[2026] QCA 103

COURT OF APPEAL

BROWN JA

Appeal No 5739 of 2025
SC No 8710 of 2024

OXFORD ON CROWN GOLD COAST PTY LTD ACN 616 351 234	**First Applicant**
PSR SOUTHPORT MP INVESTMENT PTY LTD ACN 606 343 444	**Second Applicant**
PSR SOUTHPORT INVESTMENT PTY LTD ACN 606 343 051	**Third Applicant**
ROBERT HUANG	**Fourth Applicant**
v	
GCAP PTY LTD ACN 128 770 418	**Respondent**

BRISBANE

MONDAY, 8 JUNE 2026

JUDGMENT

[1] **BROWN JA:** On 18 August 2025, Justice Freeburn granted summary judgment in favour of the respondent against the four applicants as guarantors pursuant to a Deed of Loan and Guarantee, finding that there was no arguable defence disclosed by the amended defence and affidavit material relied upon by the applicants before him. The first applicant granted a mortgage in favour of the respondent over a property at Park

Lane at the Gold Coast, which I will refer to as the Property other than when referring to orders made by his Honour below.

[2] The primary judge ordered that the applicants jointly pay damages of $3,074,212.00 due to a breach of the Deed of Loan and Guarantee executed on 8 December 2017 and breach of the associated registered mortgage (reference 718482209) (together referred to as the mortgage).

[3] The primary judge further ordered that pursuant to the *Land Title Act 1994* (Qld) s 78(2)(c)(i) the plaintiff may take possession of the land known as 8 and 8A of Park Lane, Southport in the State of Queensland (title reference 13161230) due to the breach of the mortgage referred to in paragraph 1 of the Order.

[4] A notice of appeal was sought to be filed by the applicants on 12 December 2025. As it was outside the 28-day time provided for the filing of a notice of appeal the applicants also filed an application for leave to appeal. That application has not yet been determined.

[5] On 5 January 2026, a further application was filed seeking a stay of the orders made on 18 August 2025. There has been considerable delay in this application being heard as a result of parties' availability. Notwithstanding the length of time the applicant had to prepare material for the application and make submissions, the applicant did not comply with the Court's directions and on the day of hearing applied for an adjournment. The Court granted the adjournment for one week and made directions for the filing of material and submissions.

[6] The applicants are not legally represented. At the hearing below and in the hearing before me, Mr Adam Watson, a consultant who has apparently advised the applicants in some capacity appeared. According to an affidavit he provided he has been "representing and assisting the appellants in this matter since prior to hearing before Justice Freeburn on 18 August 2025" and has been the primary point of contact throughout. Although the Fourth Applicant, Mr Huang, has sometimes referred to Mr Watson in affidavits as a legal representative, Mr Watson informed the Court he was not a lawyer but was assisting the applicants and that Mr Huang who was the fourth applicant and director of the other three applicants was not proficient in English to the degree he could represent the applicants. On that basis I gave him leave for the

purposes of appearing for this application only. Mr Huang joined the hearing by Webex.

[7] The Court has a power to grant a stay under r 761 of the UCPR when a notice of appeal has been filed. As there was no notice of appeal on foot in the present case to enliven the Court's power under r 761 of the UCPR, it does not apply. However, the Court has an inherent power to grant a stay.

[8] The principles for the granting of a stay have been well established since *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at [12]-[15]. Special or exceptional circumstances do not need to be shown but a sufficient basis must be shown to outweigh the considerations that judgments are not provisional and that successful parties are entitled to its fruit (see *Cook's Construction* at [12]). The court is to have particular regard to whether there is:

(a) a good arguable case to be raised on appeal;

(b) the applicant will be disadvantaged if a stay is not granted; and

(c) there is some competing disadvantage to the respondent if the stay is granted which outweighs the disadvantage suffered by the applicant.[1]

The principles in *Cook's Constructions Pty Ltd* have been followed in a number of cases in this Court.

