SUPREME COURT OF QUEENSLAND

CITATION: *Goomboorian Transport Pty Ltd & Ors v Hanson & Ors* [2018] QSC 194

PARTIES: **GOOMBOORIAN TRANSPORT PTY LTD ACN 011 054 658**
(first plaintiff)

AND

J & M LOGHANDLING PTY LTD ACN 011 054 667
(second plaintiff)

AND

BELLING INVESTMENTS PTY LTD ACN 123 710 734
(third plaintiff)

AND

GOOMBOORIAN LOGGING PTY LTD ACN 076 970 995
(fourth plaintiff)

AND

LITTLE YABBA DROUGHTMASTER STUD PTY LTD ACN 086 875 845
(fifth plaintiff)

AND

EMMERDALE FARMING PTY LTD ACN 151 515 909
(sixth plaintiff)

AND

JILRAY PTY LTD ACN 058 181 463
(seventh plaintiff)

AND

J & M FARMING PTY LTD ACN 086 991 291
(eighth plaintiff)

AND

J & M FARMING PTY LTD and LITTLE YABBA DROUGHTMASTER STUD PTY LTD ABN 89 152 178 639
(ninth plaintiff)

AND

JOHN GERHARD BELLING
(tenth plaintiff)

AND

MARLENE ANNE BELLING

(eleventh plaintiff)

v

ESTATE OF NORMA RENEE HANSON, DECEASED
(first defendant)

AND

DOROTHY MAUREEN HANSON
(second defendant)

AND

NORMAN RICHARD HANSON
(third defendant)

FILE NO/S:	SC No 4392 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2018
JUDGE:	Bond J

ORDER: **Upon the applicants undertaking through their counsel:**

(a) to maintain the undertakings provided by their counsel to this court on 19 June 2015;

(b) until further order or agreement with the plaintiffs, not to deal with any of the funds held on their behalf in the Big Law/Lawyers trust account;

(c) that they will maintain the registration and insurance for the Mercedes-Benz A-Class motor vehicle (VIN WDD1 173432N154473) and will otherwise store it in a shed on their property and not use it; and

(d) to terminate forthwith their retainer of Brown Macaulay and Warren Financial Services Pty Ltd as financial advisers,

and subject to the condition that the applicants must, as soon as is practicable, and having made full disclosure of the state of white ant damage to the home located at 22 Parkland Drive, Chatsworth, secure and maintain insurance over that home equivalent to that apparently secured by the existing Suncorp policy,

the orders of the Court are:

1. The orders made by Bond J on 14 August 2018, which were the subject of interim stay ordered on that date, be stayed until such date as the appeal in Court of Appeal proceeding 7390/2018 is

determined or further earlier order of the Court is made.

2. Costs of the application for stay be reserved.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the second and third defendants applied for an interim stay of judgment and further orders pending further argument as to a stay pending appeal – where the interim stay was granted – where the second and third defendants applied for the interim stay to continue until the determination of the appeal – where the third and sixth plaintiffs opposed the stay – whether there is a good arguable case on appeal – whether the second and third defendants will be disadvantaged if a stay is not ordered – whether the competing disadvantage to the third and sixth plaintiffs, should the stay be granted, outweighs the disadvantage suffered by the second and third defendants, if the stay is not granted – whether the judgment and further orders should be stayed pending the outcome of the appeal

Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd [2017] QSC 112, cited

Goomboorian Transport Pty Ltd v Hanson [2018] QSC 135, related

Goomboorian Transport Pty Ltd v Hanson [2018] QSC 182, related

Goomboorian Transport Pty Ltd v Hanson [2018] QSC 189, related

Goomboorian Transport Pty Ltd v Hanson [2018] QSC 190, related

Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd [1996] 1 Qd R 26, cited

COUNSEL: C Heyworth-Smith QC, with N H Ferrett, for the plaintiffs
No appearance for the first defendant
G J Handran, with K W Wylie, for the second and third defendants

SOLICITORS: Griffith Hack for the plaintiffs
No appearance for the first defendant
Baldwins Lawyers for the second and third defendants

The present status of this proceeding

[1] On 12 June 2018 I published my reasons for judgment in *Goomboorian Transport Pty Ltd v Hanson* [2018] QSC 135. Amongst other things on that day:

(a) I declared that the proceeds of the Asteron term life policy 81318923 were received by the second and third defendants as trustees for the third and sixth plaintiffs; and

(b) I declared that the second and third defendants held their interest in the home located at 22 Parkland Drive, Chatsworth, subject to an equitable lien in favour of the plaintiffs in the amount of $12,622.22; and

(c) I identified certain matters on which I would hear the parties further and set a timetable for the delivery of further submissions.

