SUPREME COURT OF QUEENSLAND

CITATION:	*Mackellar Mining Equipment Pty Ltd & Ors v Thornton & Ors (No 2)* [2018] QSC 208
PARTIES:	**MACKELLAR MINING EQUIPMENT PTY LTD (ACN 010 398 428) AND DRAMATIC INVESTMENTS PTY LIMITED (ACN 059 863 204) TRADING AS PARTNERSHIP 818** (First Applicant) AND **JANET ELIZABETH WRIGHT AS REPRESENTATIVE OF THE ESTATE OF LESLIE ARTHUR WRIGHT (DECEASED)** (Second Applicant) **v** **TRAD THORNTON AND THE PARTIES LISTED ON THE ORIGINATING APPLICATION** (Respondents)
FILE NO/S:	BS No 2252 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application for Stay
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2018
JUDGE:	Lyons SJA
ORDER:	**The orders of the Court are:** **1. The interlocutory injunction ordered on 7 March 2017 and extended on 21 March 2017 and 27 April 2017 and then extended until further order on 13 June 2017 be dissolved.** **2. Paragraphs 3 to 6 and 11-12 of the Originating Application 2252 of 2017 be dismissed.** **3. Judgment for the Respondents against the Applicants in relation to paragraphs 3 to 6 and 11-12 of the Originating Application 2252 of 2017.** **4. There be an inquiry whether the Respondents have**

sustained any, and what, damage by reason of the injunction granted by order on 7 March 2017, 21 March 2017, 27 April 2017 and 13 June 2017 which the Applicants ought pay according to the undertakings contained in the said orders.

5. **The said inquiry be adjourned to a date to be fixed.**
6. **The costs of the said inquiry be reserved.**
7. **The Applicants and Respondents each have liberty to apply with respect to the said inquiry and the orders in paragraphs 4, 5 and 6 of this order by one party giving the other parties five (5) clear business days' notice in writing.**
8. **All questions of costs, including reserved costs and the costs of the Application for the stay, be adjourned to a date to be fixed.**
9. **Each party have liberty to apply in relation to the questions of costs in paragraph 8 of this order by giving the other parties three (3) clear business days' notice in writing.**
10. **The Application for the stay of orders 1 to 3 above is refused.**
11. **The application filed on 12 October 2017 in relation to paragraphs 7 and 8 of the Originating Application 2252 of 2017 is adjourned to a date to be fixed to be relisted by one party giving the other parties five (5) clear business days' notice in writing.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT GENERAL STATUTORY POWERS – TO STAY OR DISMISS ORDERS OR PROCEEDINGS GENERALLY – where the applicants seek a stay of a decision of this court on 23 August 2018 – where the application that sought, inter alia, an anti-suit injunction was dismissed on 23 August 2018 – where the applicants have filed a Notice of Appeal – where the appeal could be heard in November 2018 – where the respondents have a trial date in Missouri in July 2019 – where the respondents allege that a stay would prevent them preparing for trial – whether the stay is necessary to ensure that the orders made on appeal will not be nugatory – whether the applicants suffer prejudice if the stay is refused – whether the respondents will suffer disadvantage if the stay is granted – whether the stay should be granted or refused

Uniform Civil Procedure Rules 1999 (Qld) r 761

Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd (No 2) [2017] QSC 112

Berry v Green [1999] QCA 213

Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] QCA 322

Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd [2017] QCA 275

Palmer v Parbery & Owen in their Capacities as Liquidators of Queensland Nickel Pty Ltd (Controller Appointed) (In Liq) & Anor; QNI Metals Pty Ltd & Ors v Parbery & Owen in their Capacities as Liquidators of Queensland Nickel Pty Ltd (Controller Appointed) (In Liq) & Anor [2018] QCA 139

COUNSEL: D de Jersey for the Applicant
K Holyoak for the Respondent

SOLICITORS: Holman Webb as town agents for Norton White Lawyers for the Applicant
Cleary & Lee Lawyers for the Respondent

This application

[1] The applicants seek a stay of a decision of 23 August 2018 which would have effectively dismissed their application for an anti-suit injunction.

Background

[2] By originating application filed 6 March 2017, the applicants sought a number of declarations and orders which would have permanently restrained the First to Sixty First Respondents from essentially taking any step to pursue proceedings which are currently listed for a three week trial in Missouri in July 2019.