[9] Mere financial hardship or inconvenient is not sufficient to justify a stay.[2]

[10] The Court of Appeal also looks to whether any orders it makes, if the appeal is successful, will be rendered nugatory in the absence of a stay.

[11] On an application for a stay pending appeal, the Court will make an assessment of the prospects. If the prospects of success are poor, they will tend to favour a refusal of a stay.

[12] The notice of appeal for which the applicants apply for leave is in very general terms and is not in accordance with r 747(1) of the UCPR which requires a notice of appeal to identify the findings of the primary judge which are said to be made in error and state in specific terms the grounds on which it is asserted those findings were in error.

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1 *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd*.

2 *Cook's Constructions* at [12].

[13] In summary, the notice of appeal asserts a number of errors of law and factual errors, namely that:

(a) first, there was a verbal agreement/contract (loan offsetting against the off-plan contract settlement money) which existed between the plaintiff and the defendants for this loan;

(b) the plaintiff revoked the above agreement by rescinding the off-plan contract between the plaintiff company, the respondent company and the fourth applicant's company on 27 June 2024;

(c) thirdly, the respondent is not a respondent lender and there are errors in the loan administration procedure;

(d) fourthly, there is a conflict of interest between the solicitors who acted for the respondent and the applicants;

(e) fifthly, proper court processes of cross-examination of evidence had been ignored without going to a trial; and

(f) finally, the overall summary judgment had resulted in an unfair outcome.

[14] Mr Watson provided an affidavit in support of the application. Material was also read by the respondent from the hearing below. Some of Mr Watson's affidavit was not in admissible form or provided evidence that was not before the court below nor the subject of defences in the applicants' amended defence. To the extent that it raised new matters not before the court below, I upheld the objection the material was inadmissible for the purposes of this application. Similarly, some of the objections to hearsay material were upheld, in the case of other paragraphs which were in the nature of submissions I treated them as such. I should say that the evidence that was ruled inadmissible would have had little impact on the present application.

[15] The amended defence considered by the primary judge did not challenge the existence of the deed of loan and guarantee, nor that the loan went into default in December 2018. The evidence showed the applicants as guarantors had been served with notices of demand in May 2020 and March 2022, well before 2024 when the respondent initiated proceedings. Although there were some complaints in the amended defence as to the borrower having been induced to take the loan without proper documentation and separate legal advice and an issue of conflict was raised, the primary judge had

considered those matters and found that there was no specific conflict identified. Similarly, while the amended defence raised that the respondent had failed to produce a copy of the credit licence they did not, as the primary judge found, raise any basis upon which the recovery under the deed of loan and guarantee was affected or impugned.

[16] The applicant's representative focussed on three matters in seeking to raise arguable error made by the primary judge.

[17] First, that there were material factual disputes which existed, and which should have been tested by cross-examination but which the primary judge declined to find were triable issues.

[18] Secondly, that the primary judge failed to find that the applicants had a defence arising from the respondent entering the property as a mortgagee in possession and terminating a tenancy and subsequently blocking the applicants from obtaining a tenant, which had the effect of reducing their funds to repay the loan amongst other things.

[19] Thirdly, he contended that there had been a refinancing offer obtained by the fourth applicant for a loan facility in 2025, which would have been sufficient to discharge the debt of the applicants which was however rejected on behalf of the respondent. The primary judge is said to have dismissed that evidence without giving it appropriate weight.

[20] As to the first matter, the factual disputes identified by the applicant, are whether a verbal offset agreement existed, whether the respondent had acted as mortgagee in possession, whether the respondent had blocked re-tenanting, whether the respondent refused to engage with a refinancing proposal and whether the judgment quantum correctly reflected the amount owed.

[21] The primary judge found, to the extent that the above were raised before him as part of the amended defence, that they were unsupported by evidence before him or did not raise any real defence so as to raise a triable issue. In particular, he did not find that they raised a factual issue such that it was necessary that there be a trial. The primary judge considered each of the nine possible defences raised in the applicants defence. Significantly, as the primary judge had stated in his reasons, it was not

asserted in the amended defence nor before him that the loan was not in default nor that the respondent was not entitled to take possession of the Property. He noted that it was conceded before him that the applicants did owe the respondent money although the specific amount was not identified by the applicants. The primary judge found that the applicants had no real prospect of defending all of the respondent's claim.