[2] On 14 August 2018, I published my reasons for judgment in *Goomboorian Transport Pty Ltd v Hanson* [2018] QSC 182, in which, having heard the parties further, and amongst other things, I made the following declarations which were ancillary to the primary declaration as to the proceeds of the Asteron term life policy because they were consequent upon certain agreed facts concerning the way in which the second and third defendants had disposed of the proceeds of the policy:

(a) I declared that so much of the second and third defendants' interest in the home located at 22 Parkland Drive, Chatsworth as represented the ratio between

(i) the amount of the $51,833.61; and

(ii) the value of that home at 26 February 2015,

was held on trust by the second and third defendants for the third and sixth plaintiffs.

(b) I declared that the Mercedes Benz A-Class motor vehicle (VIN WDD1 173432N154473) purchased by the second and third defendants on 3 March 2015 was held on trust by the second and third defendants for the third and sixth plaintiffs.

(c) I declared that:

(i) as at and from the date of the deposit on 2 April 2015 of $180,000 into First Colonial superannuation account number 5129899 in the name of Norman Hanson, the third defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;

(ii) as at and from the date of the deposit on 2 April 2015 of $540,000 into First Colonial superannuation account number 5129925 in the name of Dorothy Hanson, the second defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;

(iii) as at the date of the deposit on 28 March 2015 of $80,000 into term deposit account number 154404313 in the name of Norman Hanson, the third defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;

(d) I declared that as at the date of the deposits referred to below, the second and third defendants held their choses in action in relation to the deposits on trust for the third and sixth plaintiffs:

(i) the deposit on 4 May 2015 of $20,000 into the trust account of the solicitors for the second and third defendants; and

(ii) the deposit on 6 May 2015 of $100,000 into the trust account of the solicitors for the second and third defendants.

[3] Having published judgment on 14 August 2018, I received certain further evidence and heard further argument from the parties, which resulted in two *ex tempore* judgments on that day.

[4] First, *Goomboorian Transport Pty Ltd v Hanson* [2018] QSC 189, in which, having heard the parties further, and amongst other things, I explained my reasons for making the following further orders:

1. The Second and Third Defendants are forthwith to take all such steps as are necessary to:

   (a) realise the value of the chose in action consisting of the Third Defendant's rights, title and interest in First Colonial superannuation account number 5129899 in the name of Norman Hanson by withdrawing so much of the money held in that account as may be withdrawn according to the terms and conditions of the account;

   (b) realise the value of the chose in action consisting of the Second Defendant's rights, title and interest in First Colonial superannuation account number 5129925 in the name of Dorothy Hanson by withdrawing so much of the money held in that account as may be withdrawn according to the terms and conditions of the account;

   (c) realise the value of that part of the chose in action consisting of the Second and Third Defendants' rights, title and interest in the amount of $150,000 (and any accretions on that amount) held on trust for them by Big Law Lawyers by instructing that firm to pay out that amount to them,

   and pay all such amounts to the Third and Sixth Plaintiffs.

2. Within 14 days of the date of this order, the Second and Third Defendants are to:

   (a) take all steps necessary (including paying such fees, costs and any expenses for mechanical work as may be necessary to render the Vehicle roadworthy) to transfer the Vehicle to the Third and Sixth Plaintiffs; and

   (b) deliver up possession of the Vehicle to the Third and Sixth Plaintiffs.

3. Pursuant to section 38 of the Property Law Act 1974, Stuart Alexander Rees and Jon Walter Colin Broadley ("the Sale Trustees") be appointed as trustees for the sale of the real property ("the Real Property") identified at paragraph 5 of the orders published in Goomboorian Transport Pty Ltd v Hanson [2018] QSC 182 ("the Orders") with effect 7 days after the date of this order.

