

HIGH COURT OF AUSTRALIA

EDELMAN J

IN THE MATTER OF AN APPLICATION BY MS
MONFORT FOR SPECIAL LEAVE TO APPEAL

[2024] HCASJ 15
Date of Judgment: 16 April 2024
B22 of 2024

ORDER

- Application refused.*

Representation

The applicant is unrepresented

1 EDELMAN J. This application is brought today by Ms Monfort (a pseudonym) under r 8.07.1 of the *High Court Rules 2004* (Cth) for "a stay of proceedings in, and orders made by, the Federal Circuit and Family Court of Australia [(Division 1)]" pending determination of her amended application for special leave to appeal from the judgment of the Federal Circuit and Family Court of Australia (Aldridge, Austin and Harper JJ).

2 On 13 October 2017, final property adjustment orders were made in the Federal Circuit Court of Australia providing for property to be divided between Ms Monfort (75 per cent) and her husband (25 per cent) ("the 2017 Orders"). The division of property was to be achieved in part by the husband transferring his interest in "Property B" to Ms Monfort and for Ms Monfort to release her husband from any liability in respect of the property, including the mortgage. Lawyers were appointed trustees for the sale of Property B in the event of default by Ms Monfort.¹

3 Property B is the central subject of Ms Monfort's concern in this stay application. She describes Property B as being "at immediate risk" and says that she has been required by the trustee for sale to deliver up vacant possession by today, Monday 15 April 2024.

4 The 2017 Orders also included liberty to apply. An appeal from those orders was dismissed. On 1 February 2019, the 2017 Orders were varied by consent, substituting a new trustee for sale and "including an express reference to s 80(1)(e) of the [*Family Law Act 1975* (Cth)], and ... making some provision for the payment of such trustee's costs and outlays, including costs incurred if a party failed to follow [the new trustee's] directions" ("the 2019 Orders").²

5 The judgment at first instance to which Ms Monfort's application for special leave relates was given on 25 January 2024 by a single judge (Howard J) of the Federal Circuit and Family Court of Australia (Division 1). The orders made by Howard J included vexatious proceedings orders under Pt XIB of the *Family Law Act 1975* (Cth). On 1 March 2024, Howard J made further orders (with some amendments on 20 March 2024) declaring Ms Monfort to be in default of orders 13, 14 and 15 of the 2017 Orders. The 1 March 2024 orders also included an order requiring Ms Monfort to deliver to the trustee vacant possession of Property B within 45 days from the date of the orders and orders for various other matters, including the removal of caveats and the sale of Property B.

6 Ms Monfort sought leave to appeal from the decision of Howard J. The Federal Circuit and Family Court of Australia (Division 1) relied upon s 102QE(2) of the *Family Law Act 1975* (Cth), read with the definition of "institute" in

¹ See *Monfort* [2024] FedCFamC1A 23 at [3].

² *Monfort* [2024] FedCFamC1A 23 at [12].

s 102Q(1), requiring Ms Monfort to "apply to the court for leave" to institute an appeal.³ The Federal Circuit and Family Court of Australia (Division 1) heard that application *ex parte* and on the papers. On 8 March 2024, that Court delivered reasons for decision addressing Ms Monfort's grounds of appeal and concluding that their Honours were "not satisfied that the proposed appeal is not vexatious" and that Ms Monfort "has not demonstrated her proposed appeal would be brought on reasonable grounds".⁴ The application for leave to bring the proposed appeal was dismissed.

7 The amended special leave application filed on 10 April 2024 in this Court by Ms Monfort challenges those orders. Ms Monfort has six proposed grounds of appeal if special leave were granted. In summary, she alleges errors of law by the Federal Circuit and Family Court of Australia (Division 1) in: "[h]olding that orders made after the final orders made on 13 October 2017 were to modify the machinery provisions and to enforce rights or entitlements already determined"; "[h]olding that orders made after the final orders were to enforce rights or entitlements already determined where no application had been made in reliance on that source of power"; "[h]olding that an express reference to s 80(1)(e) of the Act was a valid source of power to make a third party order appointing a stranger 'trustee for sale'"; "[h]olding that there was a power to make a third party order and to order costs in favour of a third party and make provision for a third party's costs and outlays from the property settlement after the s 79 primary power had been exercised and exhausted on 13 October 2017"; "[n]ot concluding that the applicant was denied procedural fairness when the primary court found the applicant was vexatious"; and "[n]ot identifying from the Reasons for Judgment that a hypothetical observer would have had a reasonable apprehension of bias once the primary judge had heard counsel for the 'trustee for sale' read into the court record the precise terms of her client's settlement offer".