[3] An ex-parte interim injunction was issued by Douglas J on 7 March 2017 which was subsequently extended on 21 March 2017 and 27 April 2017. On 13 June 2017 the injunction was extended until further order by Dalton J.

[4] By interlocutory application filed on 12 October 2017, the respondent sought an order that the interim injunction be vacated and for directions for the determination of the applicants' entitlement to injunctive relief as a separate question. The trial of the question as to whether the applicants were entitled to injunctive relief was heard on 14 and 15 June 2018. On 23 August 2018 I published my reasons for decision which indicated that the application for the injunctive relief should be dismissed.

[5] On 23 August 2018 the applicants sought a stay of any order until 7 September, pending further argument on an application for a stay as none of the Counsel who had appeared at the trial were available. On 7 September 2018 the application for the stay was argued before me and the decision was reserved. On 7 September 2018 I ordered that the

interim stay ordered on 23 August 2018 was continued until 4.30 pm 10 September 2018.

Application for a stay

[6] Pursuant to Rule 761(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), the Court of Appeal, a Judge of Appeal or the Court that made the order appealed from may order a stay of the enforcement of all or part of a decision subject to an appeal.

[7] On 6 September 2018, the applicants filed a Notice of Appeal of the decision delivered on 23 August 2018. The affidavit material indicates that enquiries of the Court of Appeal Registrar show that the applicants' appeal could be heard by the Court of Appeal on a number of dates in November including 9 November; 12, 13, 14, 15 November; 19 November; 21, 22 or 23 November. When the Notice of Appeal was filed, it was accompanied by a letter seeking an expedited hearing.[1]

[8] The applicants accordingly have applied for an order extending the operation of the stay until the determination of the appeal filed on 6 September 2018. The respondents seek an order discharging the injunction.

Principles

[9] The principles in relation to a stay of execution of judgment pending the outcome of an appeal are well known and have been considered in a number of authorities. In 2008 in the Court of Appeal in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd*[2], Keane JA (as his Honour then was) considered a number of the relevant principles and relied on the earlier decision of *Berry v Green*[3] to hold that it is not necessary for the applicant for the stay pending appeal to show that there are 'special or exceptional circumstances' that warrant the grant of the stay. The Court held that "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."[4]

[10] Accordingly, as a general rule, courts should not be disposed to delaying the enforcement of the orders of the court. Keane JA held:

> "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."[5]

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1 Court File Document 122: Affidavit of Brooke Cheree Backer sworn 6 September 2018.
2 [2008] QCA 322.
3 [1999] QCA 213.
4 *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322 at [12].
5 Ibid.

[11] His Honour then turned to a consideration of the question of the prospects of success of an appeal and considered that prospects of success on appeal may be a significant factor in the balance of relevant considerations:

> "That is because, if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion than might otherwise be the case."[6]

[12] As was noted in *Cook's Construction,* if the preliminary assessment of the prospects of success is positive, it is less clear whether it should persuade the Court towards granting a stay and the primary focus is on whether the appeal will be rendered nugatory by the refusal of the stay application and whether the applicant would be irremediably prejudiced if the stay was not granted and appeal ultimately upheld.

[13] Those principles have been approved in a number of more recent decisions including Gotterson JA in *Palmer v Parbery (in their capacities as liquidators of Queensland Nickel Pty Ltd (controller apptd)) (in liq)*[7]*:*

> "…as Justice Keane observed in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, the fundamental justification for delaying the enforcement by a stay is to ensure that orders which might be made are fully effective."[8]

[14] In *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [9] Fraser JA held:

> "In *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* Keane JA (as his Honour then was), with whose reasons McMurdo P and White AJA agreed, explained that, although it is not necessary for an applicant for a stay pending appeal to show "special or exceptional circumstances" warranting the grant of a stay as had been held in some earlier decisions, it is necessary for the applicant to demonstrate a sufficient basis "to outweigh the considerations that the judgements 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". Keane JA continued that "courts should not be disposed to delay the enforcement of court orders" and "[t]he 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"."[10]

[15] Another recent analysis of the relevant principles was by Bond J in *Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd*[11]:

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6 Ibid at [13].

