

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : CURRIE -v- CURRIE [2018] WASCA 30

CORAM : MITCHELL JA

HEARD : 8 MARCH 2018

DELIVERED : 8 MARCH 2018

PUBLISHED : 12 MARCH 2018

FILE NO/S : CACV 109 of 2017

BETWEEN : GRAEME JOHN CURRIE
Appellant

AND

BRUCE MICHAEL CURRIE
First Respondent

ANDREW JOHN CURRIE
Second Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : LE MIERE J

Citation : CURRIE -v- CURRIE [No 2] [2017] WASC 312

File No : CIV 1237 of 2013, CIV 1848 of 2015

Catchwords:

Practice and procedure - Application for suspension order pending appeal - Section 15 *Civil Judgments Enforcement Act 2004* (WA) - Rule 44 *Supreme Court (Court of Appeal) Rules 2005* (WA) - Effect of undertaking on need for stay - Preservation of subject matter - Balance of convenience - Lack of special circumstances - No prejudice to applicant if stay is not granted - Legal title to properties required for respondent to obtain finance - Application dismissed

Legislation:

Civil Judgments Enforcement Act 2004 (WA), s 15
Duties Act 2008 (WA), s 99, s 100, s 101, s 102, s 103, s 104, s 105, s 106
Supreme Court (Court of Appeal) Rules 2005 (WA), r 44

Result:

Application dismissed

Category: B

Representation:

Counsel:

Appellant : Mr N Dillon
First Respondent : Mr P G Donovan
Second Respondent : No appearance

Solicitors:

Appellant : AustAsia Legal Pty Ltd
First Respondent : MDS Legal
Second Respondent : No appearance

Case(s) referred to in judgment(s):

Currie v Currie [2013] WASC 428
Currie v Currie [No 2] [2017] WASC 312
Eastland Technology Australia Pty Ltd v Whisson [2003] WASCA 307; (2003)
28 WAR 308

MITCHELL JA:

(These reasons were delivered extemporaneously and have been edited from the court's record of the decision.)

Parties and properties

1 The appellant, Graeme Currie, is the father of the respondents, Bruce and Andrew Currie. The parties to this appeal, and many of the witnesses in the primary proceedings, are family members with a common surname. It is convenient to refer to them by their first names, without intending any disrespect.

2 This appeal concerns a number of properties (the Properties) in the Shire of Bruce Rock, which form part of a farming operation called Glenayr Farms.¹ Graeme is the registered proprietor of the Properties. Graeme's title to the Properties is subject to mortgages to Rabobank Australia Ltd (Rabobank) which were registered in 2003. Bruce has also lodged caveats to protect the unregistered interest which he claimed in the Properties at trial.

Background to the dispute

3 The background to this dispute appears from the following factual findings made by the trial judge, which I do not understand to be challenged in the grounds of appeal.

4 Graeme was born in 1940. He was 76 years old at the time of the trial. He says that his ancestors have been farming in Western Australia since around 1890. His grandfather Archibald Currie began farming in the Narembeen and Bruce Rock district in or about 1919. Graeme's father, John Currie, commenced farming with Archibald in or about 1929. John acquired land on his own account over the years. Graeme assisted his father on the farm and joined his father full time in about 1956. The Currie farm at Bruce Rock was known as the Ayrton farm. Graeme started acquiring land himself which he called the Glenayr farm. John died in 1980. He left his interest in the land to Graeme in his will to be conveyed following the death of Graeme's mother. Graeme's mother

¹ The land is described as: Lot 16289 on Deposited Plan 225549, being the whole of the land contained in Certificate of Title volume 1119 folio 499; Lot 22079 on Deposited Plan 142479 and lot 16274 on Deposited Plan 225549, being the whole of the land contained in Certificate of Title volume 1642 folio 573; Lot 1 on Diagram 64581, being the whole of the land contained in Certificate of Title volume 1642 folio 571; Lots 16275 and 26946 on Deposited Plan 225546, being the whole of the land contained in Certificate of Title volume 1060 folio 408; Lot 16271 on Deposited Plan 225546, being the whole of the land contained in Certificate of Title volume 1318 folio 295 and Lot 22958 on Deposited Plan 148044, being the whole of the land contained in Certificate of Title volume 1091 folio 883.