4. The Real Property thereupon vest in the Sale Trustees subject to encumbrances affecting the entirety but free from encumbrances affecting any undivided shares to be held by them upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of the net income until sale after payment of rates, taxes, costs of insurance, repairs properly payable out of income and other outgoings for the Third and Sixth Plaintiffs and the Second and Third Defendants in such shares as they may subsequently agree in writing or as may subsequently be determined by the Court.

5. The costs of the parties incurred after pronouncement of the Orders are reserved.

And the Court directs that:

6. The proceeding is listed for directions as to the taking of any further accounts and inquiries and for hearing with respect to whether any further relief is necessary to give effect to the plaintiffs' rights as declared in the Orders at 10am on 3 September 2018.

[5] Second, in *Goomboorian Transport Pty Ltd v Hanson* [2018] QSC 190, having heard the parties further including on the nature of the appeal which had been filed by the second and third defendants in relation to the declaration as to the Asteron term life policy proceeds, I ordered an interim stay of the orders I had just pronounced, in these terms:

Upon the second and third defendants undertake through their counsel:

(a) to maintain the undertakings provided by their counsel to this court on 19 June 2015;

(b) until further order or agreement with the plaintiffs, not to deal with any of the funds held on their behalf in the Big Law/Lawyers trust account; and

(c) that they will maintain the registration and insurance for the Mercedes-Benz A-Class motor vehicle (VIN WDD1 173432N154473) and will otherwise store it in a shed on their property and not use it.

I order that –

1. The order of Bond J appointing statutory trustees for sale is not to take effect until further order of the Court.

2. Subject to (1), the orders made in the afternoon of 14 August 2018 be stayed until 4 pm on 24 August 2018 or earlier order

3. The further argument on the application by the second and third defendants for stay be adjourned to be heard by Bond J at 10 am on 24 August 2018.

4. Costs of the application for stay be reserved

[6] I made directions concerning the delivery of affidavit material and submissions for the further argument on the stay.

The stay application

[7] On 24 August 2018, I heard argument on whether the stay should be continued until the determination of the appeal from my substantive orders.

[8] The appeal has been listed for argument before the Court of Appeal on 24 October 2018. The applicants point to evidence which suggests that "median number of days between hearing and delivery of decision for civil cases in the Court of Appeal was 108 days in 2016/17". But one cannot conclude that is a good predictor of what will happen in this case. In the normal course the Court of Appeal could be expected to try to deliver judgment within of the order of 3 months from the date of argument, but given the intervention of the summer court vacation, the normal course might extend until March 2019. In any event, the actual date judgment might be obtained could be earlier or later than that: there is no way to be certain.

[9] I reserved my decision on the application for stay, but made orders continuing the interim stay until 4:00pm today, on the same undertakings which the second and third defendants had made to obtain the interim stay.

[10] This fifth judgment is my judgment on the application for stay pending appeal. It should be read against the background of the matters dealt with in my previous four judgments. The present applicants are the second and third defendants. The present respondents are the third and sixth plaintiffs.

[11] In support of the application for stay, the applicants offer the same undertakings as they offered in support of the interim stay and also, for reasons which will become apparent, they offer to undertake to terminate the engagement of certain financial advisers.

[12] In support of their contention that the application for stay be dismissed the respondents do not (as they had at the time of the argument for interim stay) offer any undertaking to preserve any monies they obtain consequent upon the enforcement of my orders of 14 August 2018. The undertaking which was offered was an undertaking which would make –

(a) each of the plaintiffs at the trial (thus including Mr and Mrs Belling); and

(b) Loghandling & Transport Solutions Pty Ltd ACN 602 389 328,

liable to repay monies which the respondents obtain.

[13] Loghandling & Transport Solutions Pty Ltd is a corporation which I infer is under the control of Mr Belling. It was not a party but the evidence suggests it is the company through which the business which had previously been run by the first and second plaintiffs is now run and that it is the company which is funding the litigation for the plaintiffs against their former accountants, essentially to recover damages for not having discovered the fraud of Ms Hanson.