7 *Palmer v Parbery & Owen in their Capacities as Liquidators of Queensland Nickel Pty Ltd (Controller Appointed) (In Liq) & Anor; QNI Metals Pty Ltd & Ors v Parbery & Owen in their Capacities as Liquidators of Queensland Nickel Pty Ltd (Controller Appointed) (In Liq) & Anor* [2018] QCA 139.

8 Ibid at 5.

9 [2017] QCA 275.

10 Ibid at [11].

11 [2017] QSC 112.

"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 Limited v Motor Vehicles Insurance Limited* [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 P/L v Stork Food Systems Aust P/L* [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."[12]

[16] It is clear from an analysis of those principles that special circumstances need not be shown and it is important that when asked to exercise the discretion to grant a stay, the court should bear in mind that a judgment given after a trial should not be treated as merely provisional and that a successful party in litigation is entitled to the fruits of the judgment in his or her favour. However, one of the matters of fundamental concern is that the court should strive to ensure that the orders which will finally resolve the litigation should be effective and should not leave a residue of avoidable injustice to the party which is ultimately successful.

[17] Accordingly, where there is an appeal with arguable prospects on foot, a stay should be granted where it appears that it is necessary to ensure that the orders ultimately made on appeal would not be nugatory.

Prejudice to the applicant should a stay be refused

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[12] Ibid at 3.

[18] In terms of whether there has been disadvantage, the applicants argue that the respondents could seek an anti-suit injunction in Missouri to restrain the applicants from taking any further steps in the Supreme Court of Queensland proceeding and that the appeal commenced on 6 September 2018 will be rendered nugatory. It is argued that the stay is required to allow the applicants to have an opportunity to pursue their appeal to hearing and a judgment on its merits. The applicants argue that if the stay is refused, the respondents would apply for an anti-suit injunction in Missouri, given their opposition to the application and their application that the injunction be discharged.

[19] The applicants argue that the disadvantage they would suffer would be particularly acute in view of the fact the appeal can be heard in November and an expedited hearing of the appeal has been requested. Accordingly, it is argued that the appeal will be heard and most likely determined by early 2019 which would be months before the commencement of the trial in Missouri. The applicants therefore submit that the respondents have not identified any competing disadvantage to them should the stay be granted which outweighs the disadvantage suffered if the stay is not granted, particularly given that the trial in Missouri is not due to commence until 15 July 2019.

[20] The respondents argue, however, that the prospects of success on appeal must be difficult. It is argued that a particular difficulty was the finding that the application for the anti-suit injunction was instituted for the dominant purpose of preventing the decade-long proceedings from proceeding to a conclusion at the point where it had entered its final stage. A further difficulty is the fact there was no explanation as to why the application was not applied for when the last of the US defendants left the matter in early 2016.

[21] I accept, for the purposes of this application, the argument by the applicants that there is an arguable case and that the Notice of Appeal contends:

(i) There should have been a finding of fact made based on the expert evidence that a Missouri judge and jury would be required to identify and apply Queensland law;

(ii) There was an error in finding that the respondents who would have no claim for damages under Australian law might have a claim for damages in the current proceedings in Missouri;

(iii) A failure to find that the proceeding in Missouri was vexatious and oppressive;

(iv) An error in holding that as a matter of discretion the injunction should be refused on a ground of delay, where delay would have been a reason for refusing the injunction only if it were also proved that the respondents suffered substantial prejudice which could not be appropriately accommodated or compensated.

[22] However even though the applicants may have a good arguable case having considered the arguments of counsel and the affidavits in support of the application, I am not satisfied that the applicants have established that they would suffer any actual disadvantage if the stay is not granted. I consider that the respondents however have established that there would be substantial disadvantage to them if the stay were granted.

[23] The affidavit of Patrick Thomas Nunan sworn 7 September 2018[13] outlines the enormous amount of work that must be undertaken prior to the three week trial which is currently listed to commence in July 2019. This includes the preparation of depositions for the trial. There can be no doubt that the respondents have effectively been restrained from proceeding in Missouri since March 2017 and there is a body of work which needs to be done to make the matter ready for trial. Mr Nunan's affidavit states that on 21 December 2017 the Missouri action was set down for trial for three weeks commencing 15 July 2019 and that this occurred whilst the interim injunction first ordered on 7 March 2017 was in place. He states that in compliance with that order, he has taken no action on behalf of the plaintiffs in the Missouri action to prepare for trial. Mr Nunan also states that he has been informed by the attorney in Missouri that neither he nor anyone on his behalf has taken any steps in the US to prepare for trial. The trial of the Missouri action is now 10 months away.

