SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2018 0091

QUEENSLAND PHOSPHATE PTY LTD (ACN 609 384 894)	First applicant
PARADISE PHOSPHATE LIMITED (ACN 154 180 882)	Second applicant
v	
MARK ANTHONY KORDA AND CRAIG PETER SHEPARD AS JOINT AND SEVERAL LIQUIDATORS OF LEGEND INTERNATIONAL HOLDINGS INC (IN LIQUIDATION) (ARBN 120 855 352)	First respondent
LEGEND INTERNATIONAL HOLDINGS INC (IN LIQUIDATION) (ARBN 120 855 352)	Second respondent

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JUDGES:	McLEISH and HARGRAVE JJA
WHERE HELD:	MELBOURNE
DATES OF HEARING:	10, 27 May 2019
DATE OF JUDGMENT:	30 May 2019
MEDIUM NEUTRAL CITATION:	[2019] VSCA 119
JUDGMENT APPEALED FROM:	[2018] VSC 789 (Randall AsJ)

PRACTICE AND PROCEDURE – Stay – Winding-up order – Applicants granted stay pending appeal – Stay unopposed by respondents – Order for payment of arrears of rental and annual fees in respect of mining tenements – Undertaking to inform authorities of appeal – Breach by applicants of order and undertaking – Application by respondents to lift stay – Whether mining tenements at risk of cancellation for non-payment of rent and annual fees – *Mineral Resources Act 1989* (Qld) ss 160, 308(2); *Environmental Protection Act 1994* (Qld) ss 278(2)(f), 280, 316I – Whether onus on applicants to establish special or exceptional circumstances – Stay varied to require payment of arrears within 14 days.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr T Greenway (10 May 2019) Mr D Ratnam (27 May)	Coleman Greig Lawyers
For the Respondents	Dr C G Button QC with Ms R Zambelli	Arnold Bloch Leibler

McLEISH JA
HARGRAVE JA:

1 Paradise Phosphate Ltd is the holder of a number of mining tenements and associated exploration authorities in Queensland. By a series of transactions which it is unnecessary to explain in any detail, Queensland Phosphate Pty Ltd and Paradise ('the applicants') entered into an arrangement by which Queensland Phosphate purported to acquire from Legend International Holdings Inc all the shares in Paradise. Legend is the second respondent. The purchase price was stipulated as $1 or a valuation amount, if higher.

2 On 1 February 2019, Randall AsJ made orders, among other things, that the relevant agreements were void and unenforceable. He ordered that Paradise be wound up in insolvency under s 459A of the *Corporations Act 2001* (Cth) and that Mark Anthony Korda and Craig Peter Shepard (who together are the first respondent) be appointed as its liquidators. Randall AsJ stayed those orders for 14 days to permit Queensland Phosphate and Paradise to seek leave to appeal, which they duly did. That stay was extended by Hargrave JA on 22 March 2019 until the determination of the present application for leave to appeal and any appeal.

3 The orders of Hargrave JA were made without full argument but on terms that were essentially unopposed. As part of the orders, Paradise was ordered to do all things necessary to maintain a valid and beneficial interest in each of its mining tenements, and not, by any act or omission to render any tenement liable to forfeiture, cancellation, suspension or non-renewal, specifically including by paying all statutory rental fees, including those currently in arrears, payable in respect of each tenement or an applicable environmental authority as they become due and payable. Through their counsel, Paradise and Queensland Phosphate also undertook to give notice to the Queensland Department of Natural Resources, Mines and Energy ('Queensland Mines') by 26 March 2019 of the proposed appeal, including a copy of the orders of Hargrave JA, and to ask Queensland Mines to send to the respondents a copy of any notices or correspondence issued to the applicants

in respect of the tenements.

4 The respondents seek to have the stay lifted on the basis that Paradise has failed to comply with this order. It was also submitted that the applicants had breached the undertaking.

5 The matter came before the Court on 10 May 2019 and the respondents contended that Paradise was in arrears and owed $122,740.56 in overdue rental in respect of its mining tenements and a further amount, later clarified to be $103,170.54, in respect of annual fees for associated environmental authorities. The latter amounts were said to be due to the Queensland Department of Environment and Science ('Queensland Environment'). Paradise contended that, by agreement with the Queensland authorities, the amounts in question were not currently payable. The respondents contended in response that the amounts were payable according to statute and no administrative agreement could alter that obligation.

