

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

CIV 2006-412-000513

BETWEEN EWAN ROBERT CARR
 Plaintiff

AND RODNEY JOHN HUMPHRIES
 Defendant

Hearing: 20 October 2009
 (Heard at Christchurch)

Counsel: S Carradus for Plaintiff
 A R Gilchrist for Defendant

Judgment: 20 October 2009

JUDGMENT OF FOGARTY J

[1] On 27 August 2009 I heard an application by Mr Humphries for a permanent stay of a High Court judgment for specific performance against him in favour of Mr Carr which judgment provided for the transfer of a property known as the Styx property from Mr Humphries to Mr Carr.

[2] On 4 September 2009 I dismissed the application for stay applying the principles of res judicata. That judgment has now been appealed and Mr Humphries seeks today an order staying the transfer of the Styx property pending pursuit of the appeal. Secondly, Mr Humphries has also applied to the Court of Appeal for leave to appeal the judgment of Associate Judge Osborne. The application for stay, pending the decision of the Court of Appeal, is opposed today by Mr Carr. I have heard argument from his counsel, Mr Carradus.

[3] Mr Carr's argument is based on essentially two propositions: firstly, he has put behind him his impecuniosity of the past and is in a position where he has been meeting all his obligations, having secured financial support and employment. He now wishes to get back the Styx property which he says has been in his family since the turn of the century. He wishes not only to live in and enjoy the property but as well to develop it to its full potential.

[4] The second limb of his argument is that there has been a sorry history of delays in execution of the judgment which he first obtained in November 2006, and even at that time, against a history of delay.

[5] As I pointed out to his counsel Mr Carradus in argument, there have been, however, a lot of dealings between the parties and further litigation since November 2006. This is referred to in the judgment that I delivered on 4 September 2009 and I see no point in setting it out again. Certainly, sitting here today, I am in no position to judge the rights and wrongs of the matter in terms of delay.

[6] Mr Carradus' legal argument, built on these two factual planks, is that the problem that Mr Humphries is now in is that in October 2008 he could have applied for a permanent stay rather than applying to set the summary judgment aside and having chosen the path to set the summary judgment aside it is too late now to seek a permanent stay. He relies on the famous judgment of *Henderson v Henderson* (1843) 3 Hare 100 of merger of cause of action in judgment.

[7] I do not see it that way. Mr Humphries has a right of appeal against the judgment of this Court of 4 September. He has exercised it. He has also applied to seek leave to appeal out of time the judgment of Associate Judge Osborne, that appeal having been abandoned, and that abandonment also explained in the judgment of 4 September. The principles relating to stay run off and are consequences of the exercise of rights of appeal. That is the context of the current application of the principles relating to stay in the situation.

[8] The affidavit that Mr Carr filed, which I accept is well intentioned, does not, however, satisfy me that provisions are put in place which would ensure that the

Styx property could be retransferred back to Mr Humphries should Mr Humphries succeed ultimately in this litigation. “This litigation” is a term I use for the complex web of all the litigation between Mr Humphries and Mr Carr, of which I have only a partial understanding.

[9] For these reasons it seems to me that the just solution to the present predicament is to provide for the Styx property to be transferred to Mr Carr in performance of the judgment of Associate Judge Christiansen, but against securitisation of the property, which would ensure that it could be retransferred, should an order to that effect be obtained some time in the future by Mr Humphries.

[10] For these reasons I am not satisfied that Mr Carr’s argument for a simple dismissal of the application for stay is justified and I move to what Mr Carradus calls “Plan B”.

[11] Mr Carr’s proposal, arising out of the hearing today, is that he will purchase the Styx property pursuant to the judgment of Associate Judge Christiansen. Second, he will agree that he will not charge the property with a loan or other security. Thirdly, he is prepared to execute a mortgage back to Mr Humphries on terms that if Mr Humphries is successful ultimately then the property can be retransferred.

[12] I emphasise that these elements are obviously just a sketch. The last thing I intend to do today is to try to define these clauses, particularly the last clause, precisely. Rather, what I propose is a timetable, which I have discussed with counsel. The timetable will enable the proposal to be put up, to be considered, and if not agreed this Court can impose a solution on the parties.

[13] For all these reasons, the result of today’s hearing is that Mr Humphries is granted an interim stay against execution of the High Court judgment for specific performance against him granted in 2006, against the following timetable:

1. Within two weeks from today Mr Carr will file a proposal along the lines set out above, or indeed, any substitute proposal.

2. Mr Humphries within one working week will respond to that.
3. Finally, one calendar month from today there will be a telephone conference between counsel and myself in which I will resolve any differences between the parties or if there is no proposal even being discussed will hear argument and settle a proposal binding on both parties.

[14] I will have the telephone conference starting 2 pm, Friday, 20 November. Mr Gilchrist has advised he may not be able to stay or possibly not even participate in that conference but if he has difficulties with other hearings he will have to have his instructing solicitor and/or other counsel briefed as I intend to resolve all outstanding disputes on that day in partial recognition of Mr Carr's submissions that I have heard today complaining about delay. I am free to continue the telephone conference as long as needs be, that Friday afternoon from 2 pm. Mr Carradus, who is based here in Christchurch is not obliged to attend in Dunedin. The whole thing can be done by telephone conference.

[15] Costs are reserved.

Solicitors:
Rhodes & Co, Christchurch, for Plaintiff
A R Gilchrist, Auckland, for Defendant