HIGH COURT OF AUSTRALIA

EDELMAN J

PIOTR MACIEJ CWALINA APPLICANT

AND

ALAN WESLEY ROSE RESPONDENT

[2024] HCASJ 16
Date of Judgment: 18 April 2024
M10 of 2024

ORDER

1. The application filed 5 March 2024 for a stay of orders is refused.

Representation

The applicant is unrepresented

The respondent is represented by Russell C Byrnes

1 EDELMAN J. By an application to this Court filed on 5 March 2024, the applicant, Mr Cwalina, seeks a stay of orders made by the Supreme Court of Victoria on 31 January 2024 until determination of Mr Cwalina's proposed amended application for special leave to appeal directly to this Court from those orders.

2 The orders which Mr Cwalina seeks to stay followed the reasons for decision of Tsalamandris J in *Rose v Cwalina*.[1] In her Honour's reasons for decision, Tsalamandris J held that there should be specific enforcement of a settlement agreement between Mr Rose and Mr Cwalina concerning land in issue between them that has been subdivided into two lots described as the Geofrey Street lot and the Helen Street lot.

3 The proceedings between Mr Cwalina and Mr Rose were initially commenced by Ms Majak seeking declarations against both Mr Rose and Mr Cwalina that she had part ownership of the land. In August 2017 in the Supreme Court of Victoria, Ms Majak's action against Mr Cwalina was dismissed and her action against Mr Rose (with whom she had been in a de facto relationship) was transferred to the Family Court of Australia. The proceedings in the Supreme Court of Victoria were continued as a dispute between Mr Rose and Mr Cwalina. During the course of those proceedings they entered the settlement agreement.

4 On 18 December 2023, Tsalamandris J made orders giving effect to her reasons requiring specific enforcement of the settlement agreement, including: requiring partition of the land, with the Geofrey Street lot to be registered solely in the name of Mr Rose and the Helen Street lot to be registered solely in the name of Mr Cwalina; requiring valuations of the land; requiring a payment by Mr Cwalina to Mr Rose of 50 per cent of the difference in value between the two lots; and ordering that orders 1-10 be vacated and there be a judicial sale in the event of non-compliance by Mr Cwalina with "any or all of orders 1, 3, 4, 5, 7 and 8". An injunction was also extended, restraining Mr Rose, Mr Cwalina and Ms Majak from entering, occupying or taking possession of the property on either of the lots until either: (i) the time of partition; (ii) the date of settlement following a judicial sale (if it occurred); or (iii) any other date ordered by the Court.

5 The 18 December 2023 orders also included numerous steps to give effect to those orders including that by 4 pm on 17 January 2024, by order 1(b), Mr Cwalina was "required to complete, and submit to Davis Lawyers, any documents that Davis Lawyers advise are necessary for him to verify his identity" and, by order 1(c), that Mr Cwalina was "required to sign and submit to Davis Lawyers a client authorisation form, in the form required by Davis Lawyers". The parties were given liberty to apply.

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1 [2023] VSC 721.

6 On 31 January 2024, following the exercise of that liberty, Tsalamandris J vacated orders 1 to 10 of the 18 December 2023 orders and made orders to give effect to a sale of the properties. The orders of 31 January 2024 recorded that her Honour had received affidavit evidence and exhibits "which demonstrated non-compliance by Mr Cwalina with orders 1(b) and 1(c) of the orders of this Court dated 18 December 2023".

7 By a proposed amended application for special leave to appeal, dated 28 February 2024, Mr Cwalina seeks special leave to appeal to this Court from the orders of Tsalamandris J made on 18 December 2023 and 31 January 2024. Mr Cwalina relies upon sixteen proposed grounds of appeal. Those grounds are prolix and unclear in some respects. They contain wide-ranging submissions including, but not limited to, assertions regarding non-compliance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic), errors of law in failures by the trial judge to consider a range of matters, failures to afford procedural fairness to Mr Cwalina, and taking into account irrelevant matters.

8 It appears that the reason that Mr Cwalina seeks special leave directly from this Court, rather than seeking to appeal the orders of Tsalamandris J in the Court of Appeal of the Supreme Court of Victoria, is that (he says) "the main aspect of the appeal requires clarification of the scope of s 5(1)(b)(C) of ... the Jurisdiction of Courts (Cross-vesting) Act 1987 [Cth], the [Supreme Court of Victoria] would not have jurisdiction to determine the appeal on all grounds. Subsequently, only the High Court could deal with such appeal."

9 There may be overlap between Mr Cwalina's attempt to invoke the jurisdiction of this Court to consider a "leap frog" appeal from the Supreme Court of Victoria and an application that Mr Cwalina and Ms Majak sought to make in September 2023 for a constitutional or other writ in the original jurisdiction of this Court. In that proposed application, Mr Cwalina's principal submission was that the Federal Circuit and Family Court of Australia did not have jurisdiction in respect of that part of the matter that had been transferred to it by order of the Supreme Court of Victoria in August 2017, and that, as a result, all consequential orders of the Federal Circuit and Family Court of Australia were invalid. Gleeson J directed that that application not be accepted for filing without leave of a Justice of this Court. Mr Cwalina sought leave and that leave was refused by Jagot J on grounds which included that the "application and supporting affidavit do not expose any basis upon which it might be inferred that the Federal Circuit and Family Court of Australia did not have jurisdiction in respect of that part of the matter transferred to it". The same might also be said of Mr Cwalina's asserted basis for the exercise of jurisdiction by this Court to entertain a "leap frog" application for special leave to appeal.

10 In any event, however, putting aside the question of whether this Court would exercise an exceptional jurisdiction to entertain such a "leap frog" appeal, Mr Cwalina's application for a stay does not reveal exceptional circumstances that

would justify the grant of a stay pending determination of his proposed amended application for special leave to appeal. In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]*,[2] Brennan J explained,[3] in terms which have been reiterated on a number of occasions in this Court:[4]

> "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."

11 Before he brought this application, Mr Cwalina properly sought a stay from the Supreme Court of Victoria. That application was refused.[5] In Mr Cwalina's submissions in support of his application for a stay (filed on 5 April 2024), he submitted that the injury to him if the properties are sold "will be irreparable". He also asserts in his affidavit in support that his inability to enter the properties due to the subsisting injunction leaves him in breach of obligations to his insurer to "maintain the property occupied".

12 The nature of Mr Cwalina's asserted prejudice is not entirely clear from his affidavit material and his submissions in support of his application for a stay, especially in light of the likely disposition of his proposed amended special leave application next month or in June. Nevertheless, even accepting that Mr Cwalina will suffer some prejudice from the sale of the properties and from the continuing restraint upon entry on to the properties, I do not consider that there is a sufficient, or a substantial, prospect of a grant of Mr Cwalina's application for special leave to appeal (and an extension of time to make that application) to justify the exceptional order of a stay.

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2 (1986) 161 CLR 681.

3 (1986) 161 CLR 681 at 685.

4 See, eg, *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* (1997) 71 ALJR 814; 145 ALR 121; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 2]* (1998) 72 ALJR 869; *Obeid v The Queen* (2016) 90 ALJR 447; 329 ALR 372; *Mercanti v Mercanti* (2017) 91 ALJR 258; 340 ALR 225.

5 *Rose v Cwalina* (unreported, Supreme Court of Victoria, 23 February 2024).

13 The application should 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 orders made pursuant to r 13.04.