6 In order to enable the parties to address the unsatisfactory state of the evidence as to the current status of the tenements and the amounts said to be outstanding, the Court adjourned the respondents' application for the lifting of the stay to 27 May 2019 and made directions for the filing of material regarding the existence and terms of any agreement not to cancel the tenements until the hearing and determination of the application for leave to appeal, or for any other period.

7 Paradise did not file any affidavits or submissions by the date fixed. The respondents filed an affidavit exhibiting correspondence in which the relevant authorities both denied the existence of any such agreement. In particular, the Manager (Assessment) of the Mineral Assessment Hub, Minerals and Coal, within Queensland Mines advised that the Department had not entered into any agreement regarding the timing for payment of outstanding annual rental or any agreement not to cancel the tenements pending the determination of court proceedings or any other relevant timeframe. He stated that Queensland Mines would not cancel a tenement without prior written notice. On behalf of Queensland Environment, the principal

lawyer of that department stated that it was not currently party to any agreement with Paradise concerning the future action that might be taken with respect to its environmental authorities.

8 Paradise belatedly, and without explaining its tardiness, filed an affidavit deposing to statements by officers of the relevant departments to the effect that Paradise would be given at least 20 business days' notice before any action was taken to cancel a mining tenement or environmental authority for non-compliance. Paradise contends that, in effect, the relevant authorities have indicated that they will not take any enforcement steps until the determination of the present proceeding. In that regard, the Senior Mining Registrar of Queensland Mines had advised that the department was 'supportive of awaiting the outcome of legal proceedings'. The Director (Performance and Permits) within Queensland Environment advised that that department had no intention of cancelling Paradise's environmental authorities and was not aware of any circumstances likely to arise before 30 September 2019 that would cause it to do so.

9 Paradise also filed evidence that it had advised Queensland Mines on 8 May 2019 of the proposed appeal, attaching the Court's order and asking that copies of all notices and correspondence from Queensland Mines be sent to the respondents. It was said that the failure to give this notice by the date in the undertaking was due to an 'administrative oversight', without further elaboration.

10 Senior counsel for the respondents, Dr Button, submitted that in circumstances where there had not been a fully contested hearing regarding the stay, and given the applicants' failure to comply with the orders, the onus rested on the applicants to make out their case for a stay afresh. She relied in that regard on *Brimaud v Honeysett Instant Print Pty Ltd*.[1] Dr Button submitted that the Court should apply the well-known principles set out in *Maher v Commonwealth Bank of Australia*, including the requirement that there be special or exceptional circumstances to

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1 (1988) 217 ALR 44, 46–7 (McLelland J).

justify a stay pending appeal, bearing in mind that the judgment is to be presumed to be correct and that the successful party is entitled to the benefit of that judgment.[2] The Court was, it was submitted, required in this case to consider whether there was a real risk that it would not be possible for the applicants, if successful in the proposed appeal, to be restored substantially to their former position if the judgment against them were to be executed.[3]

11 It was submitted that there would be no real prejudice to the applicants if the tenements were to be sold. Paradise would be entitled to the proceeds, if the liquidation were to be set aside. Queensland Phosphate would still be entitled, on completion of the sale arrangement, to acquire the shares in Paradise if it could pay the valuation amount. It was pointed out that there was no evidence before the Court suggesting that Queensland Phosphate would have access to the required amount in any event. Dr Button noted that it was the applicants' case that the tenements were worth in the order of $29 million and that this was offset by intercompany debt in the amount of about $18 million.

12 The respondents submitted that it had now become clear that the amounts in question were due and payable and that the applicants were saying no more than that the authorities would give 20 business days' notice before taking action to cancel any tenements or environmental authorities. In circumstances where the applicants had failed to comply with orders and the undertaking they gave to the Court, the Court could, it was submitted, have no confidence that the giving of such notice would suffice to preserve the tenements. Moreover, the further evidence had revealed that the environmental authorities were currently suspended due to non-payment of the amounts due, a matter of which the applicants had claimed to be unaware at the time of the last hearing. It was also noted that correspondence sent to the registered office of Paradise by the Indjalandji-Dhidhanu Aboriginal Corporation

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2 [2008] VSCA 122 [20] (Dodds-Streeton JA, with Redlich JA agreeing).

3 Ibid [25]), quoting *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653, 657 (Young CJ, with Brooking J agreeing).

RNTBC, which claimed to be owed annual payments in respect of exploration permits, had been returned as undeliverable and marked 'not at this address'. All these matters, together with the manner in which the applicants had conducted the present litigation, were said to point to a 'brinksmanship' approach which showed that the tenements were in jeopardy.