[24] Mr Nunan states that 43 of the 61 respondents are Bamaga plaintiffs who were the spouses, parents (natural or cultural) of the five passengers from the Far North Queensland/Cape York Peninsula community around Bamaga who died in the crash. He states that only 5 of the Bamaga plaintiffs have given a deposition and that they were given in December 2012. Accordingly by the time the trial commences in Missouri, it will be 6.5 years since the depositions were taken. I accept therefore that the circumstances of the five Bamaga plaintiffs who have given a deposition will need to be updated for use by the US counsel.

[25] In addition, statements from the remaining 38 Bamaga plaintiffs will also need to be obtained. Mr Nunan in his affidavit swears as follows:

> "Most of the Bamaga plaintiffs live in the northern peninsular region communities of Bamaga, Injinoo, Mapoon and the Torres Strait Islands being Thursday Island, Horn Island and Mabuiag Island. Some live in Cairns. Obtaining statements/updated statements from the Bamaga plaintiffs will be a monumental logistical exercise which will fall mainly on me. Bamaga is 1,000 kilometres by road from Cairns. The road is a dirt road that is mostly impassable even to four-wheel drive vehicles during the monsoon season that runs from December to March. The only secure way in is by airline that is also affected by the monsoon season. Eight months to obtain statements/updated statements from the Bamaga plaintiffs for the trial of the Missouri action is barely sufficient time for that preparation alone to be comfortably carried out in advance of the trial in the Missouri action commencing on 15 July 2019.
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> I acted for the families of the five Bamaga passengers who died in the crash when actions were commenced in the Supreme Court in Cairns in 2007 pursuant to the *Civil Aviation (Carriers' Liability) Act 1964* (Qld) (CACL Act). The five actions were heard in Cairns over a seven-day period commencing 12 June 2012 (the Bamaga CACL ~~Act~~ trials). Before the trail commenced, directions was sought as to how the trial was to be conducted, An application for directions was filed some eight months before the trial was to commence and orders were made as to how the trial of the five actions were to be conducted with the essential order being that "the plaintiff's evidence in chief be provided by way of a statement to be

[13] Filed by leave at hearing on 7 September 2018.

> filed within 21 days prior to the trial of the proceeding, The task of obtaining statements from the five plaintiffs by itself was an extremely difficult logical exercise as a number of trips had to be made to Bamaga and surrounding areas to interview the plaintiffs and secure documents and have the plaintiffs sign the statements. That task alone was completed barely in time to meet the deadline of twenty-one days prior to trial.
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> What makes the preparation for the Missouri trial even more difficult as far as the Bamaga plaintiffs are concerned, is that a great majority of them do not have English as their first language. For some English is their third language. For those plaintiffs it is necessary for an interpreter to be present to assist with the obtaining of instructions and that has been extremely difficult in arranging for someone from the community to assist especially if that person is a relative or friend as the disclosure of private information is difficult for the plaintiff in front of a relative or friend. The only alternative is to bring in an interpreter from Cairns or one of the Torres Strait islands and that needs to be arranged well in advance as an interpreter with the necessary language skills are few in number. The difficult in obtaining a suitable interpreter was my experience when the depositions were taken in Cairns from five of the Bamaga plaintiffs in December 2012."[14]

[26] I also note the particular difficulty which Mr Nunan outlines in his affidavit, which is the transient lifestyle of many of the Bamaga plaintiffs which makes contacting them difficult. He states this is particularly so with the plaintiffs who more recently joined the Missouri action who are the children of the Bamaga passengers who died in the crash. He states that with the imposition of the interim injunction, he has not been able to keep a track of most of those plaintiffs and that in his experience a great majority of them will have changed residences and jobs in the 18 months since he last had contact with them. He also indicates that whilst many have mobiles phones, the mobile phone coverage is spasmodic.