incorporated John's land into the trust known as the Glenayr Trust and Graeme became the trustee of the Glenayr Trust. Graeme acquired more land that he added to the Glenayr Trust.²

5 Bruce and his siblings grew up on the farm and, as he and his brothers progressively left school, they joined Graeme in the farming operations. Eventually, each of the three sons worked fulltime on the Currie farm. The business name G&E Currie & Sons is a trading name of the Glenayr Trust. The land farmed at Bruce Rock was at all material times held either in Graeme's name or the name of Coodarin Grazing Co Pty Ltd.³

6 Graeme and his wife Erica moved off the farm to their current house in Bruce Rock township in about 1997. In 1998, Graeme established a trust to purchase farming land at Cunderdin, which his oldest son has lived on and farmed. From 1998 to about 2003, Graeme, Andrew and Bruce worked together on the Currie farm. Andrew and Bruce received wages. Andrew lived in the Currie homestead where Graeme and Erica had previously resided. Bruce moved into a house on another part of the Currie farm. Bruce started living with his current wife, Lara, in 2002, and they married in 2006.⁴

7 In February 2003, a document was produced which, in general terms, described dividing the Currie farm between Andrew and Bruce. That document proposed the division of the land according to a schedule, the equal division of other items and provided that responsibility for the liabilities of the operation were to be divided equally. It proposed the payment of \$10,000 per month by Andrew and Bruce to Graeme and Erica.⁵

8 On 8 April 2003, the Glenayr Trust No 2 was created for the purpose of Bruce carrying on his own farming business.⁶

9 In about mid-2005, Bruce and Andrew each assumed half of the debt of G&E Currie & Sons. Bruce and Andrew each obtained a facility with Rabobank, and drew down on the facility to pay out the debt owing by G&E Currie & Sons. Glenayr Trust No 2's facility was for \$1,650,000. Bruce's loan, like Andrew's, was guaranteed by G&E Currie & Sons and the land, which was still in Graeme's name, was security for the loans.

² *Currie v Currie [No 2]* [2017] WASC 312 (primary decision) [52].

³ Primary decision [53]-[54].

⁴ Primary decision [55]-[58].

⁵ Primary decision [62].

⁶ Primary decision [63].

Graeme signed the guarantee in his personal capacity and as trustee for the Glenayr Trust and as director for Coodarin Grazing Co. Erica signed as director of Coodarin Grazing Co. On 1 July 2005, the sum of \$1,551,659.05 was transferred from Bruce's Rabobank account to Graeme's Rabobank account. This sum represented half of Graeme's total debt owed to Rabobank.⁷

10 I note that the findings to which I have just referred are the subject of inconsistent statements in an affidavit filed by Graeme on 7 March 2018. However, it remains the case that those findings of the trial judge are not challenged by any of the grounds of appeal.

11 Also in 2005, Bruce entered into discussions with owners of a neighbouring property for the purchase of additional land for Glenayr Farms. The purchase of that land by Bruce settled on 28 February 2006. Bruce paid approximately \$1.117 million from his Rabobank account at settlement and took possession of the land at about that time.⁸

12 Bruce's financial position deteriorated over 2006-2007. He asked Graeme to consider selling 1,000 ha of Glenayr farm to help him achieve a viable farm. From 2007 to 2010, Graeme agreed to reduce the \$5,000 monthly payments he received from Bruce.⁹ In March 2011, Graeme signed a contract to sell certain blocks of the Glenayr farm. The sale settled in April 2011. The net sale proceeds of \$1,198,700 were paid to Rabobank to reduce Bruce's debt to Rabobank to \$1.1 million.¹⁰

13 In January 2012, Bruce lodged a caveat over the remaining Glenayr Farms properties registered in Graeme's name, claiming a beneficial interest in the Properties.¹¹ In October 2013, Graeme gave a written notice to Bruce purporting to terminate a lease over the Properties.¹²

Primary proceedings

14 On 13 February 2013, Bruce commenced proceedings in the General Division of this court seeking a declaration that the Properties were held on trust for him, and an order that the titles to the Properties be transferred to him. Although his cause of action was initially framed in contract,

⁷ Primary decision [66]-[67].

