained from the tenants is insufficient to meet the interest payments to Perpetual Trustee (Challenger Financial) and it clearly receives outside assistance.

- [23] A perusal of the financial statements shows that although making provision for its contingent liability to the plaintiff, and the liability to Perpetual Trustee (in the amount of \$1.12 million) if sold at valuation there maybe insufficient funds to discharge the plaintiff's entitlement entirely.
- [24] Against the concerns advanced by Port Ballidu, Mr J McLeod, the liquidator of the plaintiff, deposes to the serious personal hardship of a number of the plaintiff's creditors.
- [25] No particular approach is identified in r 895 or r 801, which is in the same terms referring to a stay of money orders. In respect of the latter, Holmes J (as her Honour then was) in *Willemse Family Co Pty Ltd v Deputy Commissioner of Taxation*¹⁸ considered if a stay were "appropriate". In *Gel Custodians Pty Ltd v RQ Consultants Pty Ltd & Ors*,¹⁹ McMeekin J, considering a stay application pursuant to r 300,²⁰ discussed the balance of convenience. In *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No. 2)*,²¹ Derrington J, with whom Campbell CJ and Kelly J agreed, pointed out that a plaintiff having succeeded is entitled to the fruits of its judgment unless good reason is shown to the contrary.²²
- [26] It is not appropriate to consider the prospects of Port Ballidu in obtaining a payment from the State under the provisions of the *Land Title Act* which would permit it to redeem the mortgage granted to the plaintiff. But, as Mr Pedan for the plaintiff submitted, there is no basis for the expectation expressed by Mr Sheahan that all would be resolved and a payment made in a matter of months. A large sum is involved. It will require a hearing in the Supreme Court. While the four years which had elapsed in *Royalene Pty Ltd v Registrar of Titles*²³ maybe unduly pessimistic, there is nothing to indicate that the outcome, if successful, will be speedy. Port Ballidu has raised no real countervailing considerations against those of the plaintiff's creditors. Accordingly, the application for stay is dismissed.
- [27] In the conclusion the following are the orders:
1. The plaintiff recover possession of the property described as Lot 1 on Plan 112591 County of Stanley, Parish of South Brisbane being all of the Land contained in Certificate of Title reference 14022138 situated at 17 Manning Street South Brisbane.
 2. It is declared that the bill of mortgage registered number 709818322 secures the debt the subject of the Loan Agreement dated 28 July 2006 listed in Clause 6 of the Form 2 mortgage dated 1 August 2006.
 3. It is declared that the defendant is not bound by the Loan Agreement dated 28 July 2006.
 4. It is declared that the defendant is not bound by the Variation of Loan Agreement.
 5. Caveat No. 713145150 lodged by the plaintiff over the defendant's property being Lot 1 on Plan 112591 County of Stanley, Parish of

¹⁸ [2003] 2 Qd R 334; [2002] QSC 292.

¹⁹ [2010] QSC 173.

²⁰ Judgment under Chapter 9 Part 2 of the *UCPR*.

²¹ [1983] 2 Qd R 255.

²² *Ibid* at 258.

²³ [2008] QSC 64.

South Brisbane being all of the land contained in Certificate of Title reference 14022138 situated at 17 Manning Street, South Brisbane be removed.

6. The defendant pay the plaintiff's costs of and incidental to the proceedings to be assessed on the standard basis.
7. The monies paid into court as security for the defendant's costs by the plaintiff be paid out to the plaintiff.
8. The application for a stay of execution be dismissed and the defendant pay the plaintiff's costs of and incidental to that application to be assessed on the standard basis.