13 Dr Button also submitted that the evidence showed that the respondents would suffer prejudice as a result of a continuation of the stay, principally because of the effect of the passing of time upon any sale process and the resulting loss of interest of potential purchasers.

14 Finally, Dr Button indicated that the liquidators were prepared to undertake to hold the proceeds of any sale of the relevant mining tenements pending the resolution of the proposed appeal.

15 Mr Ratnam, who appeared for the applicants, submitted that the evidence showed that both Queensland Mines and Queensland Environment had agreed not to cancel the tenements or authorities without first giving at least 20 business days' notice, and that they were taking the position that matters should be left in abeyance until the proposed appeal had been determined. As a result, none of the tenements were in jeopardy. It was submitted that Queensland Mines had indicated as long ago as 2016 that it would approach the matter in this way, and that nothing had changed. Mr Ratnam pointed out that the liquidators had known of the position taken by the authorities at that time.

16 Mr Ratnam submitted that the failure to comply with the undertaking by the specified date was due to oversight and that this had been duly remedied. No prejudice flowed to the respondents from the mistake.

17 It was further submitted for the applicants that, because they wished to develop the mining tenements, those assets of Paradise were worth more to the applicants than they would be to other potential purchasers. As such, there was a risk of irreparable financial loss if the tenements and associated environmental

authorities were to be sold to third parties while the proposed appeal was pending. However, it was Mr Ratnam's primary position that the stay orders should be maintained because there had been no substantive breach of the orders which could be said to have jeopardised the assets of Paradise.

18 The starting point in considering the respondents' application to lift the stay orders must be whether those orders have been complied with by the applicants. In two significant respects, they plainly have not. First, the undertaking to notify Queensland Mines of the appeal, and to ask for copies of notices and correspondence to be sent to the respondents, by 26 March 2019 was not complied with until 8 May 2019. Especially in circumstances where the protection of the tenements was a consideration at the heart of the stay, this is quite unacceptable. The only explanation for the breach of the undertaking, being an unspecified 'administrative oversight', suggests a cavalier approach to the Court's orders.

19 Secondly, we do not think it can seriously be disputed that the order as to payment of arrears was breached. When the matter first came back before the Court, the applicants sought to persuade us that the amounts in question were not currently payable, by virtue of the alleged agreements with the relevant departments. The applicants subsequently refined this argument by contending that there was a longstanding arrangement whereby each department would give Paradise at least 20 business days' notice of any cancellation or other adverse action, with a view to taking no steps of that kind until the litigation had concluded.

20 Even if such an arrangement were in place, it would not amount to anything more than a forbearance to take action in respect of the unpaid amounts. We do not accept the applicants' contention that the order is to be read as if it was confined to the payment of rental in circumstances where the tenement is in jeopardy. The order clearly required payment of rental and annual fees in arrears as a specific obligation. It is not to be read down as applying only in circumstances where a tenement is liable to forfeiture, cancellation, suspension or non-renewal. The order proceeds on the basis that non-payment of rental or annual fees is an example of such

circumstances.

21 That assumption is borne out by the legislation. As Dr Button submitted on 10 May 2019, the obligation to pay rental for mining tenements arises under statute.[4] The same is true of annual fees under environmental authorities.[5] The amounts in question therefore remain payable. The Minister may cancel an exploration permit or a mining lease for non-payment of rent without notice.[6] Notice is required of cancellation of an environmental authority, including for non-payment of annual fees, but that is again a basis for cancellation.[7] Accordingly, the legislation both creates the payment obligation and provides for cancellation for its breach. Moreover, as now appears, the environmental authorities have been suspended. This renders it impossible to perform mining activity under the mining tenements, exposing the exploration permits, at least, to risk of cancellation for failure to fulfil any condition requiring the carrying out of programs of work.[8]

22 The applicants sought to circumvent the exposure of the tenements to cancellation under the legislation by pointing to communications with the departments of the nature already mentioned. Those communications must be considered in the light of other statutory provisions. Cancellation of a mining tenement on grounds other than non-payment of rental is subject to a minimum notice period of 20 business days.[9] Notice is also required to be given of cancellation or surrender of an environmental authority.[10] With that in mind, at its highest, the evidence relied on by the applicants supports a suggestion only that the relevant departments have agreed to apply the 20 business days' notice period to the

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4 *Mineral Resources Act 1989* (Qld) ss 138(3) and 141(1)(g) (exploration permits), and ss 276(1)(k) and 290 (mining leases).