⁸ Primary decision [69]-[72].

⁹ Primary decision [82]-[89].

¹⁰ Primary decision [102].

¹¹ Primary decision [109].

¹² Primary decision [111].

Bruce ultimately claimed that his entitlement arose from a proprietary estoppel.¹³

15 Bruce responded to Graeme's notice purporting to terminate a tenancy by applying for an interlocutory injunction to restrain Graeme from entering the land. On 29 November 2013, Allanson J granted an interlocutory injunction.¹⁴ Allanson J ordered that, until judgment or further order, Graeme be restrained from seeking to re-enter upon, occupy or resume possession of the Properties. Since the order was made, Bruce has continued to farm what remains of Glenayr Farms.¹⁵

16 In 2015, Graeme commenced proceedings in his personal capacity and as trustee for the Glenayr Trust to recover \$1,198,700, being the proceeds of the sale of the blocks in 2011. Graeme claimed this amount as a debt, and claimed to be subrogated to the rights of Rabobank as against Bruce.¹⁶

17 The proceedings in the General Division were subsequently consolidated.

Trial judge's decision

18 The trial judge found that Bruce assumed that Graeme would assign, or pass ownership of, the properties comprising Glenayr Farms to him, and that Bruce would be entitled to exclusively conduct a farming business on the land.¹⁷

19 Bruce worked fulltime on Glenayr Farms, pursuing a career in farming and abstaining from taking or training for a different career path. He forewent the opportunity of following a non-farming career.¹⁸

20 The trial judge found that Graeme induced or encouraged Bruce's assumption, by statements made and documents prepared from late 2002 to March 2006, and by the conduct of the parties after March 2006.¹⁹

21 The trial judge also found that Bruce did things in reliance upon his assumption that Graeme would assign or pass ownership of the Glenayr Farms properties to him. These included:²⁰

¹³ Primary decision [16].

¹⁴ *Currie v Currie* [2013] WASC 428.

¹⁵ Primary decision [112].

¹⁶ Primary decision [20].

¹⁷ Primary decision [123].

¹⁸ Primary decision [124].

¹⁹ Primary decision [124]-[135].

- (1) Borrowing \$1.551 million to repay half of Graeme's debt to Rabobank;
- (2) Assuming liabilities with respect to plant and equipment totalling \$85,599;
- (3) Incurring further borrowings of \$1.25 million to purchase additional land in 2005; and
- (4) Incurring operational expenditures and operational losses in operating the farm and living and working on the farm from 2003 to 2011.

22 In the trial judge's view, Bruce's detrimental reliance also included increasing his loan facility limit with Rabobank from time to time in order to obtain working capital for the running of the business on Glenayr Farms, and paying monthly payments to Graeme.²¹ The actions which Bruce took in reliance upon his assumption affected every aspect of his life, not merely financial ones. Bruce incurred significant stress and health issues as a consequence of farming Glenayr Farms, culminating in his hospitalisation at Perth Clinic in October 2011.²²

23 The trial judge accepted Bruce's evidence that he did all those things in reliance on the assumption or expectation which his father induced him to adopt, namely that the Glenayr Farms properties would be assigned to him. His Honour found that Graeme's conduct in 'splitting' the Currie farm between Andrew and Bruce, and Graeme's promises, assurances and conduct between 2003 and 2006 were an inducement or encouragement to Bruce to do all those things.²³

24 The trial judge found that there was no doubt that Graeme had resiled from or disavowed the assumption.²⁴

25 The trial judge said that, on the face of it, it would be against conscience for Graeme to not fulfil the assumption which he induced or encouraged and on which Bruce had relied to his detriment. His Honour

²⁰ Primary decision [150]-[153].