[27] In terms of the 18 non-Bamaga plaintiffs, he states that 8 have given depositions in the Missouri action, some of whom gave their depositions in early 2012. Accordingly, updated statements will need to be obtained in preparation for trial. In relation to the 10 non-Bamaga plaintiffs who did not give a deposition, a statement of loss and damage will need to be taken from each of them. In addition, further current financial information as to their income and expenditure will be required and that will take some time to gather.

[28] Given that background, I accept the force of the submission that every day between now and 15 July is vital to prepare the plaintiffs' cases for trial. Mr Nunan states that a stay of even two weeks will seriously prejudice his ability to confirm the current residential and employment addresses for the plaintiffs and then also to visit the plaintiffs especially in the northern region to obtain updated information and instructions before the monsoon season commences in December 2018. Mr Nunan swears that his plan is to then return to the northern region in February and March to finalise the statements and to prepare the plaintiffs to give evidence in the Missouri trial. He states that that exercise alone will take three weeks. Mr Nunan states that as a result of his experience

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[14] Affidavit of Patrick Thomas Nunan sworn 7 September 2018 and filed by leave at hearing on 7 September 2018, [5] – [7].

with the previous trial, he will then need a third visit to the northern region in late April 2019 to have statements signed and to them make travel and accommodation arrangements for the plaintiffs to give evidence either in person in Missouri or via video conference in Cairns, Bamaga or Thursday Island. Mr Nunan also indicates that because of the injunction in place since March 2017, he has not been able to ascertain if any of the locations support video conferencing technology.

[29] The Court docket from Missouri indicates that the trial judge has ordered that the parties participate in a mediation which must be conducted by mid-May 2019. The affidavit material states that is intended that the mediation will occur in late April or early May. Accordingly, preparations in respect of all of the evidence to be given at trial will need to be finalised by late April 2019 in order to meaningfully participate in that mediation.

[30] Given the significant disadvantage which Mr Nunan has outlined, I am satisfied that a sufficient basis has been shown for the refusal of the stay. There would be a significant disadvantage to the current respondents should the trial be delayed any further.

[31] In particular, I do not consider that the applicants have established that there will be a disadvantage if the stay is not granted. Whilst it is argued that the respondents may seek an anti-suit injunction in the Missouri courts to stay the appeal in the Court of Appeal, there is no evidence that this would occur. Neither is there any evidence that the Missouri court would grant such an application knowing that an appeal hearing was pending. As counsel for the respondent put it in oral submissions, "The difficulty with the submission…is the starting premise, which is that there's any basis for the suggestion that [the respondent] is going to [make such an application]."[15] Accordingly I do not consider that a stay is required to ensure that orders which might be made by the Court of Appeal are fully effective.

[32] I consider that the application for the stay of the decision of 23 August 2018 should be refused. The parties have agreed that the form of the Orders should be as follows:

Orders:

1. The interlocutory injunction ordered on 7 March 2017 and extended on 21 March 2017 and 27 April 2017 and then extended until further order on 13 June 2017 be dissolved.

2. Paragraphs 3 to 6 and 11-12 of the Originating Application 2252 of 2017 be dismissed.

3. Judgment for the Respondents against the Applicants in relation to paragraphs 3 to 6 and 11-12 of the Originating Application 2252 of 2017.

4. There be an inquiry whether the Respondents have sustained any, and what, damage by reason of the injunction granted by order on 7 March 2017, 21 March 2017, 27 April 2017 and 13 June 2017 which the Applicants ought pay according to the undertakings contained in the said orders.

5. The said inquiry be adjourned to a date to be fixed.

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[15] T 1-20: 5 - 7.

6. The costs of the said inquiry be reserved.

7. The Applicants and Respondents each have liberty to apply with respect to the said inquiry and the orders in paragraphs 4, 5 and 6 of this order by one party giving the other parties five (5) clear business days' notice in writing.

8. All questions of costs, including reserved costs and the costs of the Application for the stay, be adjourned to a date to be fixed.

9. Each party have liberty to apply in relation to the questions of costs in paragraph 8 of this order by giving the other parties three (3) clear business days' notice in writing.

10. The Application for the stay of orders 1 to 3 above is refused.

11. The application filed on 12 October 2017 in relation to paragraphs 7 and 8 of the Originating Application 2252 of 2017 is adjourned to a date to be fixed to be relisted by one party giving the other parties five (5) clear business days' notice in writing.