[14] The undertaking was in these terms:

> Each of the plaintiffs by their counsel undertake that each of the plaintiffs (and Loghandling & Transport Solutions Pty Ltd) will accept liability to repay any funds paid to the third or sixth plaintiffs under the judgment of this court made on 14 August 2018 that are the subject of the appeal.

Relevant legal principles

[15] There is no dispute between the parties as to the applicable legal principles. In *Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd* [2017] QSC 112, I summarised the leading cases in in the following passage (emphasis added):

> The principles governing the application are not in dispute. In *Cook's Constructions Pty Ltd v Stork Food Systems Aust Pty Ltd* [2008] QCA 322, Keane JA stated at [12], as follows (footnotes omitted, emphasis added):
>
> > [12] The decision of this Court in *Berry v Green* suggests that it is not necessary for an applicant for a stay pending appeal to show "special or exceptional circumstances" which warrant the grant of the stay. Nevertheless, it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders. **The fundamental justification for staying judicial orders pending appeal is to ensure that the orders which might ultimately be made by the courts are fully effective: the power to grant a stay should not be exercised merely because immediate compliance with orders of the court is inconvenient for the party which has been unsuccessful in the litigation**.
>
> Keane JA stated at [15] that the focus of the court's attention in an application like the present should be on whether the appeal right might be rendered nugatory and on whether the appellant would be irretrievably prejudiced.
>
> A more recent statement can be found in *Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd* [2015] NSWCA 227 per Beasley P at [9]. Her Honour cited the judgment of Keane JA and observed (emphasis added):
>
> > [9] **The central determinant as to whether a stay will be granted and if so upon what terms, if any, is the court's assessment as to what is a fair balance of the rights of the parties, given that an appeal does not of itself operate as a stay and the party who succeeded at trial is entitled to the fruits of its victory. The court's concern at all times to ensure that its ultimate orders will be effective:** *Cook's Construction Pty Ltd v Stork Food Systems Aust Pty Ltd* [2008] QCA 322; [2008] 2 Qd R 453 at [15]. See also Appeal and Appellate Courts in Australia 2014, LexisNexis at 8.5–8.14.
>
> Other cases (see *Elphick v MMI General Insurance Ltd* [2002] QCA 347 per Jerrard JA and *Raschilla v Westpac Banking Corporation* [2010] QCA 255 per Fraser JA) have stated that an applicant for stay, pending appeal, must demonstrate:
>
> **(a) a good arguable case on appeal;**
>
> **(b) that the applicant will be disadvantaged if a stay is not ordered;**
>
> **(c) that competing disadvantage to the respondent, should the stay be granted, does not outweigh the disadvantage suffered by the applicant, if the stay not be granted.**

There is a good arguable case on appeal

[16] I turn to consider first the question whether there is a good arguable case on the present appeal.

[17] The appeal will turn on whether I correctly applied the principles set out in *Foskett v McKeown* [2001] 1 AC 102 to the particular circumstances of the insurance policy in this case.

[18] I concluded that the policy was very different to that which was dealt with in *Foskett v McKeown* and that the differences were such as to give rise to a different outcome than that which was obtained in *Foskett v McKeown*.

[19] Specifically, I thought the asset into which the stolen monies should be traced was a particular chose in action, namely the right to any benefits which might flow from the insurance cover for September 2014. I attributed the existence of that chose in action to the use by Ms Hanson of stolen monies to pay the relevant premium.

[20] The applicants contend on appeal that I misconstrued the policy and, accordingly, misapplied the principles of tracing. They contend I should have regarded the relevant asset as the bundle of rights under the policy concerned and that *Foskett v McKeown* was not relevantly distinguishable.

[21] The respondents contend that the argument on appeal is so hopeless that I should take the view it has very poor prospects. Their argument appears merely to be a recitation of the correctness of the construction which I gave to the policy.

[22] I reject the contention that I should regard the construction that I reached as so obviously correct that I should conclude the appellant has very poor prospects. The question did not (and does not) seem to me to be as straightforward as the respondents contend. I think there is a good arguable case on appeal.

The fair balance between the rights of the parties

[23] The next questions are:

(a) Is there any risk to the effectiveness of the ultimate orders which the Court of Appeal might make?