²¹ \$5,500 per month from October 2005 to March 2007, \$4,500 per month from April 2007 to March 2010, \$4,000 per month from April 2010 to September 2010 and \$2,000 per month from 1 October 2010 to June 2017. Those payments totalled \$447,000 in June 2017.

²² Primary decision [155].

²³ Primary decision [157]-[158].

²⁴ Primary decision [165].

rejected Graeme's reasons for asserting that the court should find that conduct was not unconscionable.²⁵

26 The trial judge concluded that Bruce's equity will be satisfied by the transfer of the remaining Glenayr Farms properties to Bruce, subject to Bruce making a payment to Graeme to account for Bruce receiving full ownership of the properties and Graeme losing any entitlement to the properties, or benefits under the succession agreement between Bruce and Graeme, at an earlier time than Bruce was entitled to insist upon. The appropriate relief was, in the trial judge's view, to declare that Graeme holds the Properties on constructive trust for Bruce, and further that Graeme was to transfer the freehold of those lands to Bruce, subject to Bruce causing any guarantee by Graeme of any loans or facilities of Bruce to be discharged and Bruce paying Graeme \$100,000 (being the monthly payments agreed to be made until Graeme turned 73 which had not been paid).²⁶

27 The trial judge held that Graeme's claim for \$1,198,700 could not succeed because Bruce had a proprietary interest in the land that was sold. His Honour also gave reasons why he would have dismissed that claim in any event.²⁷

28 The above factual findings were based, to a significant extent, on the trial judge's view as to the credibility of the witnesses. His Honour found Bruce and Lara to be truthful witnesses whose evidence he generally accepted. His Honour found that Graeme was not a credible, reliable witness, and in many respects was not a truthful witness. Andrew was found not to be a truthful or reliable witness. Erica had little or no recollection of the matters in her witness statement, and in the end the trial judge placed no reliance on her evidence.²⁸

Orders made by the trial judge

29 The trial judge made orders on 9 November 2017, which were amended on 30 January 2018.

30 The orders declared that Graeme holds the Properties on trust for Bruce (order 1) and that Bruce is the legal owner of listed items of machinery (order 2). Order 3 required that, 14 days from the order, Graeme was to provide to Bruce executed transfers in registerable form

²⁵ Primary decision [166]-[177].

²⁶ Primary decision [186]-[187].

²⁷ Primary decision [190]-[201].

²⁸ Primary decision [26]-[49].

transferring the legal title to the Properties to Bruce absolutely immediately upon Bruce providing to Graeme a written confirmation from Rabobank that it agrees that, upon registration of the transfers, Rabobank will release Graeme from any guarantee given by him to Rabobank in respect of any debts or liabilities secured by any of the Properties. Order 3 also provided for the transfer of machinery vehicle licences and provision of confirmation of identity for the land transfer.

31 Order 4 required Bruce to pay Graeme the sum of \$100,000, to be paid by being set off against Graeme's liability to pay costs. Order 5 provided for Graeme's claim to be dismissed.

Appeal and application for a stay

32 On 23 November 2017, Graeme appealed against all of the orders made by the trial judge. There is also a separate appeal²⁹ against the order dismissing Graeme's claim for \$1,198,700.

33 In the present appeal, Graeme advances 12 grounds of appeal in his appellant's case. The grounds, and particulars in support of them, are prolix and not usefully reproduced here. In essence, grounds 1-9 involve factual challenges to the trial judge's conclusions that the elements of a proprietary estoppel were established. The aspects of the trial judge's reasons which are challenged include his findings as to credibility, findings of primary fact and findings that elements of estoppel were established by the findings of primary fact. Ground 10 alleges that the trial judge erred in rejecting Graeme's application to amend his defence during the trial. Ground 11 contends that the trial judge erred in finding that Graeme was entitled to deal with the Properties as his own when they were held in his name as trustee for the Glenayr Trust. Ground 12 challenges the failure of the trial judge to find that \$5,500 monthly payments were to be paid until the death of both Graeme and Erica.