8 Ms Monfort's special leave submissions in her amended application for special leave are not easy to follow. Without attempting to summarise the entirety of her submissions, among the issues that she raises are the following. She says that there is a "question", not considered in the courts below, "as to the validity of delegating power to a third party 'trustee for sale' to exercise discretion to make decisions affecting the property and final outcome of a s 79 application". Ms Monfort also asserts that there is a conflict between "the rights of the Trustee for sale to obtain financial reward from his appointment and [Ms Monfort's] legal and equitable property rights". She says that a trustee for sale "might apply only to an appointment under [Queensland] legislation" and that the registration of the trustee for sale prevented her from completing final orders 13, 14, 15 and 16 immediately upon the appointment of the trustee. She refers to other circumstances

³ *Monfort* [2024] FedCFamC1A 23 at [6]-[7], [13]-[21].

⁴ *Monfort* [2024] FedCFamC1A 23 at [41].

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of substantial injustice to her and identifies numerous alleged errors or perceived problems with the "2024 orders" and makes allegations of apprehended bias. She claims that she is able to refinance in order to "receive the transfer" of Property B and she refers to her age, medical conditions and connection with Property B.

9 There may be an issue as to whether Ms Monfort's application for "leave to institute proceedings"⁵ by "making ... an application necessary to start an appeal"⁶ involved the reconsideration of any matter previously determined⁷ and was, in that sense, in appellate jurisdiction. If the application for leave to institute proceedings was in the original jurisdiction of the Federal Circuit and Family Court of Australia (Division 1), then Ms Monfort's special leave application would be prohibited by s 55(1)(b) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) which provides that an appeal "must not be brought directly to the High Court from ... a judgment of the Federal Circuit and Family Court of Australia (Division 1) in the exercise of its original jurisdiction". Consequently, an application for special leave to bring such an appeal would be an abuse of process. It is, however, unnecessary to consider this issue because the application for a stay must be refused.

10 The interlocutory orders for a stay that Ms Monfort seeks in this application are as follows:

- "1. A stay of the whole of the Orders made by the Federal Circuit and Family Court by Hon. Justice Howard on 25 January 2024 in BRC4638/2014;
2. A stay of the whole of the Orders made by the Federal Circuit and Family Court by Hon. Justice Howard on 1 March 2024 as amended on 20 March 2024 in BRC4638/2014;
3. A stay of the whole of the Orders made by the Federal Circuit and Family Court by Hon. Justice Howard on 25 March 2024 in BRC4638/2014;
4. A stay of all future proceedings in BRC4638/2014 which could be brought by the trustee for sale under the liberty to apply provisions granted by the above orders;

⁵ *Family Law Act 1975* (Cth), s 102QE(2).

⁶ *Family Law Act 1975* (Cth), s 102Q(1).

⁷ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [12]-[14].

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5. A stay of any writ of possession which has been issued or which could be issued granted by the above orders in BRC 4638/2014;
6. A stay of all proceedings in NAA 85 of 2024 in the Appeals Division of the Federal Circuit and Family Court of Australia."

11 This Court will only exercise its jurisdiction to order a stay of proceedings pending special leave in exceptional circumstances. As Brennan J explained:⁸

"In exercising the extraordinary jurisdiction to stay, the following factors are material to the exercise of this Court's discretion. In each case when the Court is satisfied a stay is required to preserve the subject-matter of the litigation, it is relevant to consider: first, whether there is a substantial prospect that special leave to appeal will be granted; secondly, whether the applicant has failed to take whatever steps are necessary to seek a stay from the court in which the matter is pending; thirdly, whether the grant of a stay will cause loss to the respondent; and fourthly, where the balance of convenience lies."

12 Ms Monfort says in her affidavit evidence that on 8 March 2024 and 22 March 2024 she applied for leave to institute a proceeding "to seek a stay of property orders made to give effect to the judgment given on 25 January 2024" but leave was refused in both applications by the Federal Circuit and Family Court of Australia (Division 1). She says that she has also filed three applications for leave to appeal since 16 February 2024 and that one of those applications is listed for hearing tomorrow, 16 April 2024.

13 I put to one side any delay by Ms Monfort in seeking a stay in this Court. The short period of delay since her applications to the Federal Circuit and Family Court of Australia (Division 1) for a stay is readily explicable by an unrepresented litigant preparing the materials for the application in this Court. I also take into account the serious effect that Ms Monfort says that a sale of Property B would have on her, including her description in her amended application for special leave that she "will lose her home at a time in life which due to health and age, will cause a position from which there is little chance of recovery" and other effects of that consequence on her. Nevertheless, the prospect of a grant of special leave is neither substantial nor sufficient such that in an assessment of the balance of convenience the interlocutory stay orders sought by Ms Monfort should not be made.

⁸ *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681 at 685.

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- 14 The application must be refused. It is appropriate that the application be determined under r 13.03.1 of the *High Court Rules 2004* (Cth) without an oral hearing and disposed of under r 13.04.