[22] As was observed by the primary judge, the taking of possession and alleged actions of the respondent in that regard all postdated the event of default under the loan and the mortgage. The primary judge noted that the fact it had taken time to issue proceedings was hardly a defence and that the defending guarantors were entitled to and obliged to pay the debt from the time it fell due, which was in 2018, and the fact they had not done after demands were made was not a matter which gave rise to them being able complain about the creditor's delay. While it may be that the respondent went into possession of the property as alleged by the applicants, no argument is raised to suggest any defence to the respondent's claim by the applicants in that regard, as was found by the primary judge. As it stands, the fact that the respondent went into possession or not does not assist the guarantors in terms of raising a defence, since as the primary judge stated it was open for them to pay the debt from the time it fell due and that given the default the respondent who had entitlements under a mortgage was likely to have been entitled to take possession. The contention does not appear to be that the respondent couldn't take possession, but rather that by doing so they did not tenant or permit the applicants to tenant the Property. As I will discuss below, that does not raise any basis of defence.

[23] As to the complaint about interest being at 16% during the period the property had no tenant, the applicants have failed to identify any legal basis upon which the respondent could not charge interest at that rate. There was no evidence supporting the fact that the loan had not been properly calculated, nor that the amount owing had been properly calculated. It was a matter of assertion. The quantum of the amount said to owing by the applicants had been the subject of evidence by the respondent.

[24] None of the factual matters which have been raised by the applicants in the submissions provided on their behalf suggest that oral evidence was required to be given. No evidence was placed before me suggesting that cross-examination had been requested and refused. There was no identifiable error by the primary judge in

not finding that there was no triable issue raised by any factual matter sufficient to defeat summary judgment.

[25] While Mr Huang in his affidavit, which he filed supporting the application for leave to appeal raises the prospect of a verbal offsetting agreement, it is evident from the primary judge's reasons that that matter was not substantiated by any evidence before him. More importantly, the primary judge noted that the alleged offset agreements raised by the amended defence relied on agreements in relation to other properties which prima facie were not connected with the Property relevant to this matter and that those agreements had not proceeded or in the case of two off the plan properties, had been apparently rescinded by the respondent, but without any suggestion that that rescission was unlawful. Given that, there was no identified basis for showing that they gave rise to an arguable defence or were an equitable set off in relation to the amount owing under the deed of loan and guarantee. In that respect I can identify no arguable error that has been made by the primary judge. While it may be open to the applicants to make an application to seek to adduce further evidence before the Court of Appeal in that regard, it is not presently a matter which identifies any arguable error by the primary judge relevant to this application.

[26] As to the second contention of the applicants that the tenant's income could have been used to abate the loan when the respondent was said to have taken possession as mortgagee, given the default of the borrower, the mortgagee was entitled to exercise the rights available to it. There is no evidence that the respondent was obliged to tenant the property to abate the amount owing in 2024, nor allow the applicants to tenant the property. While it was asserted that the respondent terminated the tenancy which existed when he took possession, there is no evidence to demonstrate that that was wrongful in the event that that was how it occurred at all. The case of *White v City of London Brewery Co* (1889) 42 Ch D 237 is distinguishable from the present case and provides no assistance to the applicants. There is no demonstrated arguable error by his Honour in not finding a triable issue in this regard, although it must be said the matter was not raised directly before his Honour.

[27] As to the question of refinancing, the third matter raised on behalf of the applicants, that was not a matter which was raised before Justice Freeburn in the amended defence or the material. Although Mr Watson stated that he did raise the question of refinancing by the applicants to pay the respondent before the primary judge, he agreed there was no evidence of any such refinance agreement. Even if that had been

so, and that there was a refinance agreement, it does not appear from the submissions that there was any the evidence to support the fact that the applicants offered to repay all of the amount owing to the respondent. The respondent is not obliged to compromise for less than the amount owing to it. Nor is an apparent willingness to compromise for less demonstrative of the quantum being claimed being in doubt.