34 By application in an appeal filed on 15 January 2018, Graeme seeks an order that judgment be suspended until the determination of the appeal.³⁰

²⁹ CACV 110 of 2017.

³⁰ Pursuant to s 15 of the *Civil Judgments Enforcement Act 2004* (WA) and/or r 44 of the *Supreme Court (Court of Appeal) Rules 2005* (WA).

Evidence on the stay application

Katherine Sierakowski's affidavit of 15 January 2018

35 Graeme's application for a stay is supported by an affidavit of Katherine Sierakowski sworn 15 January 2018. Apart from annexing documents, Ms Sierakowski deposes that Bruce currently has possession of the land and machinery without interference from Graeme and has done so since the injunction was granted on 29 November 2013. She says that she is informed by Graeme that he has no intention of interfering with Bruce's business activities and farming of the land until the decision in the appeal is handed down.

Bruce's affidavit of 5 February 2018

36 Bruce has filed an affidavit in opposition to the application, sworn on 5 February 2018. After referring to the background, he deposes that his Rabobank facility limit was \$1.1 million, and an arrangement was made for it to be reduced by specified payments. The facility limit and the amount owing on the facility has been reduced to \$1 million pursuant to that arrangement. Bruce's Rabobank facility is secured by registered mortgages over the Properties and two guarantees given by Graeme (individually and in his capacity as trustee of the Glenayr Trust).

37 Bruce deposes that, in or about December 2013, he was informed by Rabobank that Graeme had withdrawn the guarantees and that Bruce's Rabobank facility was frozen. The effect of his evidence is that the freezing of the facility prevents him from using it in the day to day operation of Glenayr Farms or applying for an increase in the facility where required during a farming season, such as for working capital.

38 Bruce says that, since his Rabobank facility was frozen, he has cropped, on average, approximately 60% of his croppable farmland each season. This is below his optimum cropping area of about 80%. In the 2017 season, he cropped 40% of his croppable land. He has not cropped the total croppable area since the Rabobank facility was frozen because he has not had sufficient funds to meet the operating costs (largely fertiliser and chemical spray costs) required to farm the larger area. In addition, since 2013 he has under-fertilised and under-chemical sprayed his crops, reducing the yield and the resulting income from the crops.

39 Bruce's affidavit describes arrangements that he has made with Rabobank, subject to approval by the bank's management, to receive a further \$300,000 advance on his Rabobank facility. Of that amount,

\$100,000 will be used to pay duty on the transfer of the Properties to Bruce and \$200,000 will enable him to put in a crop for the 2018 season. If the \$200,000 increase is not made available then Bruce says that he will not have sufficient funds to put a crop in for the 2018 season. The \$300,000 advance will increase the facility limit to \$1.3 million. Of course, the advance will only be made available if Bruce can secure title to the Properties.

40 Bruce deposes that the bulk of the fertiliser and chemical spray cost for the 2018 season is forecast to be incurred in April 2018, when the crop is seeded.

41 Bruce deposes that his and Lara's only assets apart from the farm are the family home in Quindalup and his superannuation. The family home has been appraised as being worth between \$1.4 and \$1.5 million, and has a home loan with a limit of \$1 million (of which \$990,000 is drawn). The funds in accounts held by Bruce are Erica are required to pay creditors (which include their legal representatives for the considerable cost of these proceedings). Bruce has been told by his mortgage broker that he cannot borrow any more against his home.

42 Bruce deposes that the total area covered by the Properties is approximately 4,560 acres. He states his belief that the Properties are valued at about \$500 per arable acre, or a total of \$2.28 million.

43 Bruce deposes that if the Properties are not transferred into his name and he does not obtain an increase in the Rabobank facility limit, then he intends to sell his family home to relieve the financial pressure he is under and, depending on when the home is sold, enable him to plant a crop for the 2018 season.