(b) What disadvantages flow from the grant or refusal of the stay?

[24] There are four categories of the second and third defendant's assets which will be affected if I refuse the stay, namely –

(a) their interest in the family home;

(b) their rights in relation to the two superannuation accounts;

(c) their rights in relation to monies presently held on trust for them in a solicitors' trust account;

(d) their rights in relation to the motor car.

[25] It is appropriate to address the questions I have posed, and what the evidence reveals, separately in relation to each of those categories of assets, before expressing an overall conclusion on what is a fair balance of the rights of the parties.

Impact on the family home.

[26] If the stay is refused, then the appointment of statutory trustees for sale will come into effect and the trustees will take steps to sell the family home. They would use the proceeds to discharge the interest which the third and sixth plaintiffs have consequent upon the equitable lien referred to at [1](b) above and the proportionate interest referred to at [2](a) above, with any balance after expenses being returned to the applicants. There is no evidence as to how long the process would take.

[27] The equitable lien is not the subject of the appeal and the applicants will have to discharge that liability regardless of the outcome of the appeal. If they win the appeal they could do so out of the insurance proceeds. If they lose the appeal, the only way they will be able to do so is by selling the family home.

[28] There is evidence before me that they would prefer not to sell their home of 22 years. The respondents criticised the evidence as being of no weight because it was given on information and belief. I reject that criticism. This is an interlocutory application. Such evidence is admissible. Such evidence is inherently likely to be true. And there is no reason to disbelieve it.

[29] The applicants submit that the sale of the family home represents a drastic step which could not be reversed if they succeeded on appeal, and is not sufficiently met by the fact

that the Court of Appeal would undoubtedly order the respondents to repay the monies (apart from the equitable lien) obtained consequent upon the sale.

[30] I agree with this submission.

[31] Moreover, on the current state of the evidence I think that the applicants have demonstrated to me that I should infer that there is some risk that that the orders which might ultimately be made by the Court of Appeal would not be fully effective, in the sense that there is a real risk that the respondents would not be in a position to repay any monies that they have obtained. I make the following observations concerning the evidence:

(a) The applicants relied on evidence which demonstrated that –

(i) Mr Belling (the tenth plaintiff) structures his business affairs to limit his personal exposure to liabilities so much as possible. So much as possible he seeks not to accumulate wealth or assets in his own name, but rather in the name of corporate entities controlled by him.

(ii) By the end of the 2013 financial year the third plaintiff had only ever acted as the trustee of the Belling Investment Trust and had no form of income or means of raising funds and had liabilities which exceeded its assets.

(iii) From a date after October 2014, the first, second, fourth and sixth plaintiffs had ceased trading. The sixth plaintiff in particular no longer undertook any business and did not own any assets.

(iv) Relevant searches showed the third and sixth plaintiffs had no real property and only paid-up share capital of $2 and $1,000 respectively.

(b) They invited me to infer that neither of the respondents have any assets which could satisfy a reversal of order on appeal. They invited me to infer that, accordingly, there was a risk that orders which might ultimately be made by the courts would not be fully effective. I am prepared to draw that inference. I am comforted in doing so by the fact that the respondents have not adduced any evidence on this question and, accordingly, I would infer that any evidence which they could adduce would not assist them.

(c) No doubt it was to provide some comfort on this question that the respondents offered the undertaking which I have recorded at [14] above and why they extended the undertaking to apply to Loghandling & Transport Solutions Pty Ltd. But there is no evidence that the net asset position of any of the persons who are the subject of the undertaking is such as would negate the assessment of the risk which I have made.

(d) Ultimately the position I reach is that the risk exists. It is difficult to quantify how great it is. But it is not entirely defused by the undertaking offered by the respondents.

[32] The respondents contended that the evidence as to the state of the dwelling led to a real concern that it was deteriorating and that "the sooner its value is realized the better". The evidence to which they referred was –

(a) evidence given by the applicants solicitor in an affidavit sworn on 13 August 2018 that–

> I was informed by Third Defendant Norman Hanson and verily believe it to be true that at least one third of the Family Home is affected by white ants. Part of the house is currently stripped, due to attempts to limit further white and infestation, and over the last 10 years approximately $10,000 has been spent on works associated with the remediation of white ant infestation

(b) evidence given by the applicants solicitor in an affidavit sworn on 20 August 2018 that there had been a pest inspection of the area of the property of most concern to the applicants (the ensuite) which recorded that no active termites were located.

