15/8 NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

A24/81

935

BETWEEN L.W. HOUSE and Others

Plaintiffs

AND J.M. JONES and Anor

Defendants

Hearing: 24 July 1984

Counsel: Mr Carter for Plaintiffs
Mr Cahill for Defendants

ORAL JUDGMENT OF HILLYER J

These are two applications for orders staying execution of judgments.

The Houses were sharemilkers on a farm belonging to the Joneses. It was alleged by the Joneses that the Houses converted cattle belonging to the Joneses. That claim was heard by Chilwell J and largely on the basis of his assessment of the credibility of the parties, he gave judgment in favour of the Joneses for an amount of $30,000 odd. From that amount it was agreed by the Joneses that a sum of the order of $12,000 should be deducted for trespass and milk processing claims. There is still however a balance of approximately $20,000 owing on the judgment by the Houses to the Joneses.

There was also some form of alleged agreement between the Houses and the Joneses under which the Houses alleged they had a right to purchase the Joneses' farm at a very cheap price. It was held, again by Chilwell J, that because of failure to comply with the Land Settlement Promotion Act, specific performance of that agreement for sale and purchase would not be granted.

The Houses made a claim against their solicitors, alleging negligence on the part of their solicitors, in failure to comply with the provisions of the Land Settlement Promotion Act. The solicitors' insurance company required the Houses to appeal against the judgment refusing specific performance before consideration of the claim for negligence. That appeal is being pursued by the solicitors for the insurance company and steps have been taken to prepare the case on appeal and a fixture is being sought. Similar diligence however, has not been shown in pursuing the appeal against the judgment for conversion, and I am told by Mr Carter from the bar that that appeal has not been pursued and the case on appeal has not been prepared because the Houses are endeavouring to find further evidence which would give them a chance of success in the face of the findings of fact that were made against them by Chilwell J.

It would seem that in the absence of such further evidence it is recognised that the chances of success in the appeal would not be good. The fact is however, that although the notice of motion on appeal in the conversion claim was filed on 16 December 1983, and security duly given by the Houses, a period of now seven months has gone by without further steps being taken to prepare the case.

In those circumstances Mr Cahill for the Joneses submits that the application for the order staying execution of Judgment is merely a delaying tactic, and that the Joneses are being deprived of the fruits of their victory for that reason only.

The principles on which a stay of execution are granted are well known and are set out in McLeod v The NZ Pine Co Ltd (1892) 11 NZLR.493 and Phillip Morris (NZ) Ltd v Liggatt & Myers Tobacco Co Ltd and Anor (1977) 2 NZLR.41, His Majesty the King v The Merchants Assn of NZ Inc & Ors No.2 1913 2NZLR.173, and other cases referred to by Mr Cahill for the Joneses in the careful and helpful memorandum prepared by him.

Broadly speaking they are that a successful litigant should not be deprived of the fruits of his victory, but that a litigant should not have his right of appeal rendered nugatory.

Weighing these two rights as best I can in the light of the fact that the bankruptcy petitions which have been brought by the Joneses against the Houses are due to be heard before me in the High Court at Whangarei on Friday of this week, I have come to the conclusion that a stay of execution should not be granted. The stay effectively would be in the claim for conversion. The only amount in respect of which judgment has been sought to be enforced in the claim for specific performance of the agreement for sale and purchase, is in the sum of approximately $2000 for costs. That is not the real issue between the parties at this stage. Even if a stay were granted in that action, still the claim for $20,000 would remain.

I asked Mr Carter whether any amount could be obtained by the Houses to enable them to pay the debt receiving security for its repayment if it was subsequently held on appeal that the amount should not be paid, buthe was unable to give me any such assurance. Indeed, if he were to do so I would have granted a stay only on condition that it be paid over.

I have considered Mr Carter's submission that the Official Assignee would not be interested in proceeding with an appeal. In my view where such a period has gone by with no steps being taken to prosecute the appeal on the conversion claim, and where even now Mr Carter is unable to advise me of any basis on which the appeal can be pursued, other than the pious hope the Houses have that further evidence may be obtained, I would not be justified in granting a stay in relation to that claim.

The jurisdiction to stay proceedings is concurrent with the High Court and the Court of Appeal. If by Friday I am advised that an application has been made to the Court of Appeal

for a stay I will grant an adjournment of the bankruptcy petition for one month, solely to allow the application to the Court of Appeal, if one is made, to be pursued. Otherwise in my view, it would not be proper for the Houses further to hold the Joneses out of their judgment.

The application for orders staying execution of judgments in A7/81 and A24/81 are therefore refused.

I allow costs in favour of the Joneses in the sum of $150 on each application. I have in mind that the arguments have been conducted together, but in my view the total sum of $300 is a proper amount, having regard to the careful way in which the matter has been argued, and the nature of the applications.

P.G. Hillyer J.

Solicitors:
Messrs Connell Lamb Gerard & Co for plaintiffs.

Messrs Malloy Moody & Greville by their agents Rishworth Kennedy & Co for the defendants.