44 In his affidavit, Bruce undertakes not to sell or otherwise dispose of or deal with his interest in any of the Properties or increase the debt secured by the Properties, other than to secure the proposed increase in the Rabobank facility limit to a total limit of \$1.3 million, without the written consent of Graeme or further order of this court. That undertaking is given until the appeal is determined or further order of the court. The undertaking is also expressed to be 'subject to [Graeme] strictly complying with all orders of this Court with respect to the prosecution of his appeal'.³¹

³¹ Affidavit of Bruce Michael Currie sworn 5 February 2018 par 88.

Joseph Burke's affidavits of 6 and 7 March 2018

45 Bruce filed a further affidavit by his solicitor, Joseph Burke, sworn
6 March 2018. That affidavit attaches various exhibits at trial which are
referred to in submissions filed on Bruce's behalf.

46 Mr Burke filed a supplementary affidavit sworn on 7 March 2018.
That affidavit attaches a 2018 Annual Review for Glenayr Farms prepared
by a consultant. I accept that as evidence of the Budget which has been
prepared for Graeme. However, there is no evidence as to the
reasonableness of the budget or the reliability of its predictions.

47 Mr Burke also deposes that he is informed by Lara and believes that
Rabobank is currently reviewing, but is yet to approve, Bruce's request for
finance. Mr Burke also deposes that he is informed by Lara and believes
that Bruce has also requested finance from Cooperative Bulk Handling
Ltd (of approximately \$200,000) and Agfarm Pty Ltd (of approximately
\$100,000) to be secured against his farm's crop. Mr Burke deposes as to
his belief that Bruce, who is currently working at a mine in rural Western
Australia, is awaiting approval of those requests.

Graeme's affidavit of 7 March 2018

48 Graeme has filed a responsive affidavit sworn 7 March 2018.

49 In that affidavit, Graeme says that he offers to allow Bruce 'to
increase the debt on the properties by \$250,000 on an overdraft basis to
allow [Bruce] to raise funds to finance a cropping regime'³² in 2018 and, if
the appeal is not resolved before 31 January 2019, in 2019. These offers
are expressed to be made on the proviso that, in each case, the \$250,000
overdraft is repaid from and upon receipt of the proceeds of the sale of the
crop by no later than 31 January in the following year. Graeme's affidavit
also offers to sign any documents presented to him to complete the
transfer of machinery to Bruce.

50 Graeme says that his understanding is that his personal guarantee to
Rabobank is limited to \$1.1 million and otherwise the bank is entitled
recourse to the entirety of the land mortgaged to them. Graeme deposes
that Rabobank has not released him from his personal guarantee.

51 Graeme annexes advertising from Rural Bank and CBH Group in
relation to finance which may be secured against a crop, as well as an
information sheet from the Office of State Revenue entitled 'Exempt

³² Affidavit of Graeme John James Currie sworn 7 March 2018 par 4.

Family Farm Transactions – Transfer Duty'. Graeme indicates his understanding as to a transfer of the Properties from him to Bruce being exempt from duty, although he says that 'the transaction would take cooperation between the parties and correspondence with the Office of State Revenue to explain the transaction'.³³ Graeme says that he and Erica have no means of income other than from the rental of farmland held by the Glenayr Trust.

52 Graeme's affidavit also explains his history with the land and attaches some of the exhibits before the trial judge.

General principles

53 The general principles governing the grant of a stay or suspension order by this court pending an appeal are not in dispute, and were summarised by the court in *Eastland Technology Australia Pty Ltd v Whisson*,³⁴ in the following terms:

- The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.
- It is for the applicant for a stay to move the court to a favourable exercise of its discretion.
- It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.
- The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.
- If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.
- If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.

³³ Affidavit of Graeme John James Currie sworn 7 March 2018 par 20.

³⁴ *Eastland Technology Australia Pty Ltd v Whisson* [2003] WASCA 307; (2003) 28 WAR 308 [9].