[33] In my view the evidence does not make good the respondents' contention. The respondents' senior counsel suggested to me that there was evidence in 2015 that the house was worth $460,000. But the only evidence to which she was able to point that that figure had diminished over time was that the home was now ensured at $385,000. Counsel for the applicants correctly points out that that does not suggest that the home and land is valued at $385,000. Whatever the house and land are now worth, there is no reason to infer that the worth will be adversely affected by the time that would pass in order for the appeal to be determined.

[34] One point which the respondents did advance was relevant. The evidence revealed that the applicants had insured the family home but that they had represented to the insurer that "there was no evidence of white ant damage". That does appear to be a representation which might adversely affect the insurance. The respondents contended and I agree that if a stay was granted it should be conditional upon the applicants being required to secure insurance equivalent to the existing Suncorp insurance, but consequent upon full disclosure having been made of the extent of white ant damage which exists in the house. It may be that all is required is to make full disclosure to Suncorp and to obtain its confirmation of the continuation of the cover, but that is a matter which the applicants should address.

[35] Subject to that consideration, in my view the balance of disadvantage in relation to this asset, favours a stay order being made.

<u>Impact on the two superannuation accounts with Colonial Mutual.</u>

[36] These are accounts into which the second and third defendants deposited part of the proceeds of the Asteron term life policy.

[37] The applicants contended and I agree that there is a real risk of irretrievable prejudice to them if a stay is refused. They contend that removal of the money from the superannuation funds would result in significant and irreparable detriment to the applicants even if that money were to be subsequently returned pending a successful appeal, for the principal reason that, due to the applicants' ages, that money could not be re-contributed to another superannuation fund, thereby denying the applicants the tax advantages which could accrue to them. Evidence from an expert financial adviser tended to support that proposition. It would be difficult to evaluate the amount of any such loss. But even if it could be evaluated, there would be some doubt that as to whether the court on appeal would necessarily make an order compensating the applicants for that loss, even if they succeeded on appeal: cf *Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd* [1996] 1 Qd R 26 at 51.

[38] The respondents contended that I should not give any weight to this alleged disadvantage to the applicants because they had not sworn to the proposition that they actually intended to preserve the funds in the form they now are, in the event that they did succeed on appeal. I do not find that proposition to be persuasive. It should be inferred from the fact of the selection of this asset into which to put funds in the first place, that the applicants desired to secure for themselves the advantages which the evidence suggests would be at risk, and there is no evidence to suggest that desire has changed.

[39] Quite apart from the foregoing concerns, my conclusion at [31] above that there is some risk that the orders which might ultimately be made by the Court of Appeal would not be fully effective, in the sense that there is a real risk that the respondents would not be in a position to repay any monies that they have obtained, also applies here.

[40] The applicants contended that the undertakings offered by them defuse any real prejudice to the respondents. The respondents contended that that was not so.

[41] First, the respondents said that they suffer a risk that if the stay continues, but the appeal is dismissed, they are at risk of not being compensated for the loss of the use of the money during the appeal. They contend that there is a differential between the amount of any likely accretions under the terms in which the monies are presently held and the amount which they could obtain with the monies. They seek to give some idea of the size of that differential by suggesting that if the appeal decision takes 120 days, to be published, interest at the default post-judgment rate would accrue to $28,165.62, and submit that there is no prospect that Mr and Mrs Hanson will be able to offer restitution for that loss.

[42] As to this, there is a possibility that there might be a differential between the amount which the respondents might earn if the monies went to them and the amount of accretions to the fund, but it is not correct to say that there is no possibility of recovery. That proposition would turn on there being no equity in the family home beyond the amount of the respondents' equitable lien and the respondents' proportional entitlement to which I have already referred. The evidence does not make out that proposition.