[28] In terms of prejudice, the applicants point to the fact that a bankruptcy notice has been issued against the fourth applicant arising out of the judgment, and that if the property is transferred to a third party the Court would be unable to undo that transfer. No evidence has been provided of the fourth applicant's financial position nor as to the amount the applicants contend that they have been paying as outgoings on the property throughout the period. The applicants contend that the respondent's position is secured by a registered mortgage over the property and that the only prejudice that could arise is from accrued interest.

[29] The respondent provided an affidavit through Ms Field, which suggests that some prejudice might be suffered by them other than continually accruing interest. Ms Field deposes to being informed by Mr Gordon that there may be an opportunity for the sale of the Property together with a neighbouring property which would make it more accessible and is anticipated would generate a higher return. While there is evidence of such negotiations, there is no evidence as to the greater value or otherwise of the Property, such that it is a matter which I do not attribute great weight. But the fact that there is such an opportunity and there is an outstanding loan where interest continues to accrue notwithstanding the security of the mortgage over the Property does support some prejudice to the respondent if the stay is not granted.

[30] More significantly, no evidence has been provided supporting the fact that the applicants could meet any judgment nor have they sought to offer any additional security, or pay money into court or demonstrate that the value of the Property well exceeds the amount that has been found to be owing to the respondent by them or to meet any additional interest that would accrue pending consideration of their application and potentially notice of appeal by the Court of Appeal.[3]

[31] As to the question of whether the Court of Appeal orders would be rendered nugatory, and the disadvantage to be suffered by the applicants if the stay is not granted and whether it outweighs the disadvantage that will potentially be suffered by the respondent if the stay is granted and it cannot enjoy the fruits of the litigation, as

3 *Serobian v Commonwealth Bank of Australia* [2009] NSWCA 350 at [27].

stated above the applicant did not place any evidence before the Court demonstrating any ability to pay the amount owing under the guarantees or mortgage notwithstanding they don't dispute that there is an amount owing. That is a factor which weighs against the grant of a stay, given the disadvantage that poses to the respondent who, albeit has a mortgage, is in a position where interest continues to accrue.[4] The property is a commercial property. While it was said from the bar table that the applicants have expended money in terms of approvals to try and develop the property, no evidence of that fact was before me. Nor is there any evidence that damages would not be an adequate remedy if the applicants were successful in obtaining leave to appeal and in their appeal in the event that the Property was sold, although I note that the only order obtained from the Court below was to obtain possession of the Property under s 78(c)(i) of the *Land Title Act*.

[32] While the applicants indicated that further evidence could be presented to bear out what they were asserting, the fact is that they had an opportunity given to them by Justice Freeburn to present such evidence before the summary judgment application and by this Court before the application was heard.

[33] While I accept that some prejudice will be suffered by the applicants if the stay is refused, I consider that the arguments that have been raised seeking the stay demonstrate that the appeal only has poor prospects of success, which does not provide a sufficient basis to outweigh the respondent having the fruits of litigation pending the determination of this appeal. Nor do I find the disadvantage that will be suffered by the applicants if the stay is refused outweighs the disadvantage to the respondent if a stay is granted, given the poor prospects of appeal and the lack of evidence presented in terms of the applicants' position.

[34] The application is dismissed. I do not propose to make any orders in relation to the setting down of the hearing of the application for leave to appeal and appeal. This matter has been fraught with delay and it is not appropriate for me to make orders accelerating the appeal in those circumstances.

[35] The orders of the Court are that:

1. The application is refused.
2. The applicants are to pay the respondent's costs on an indemnity basis pursuant to clause 19 of the deed of loan and guarantee, executed on 8 December 2017.

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4 *Serobian v Commonwealth Bank of Australia* [2009] NSWCA 350 at [27].