Disposition

54 In my view, the undertaking offered by Bruce is critical to the determination of this stay application. But for the undertaking, I would have been prepared to grant a stay of the primary judge's orders. The prospect that Bruce might sell or deal with the Properties while an appeal is pending could destroy the subject matter of this litigation, or create practical difficulties in respect of the relief which could be granted on appeal. The sale of the Properties could make it impossible to restore Graeme to the position he would have been in if Bruce's claim in the primary proceedings had been dismissed. Other dealings with the Properties, including by encumbering the Properties for an amount which Bruce cannot repay, could have the same result. The long history of Graeme's and the Currie family's association with the Properties means that an order for compensation for the value of the Properties would not place Graeme in the same position as holding title to the Properties. Further, the Properties are contiguous with other farming land which Graeme owns, and therefore may well have special commercial value to him. Some of the grounds of appeal have reasonable prospects of success, and, absent the undertaking, the balance of convenience could not be said to favour Bruce.

55 I was concerned at the qualification that the undertaking is 'subject to [Graeme] strictly complying with all orders of this Court with respect to the prosecution of his appeal'.³⁵ In my view, that qualification significantly reduces the value of the undertaking and the reliance that the court can place upon it to preserve the integrity of its processes. The qualification makes the undertaking self-discharging, so that in any enforcement proceedings it would be necessary to show that Graeme had strictly complied with procedural directions. The absence of any requirement for an order of the court before Bruce is released from the undertaking in those circumstances could create considerable uncertainty as to its application. Further, the undertaking would be discharged even on a minor transgression which did not prejudice Bruce or increase the time required to determine the appeal. For example, Graeme might file appeal books which inadvertently omit a document, and remedy the non-compliance within a few days.

56 When I raised these issues with counsel for Bruce, he indicated that the undertaking was offered on terms without that qualification. I will deal with the stay application on that basis.

³⁵ Affidavit of Bruce Michael Currie sworn 5 February 2018 par 88.

57 The modified undertaking proffered by Bruce not to deal with his interest in the land other than by increasing the limit of his Rabobank facility to \$1.3 million, means that the refusal of a stay will not render the appeal nugatory. If Graeme's appeal succeeds, then the court can make consequential orders for the return of the title of the Properties to Graeme and an order for restitution of funds received by Bruce as a result of the proposed increase of the Rabobank facility limit. There is no impediment to the court making orders that will place Graeme in the position he would have been if the title to the Properties had not been transferred to Bruce. The undertaking means that a stay is not necessary to preserve the subject matter or the integrity of the litigation. The undertaking to preserve the Properties, other than in relation to the proposed \$300,000 increase to the Rabobank facility limit, means that refusal of a stay will not create practical difficulties in respect of the relief which may be granted on appeal.

58 Counsel for Graeme also refers to the grounds of appeal which challenge the trial judge's conclusion that monthly payments to Graeme and Erica would cease when they reached the age of 73. He submits that if those grounds were successful, the Properties would need to be encumbered for the purpose of securing the monthly payments, and a caveat lodged to protect that interest. If it is assumed (without deciding) that this is correct, it does not follow that a stay of the trial judge's orders is justified. In light of the undertaking, it is not justified. If those grounds succeed and the result for which Graeme contends follows, then orders for the provision of the security can be made. The fact that Bruce will hold the titles to the Properties at that time will not prevent such an order being made.

59 Counsel for Graeme submits that, if the Properties are transferred to Bruce, there is a risk that they may be attached to enforce a judgment obtained in favour of an unsecured creditor of Bruce, or may vest in a trustee in bankruptcy if proceedings in bankruptcy are commenced by an unsecured creditor. That appears to me to be a matter of speculation. There is no evidence of the existence of any unsecured creditor who is proposing, or is in the future likely to, take that action before judgment is delivered in the appeal.

60 It was suggested that Bruce might give a guarantee secured against all of his assets in the course of operating the farming business. Such conduct would be in breach of the undertaking, and constitute a very serious contempt of court. There is no evidence that Bruce would not

honour the terms of his undertaking, breach of which could be expected to result in severe sanction by the court.