[43] Second, the respondents say that evidence demonstrates that the money is at risk in the applicants' hands. They advanced a number of submissions which were entirely speculative and unsupported by evidence before me on this application, inviting me to conclude that the extant undertakings were insufficient because there was a risk of unscrupulous behaviour by the applicants. Save in one respect, it is unnecessary to deal with those submissions. The respondents relied on evidence which demonstrated that despite the fact that the applicants had in June 2015 undertaken to the court not to deal with the superannuation funds or the proceeds or income thereof, they had in fact at a time after having given those undertakings, renewed the retainer of the financial advisers through whom the investment seems first to have been made, and that renewal had led to certain advice fees being deducted from the amount in the funds.

[44] As to this, I am not prepared to infer from the conduct of the applicants that the suggested risk exists. There is no reason to think that the renewal was anything other than a mistaken assumption that so doing represented a preservation of the status quo. In any event the applicants have now offered to undertake to terminate forthwith the engagement of the financial advisers, contending that this would ensure that there is no further deduction from the funds.

[45] Subject to that consideration, in my view the balance of disadvantage in relation to this asset, favours a stay order being made.

<u>Impact on the monies presently held on trust for the applicants in a solicitors' trust account</u>

[46] The considerations relevant to assessing this asset are in some respects the same as those affecting the superannuation funds.

[47] First, the risk explained at [31] above that the orders which might ultimately be made by the Court of Appeal would not be fully effective, in the sense that there is a real risk that the respondents would not be in a position to repay any monies that they have obtained, also applies here.

[48] Second, there is a risk of differential between the amount of any likely accretions under the terms in which the monies are presently held and the amount which the respondents could obtain with the monies. I assess the significance of that risk in the same way as I did in relation to the superannuation funds.

[49] Third, there is no other demonstrated risk to the respondents. The assets are the rights held by the applicants in relation to monies held on trust in a solicitors trust account. They are subject to the undertakings given to the Court in June 2015 and to the particular undertaking offered by the applicants as the price for obtaining the stay. Whilst the respondents, correctly, point out that they have not had a full accounting of the various trust account holdings, that does not demonstrate that there is a present risk.

[50] In my view the balance of disadvantage in relation to this asset, favours a stay order being made.

Impact on the motor car

[51] In light of the undertaking which the applicants offer in relation to this asset, the respondents correctly contend that a previous submission that the car was indispensable to the applicants, could no longer be seen as a relevant factor.

[52] If the stay is allowed, then there is no demonstrated risk to the respondents' interest in the car.

[53] If the stay is refused, then presumably that would lead to the respondents obtaining the car and realizing its value. The only consideration then relevant would be the risk explained at [31] above.

[54] In my view the balance of disadvantage in relation to this asset also favours a stay order being made.

Conclusion

[55] My overall assessment is that the fair balance of the rights of the parties favours a stay order being made in the circumstances of this case.

[56] It is not necessary specifically to deal with the order appointing statutory trustees for sale, because the order made on the occasion of the interim stay, recorded at [5] above, suspends its operation until further order. If the appeal fails, then an order should be made so that the appointment takes effect.

[57] I would order as follows:

> Upon the applicants undertaking through their counsel:
>
> (a) to maintain the undertakings provided by their counsel to this court on 19 June 2015;
>
> (b) until further order or agreement with the plaintiffs, not to deal with any of the funds held on their behalf in the Big Law/Lawyers trust account;
>
> (c) that they will maintain the registration and insurance for the Mercedes-Benz A-Class motor vehicle (VIN WDD1 173432N154473) and will otherwise store it in a shed on their property and not use it; and
>
> (d) to terminate forthwith their retainer of Brown Macaulay and Warren Financial Services Pty Ltd as financial advisers,
>
> and subject to the condition that the applicants must, as soon as is practicable, and having made full disclosure of the state of white ant damage to the home located at 22 Parkland Drive, Chatsworth, secure and maintain insurance over that home equivalent to that apparently secured by the existing Suncorp policy,
>
> the orders of the Court are:
>
> 1. The orders made by Bond J on 14 August 2018, which were the subject of interim stay ordered on that date, be stayed until such date as the appeal in Court of Appeal proceeding 7390/2018 is determined or further earlier order of the Court is made.
>
> 2. Costs of the application for stay be reserved.