5 *Environmental Protection Act 1994* (Qld) ss 278(2)(f), 316I; *Environmental Protection Regulation 2008* (Qld) reg 119.

6 *Mineral Resources Act 1989* (Qld) ss 160(2) (exploration permits), 308(2) (mining leases).

7 *Environmental Protection Act 1994* (Qld) s 280.

8 *Environmental Protection Act 1994* (Qld) ss 18(b), 107(c), 110, 426; *Mineral Resources Act 1989* (Qld) ss 141(1)(a), 160(1)(c), 276(1)(a).

9 *Mineral Resources Act 1989* (Qld) s 160(1)(b).

10 *Environmental Protection Act 1994* (Qld) ss 278, 280.

situation of non-payment of rent and annual fees, and have indicated a present intention not to take action while the litigation is pending.

23 Even assuming that these indications could bind the Minister, however, they must be considered in light of the evidence adduced by the respondents. That evidence shows that the departments do not regard themselves as bound by any agreement with the applicants concerning future action that might be taken. On that basis, reliance on either the application of the 20 day notice period or the indications of present intention regarding the conclusion of the litigation is plainly precarious.

24 For these reasons, we consider that the applicants are in breach of the order for payment of rental made on 22 March 2019, both according to its terms and because the tenements and environmental authorities are, as a result of the applicants' failure to pay rental and annual fees respectively, currently liable to cancellation.

25 While the stay was not expressed to be conditional on compliance with that order, the order was a matter of the first importance in respect of the granting of the stay and it is readily apparent that it was central to the context in which the respondents did not strenuously oppose the stay. The question is then whether the stay should be lifted as a result of the breach.

26 The respondents submit that the question of the stay is now at large before the Court and that, in the new circumstances, the applicants should be required to discharge the onus of proving special or exceptional circumstances justifying a stay. Since the stay has not previously been the subject of a full hearing, there is force in that submission. On the other hand, the approach we now take to the existing stay must inevitably start, as we have said, with the fact of that stay. It is significant that the parties have proceeded on the basis of a stay in the context of the orders made on 22 March 2019. The slate is therefore not entirely clean.

27 If we were considering the matter entirely afresh, we would give close attention to Dr Button's submission that the applicants would suffer no real

prejudice if the tenements were to be sold by the liquidators so that, upon a successful appeal, Paradise were to be left with cash instead of tenements and Queensland Phosphate were to have to find cash to complete the purchase of shares in Paradise. We are far from persuaded that the applicants would suffer particular prejudice in that scenario. At the same time, the breach has not so far adversely affected the tenements and it is capable of being remedied. We do not consider that the evidence establishes that the lapse of time pending appeal presents a significant risk of unfair prejudice to the respondents. All things being equal, therefore, the circumstances point towards the maintenance of some kind of stay, at least in the short term.

28 The purpose of the order which was breached was, as its terms indicate, to protect the tenements. The need to do so has been emphasised by the belated discovery, since the last hearing, that the environmental authorities are currently suspended. The evidence of mail to the registered address of Paradise being returned to sender, and the 'administrative oversight' already mentioned, give further cause to doubt whether the affairs of Paradise are being satisfactorily administered.

29 In our opinion, given that the Minister is now entitled to cancel the tenements and the environmental authorities for non-payment of rent and annual fees, and that there is evidence that both Queensland Mines and Queensland Environment deny the existence of any agreement not to do so, the present stay should only be continued on condition that the arrears are promptly paid. In light of the evidence about the administration of Paradise's affairs, even if there were an informal arrangement with the relevant departments by which notice would be given and no action would be taken pending appeal, by far the safer course, given what is at stake, is to pay the arrears.

30 We will therefore vary the stay by ordering that the applicants file and serve by 4:00 pm on 13 June 2019 receipts from the Queensland Department of Natural Resources, Mines, and Energy in the amount of $122,740.56 and from the

Queensland Department Environment and Science in the amount of $103,170.54 in respect of the payment of arrears of annual rental and annual fees, respectively. If they do not, then the Court intends to make orders immediately lifting the stay. In that event, any future stay would need to be the subject of a fresh application.

31 We will adjourn the further hearing of the respondents' application to Friday 14 June 2019 at 9:30 am. At that time we will hear the parties as to the form of orders, and as to costs. We will also ask counsel for the respondents to confirm the undertaking referred to at [14] above, to take effect should the stay be lifted.

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