61 In my view, on the modified undertaking, the appeal will not be rendered nugatory by the refusal of a stay.

62 As to the prospects of success, I am satisfied that some of the grounds are arguable, and have reasonable prospects of succeeding in a manner that results in some relief being granted to Graeme. At this preliminary stage, I would not put it any higher than that. Any proper assessment of the merits of many of the grounds of appeal would require a careful assessment of all of the evidence led at trial which I am not in a position to undertake, and which would not appropriately be undertaken, on a stay application.

63 In my view, on the basis that the undertaking is given without the qualification to which I have referred, the balance of convenience does not lie in favour of Graeme.

64 If a stay is granted, then Graeme will still not have the use of the Properties or any income from the Properties while the appeal is determined. In those circumstances, it cannot be said that the refusal of a stay will deprive Graeme of any income. At the conclusion of the appeal, the Properties will still secure the debt owed by Bruce under the Rabobank facility. Graeme's recent offer indicates his willingness for the Properties to be used to secure finance for the 2018 crop even if a stay were granted. Bruce's position would be more difficult if a stay is granted. His ability to put in a crop in 2018 would be compromised, through the increased difficulty in raising funds without holding title to the Properties. The only clear solution for which there is any evidence is for Bruce to attempt to sell his family home in a short time-frame. The evidence does not enable any firm conclusion to be reached as to Bruce's prospects of obtaining finance using the crop as security in circumstances where Graeme retains legal title to the Properties on which the crops will be grown. I note that the budget prepared for Bruce contemplates funding on the security of the crop in addition to the funding to be sought from Rabobank. Graeme's offer to 'allow [Bruce] to increase the debt on the'³⁶ Properties is in vague terms and its practical effect on Bruce's capacity to raise funds is not clear to me on the evidence (which does not address that issue).

³⁶ Affidavit of Graeme John James Currie sworn 7 March 2018 par 4.

65 On the other hand, if a stay is refused, there is no real prejudice to Graeme, as the titles would be returned to him if his appeal was wholly successful. The evidence does not establish that, with the equity in his family home and the proceeds of the sale of his crop, Bruce could not satisfy a consequential order for payment of the increased limit of his Rabobank facility which is secured by a mortgage on the Properties. By the offer made in the affidavit filed on 7 March 2018, Graeme proposes to allow the Properties to be used as security to fund the planting of a crop even if a stay is granted. The refusal of a stay appears likely to enable Bruce to secure from Rabobank the funding required to put a crop in, without the need to attempt to sell his family home. At the very least, having legal title to the Properties would significantly improve Bruce's prospects of obtaining the finance required to plant a crop for the 2018 season.

66 Graeme contends that the transfer of the Properties to Bruce will be exempt from duty under s 103 and associated provisions of the *Duties Act 2008* (WA), so that borrowing for the purposes of paying duty is not necessary. However, the application of those provisions in the circumstances of the present case is not straightforward, particularly given the fact that Graeme has not farmed the land for some time, and there is an issue about whether the transfer is by and to the trustees of trusts. In the circumstances, particularly given that if a crop is to be planted seeding will need to occur in April, it is a reasonable approach by Graeme to pay the duty and then seek an exemption subsequently.

67 Having regard to the considerations to which I have referred, I am not satisfied that Graeme has shown special circumstances to exist which justify a departure from the ordinary rule that a successful litigant is entitled to enforce judgment pending the determination of any appeal. The appeal will not be rendered nugatory if a stay is refused, and the balance of convenience favours the refusal of a stay.

Orders

The following orders were then made:

UPON the undertaking of the First Respondent that, until this appeal is determined or until further order of the court, he will not sell or otherwise dispose of or deal with his interest in any of the following land:

(a) Lot 16289 on Deposited Plan 225549, being the whole of the land contained in Certificate of Title volume 1119 folio 499;

- (b) Lot 22079 on Deposited Plan 142479 and lot 16274 on Deposited Plan 225549, being the whole of the land contained in Certificate of Title volume 1642 folio 573;
- (c) Lot 1 on Diagram 64581, being the whole of the land contained in Certificate of Title volume 1642 folio 571;
- (d) Lots 16275 and 26946 on Deposited Plan 225546, being the whole of the land contained in Certificate of Title volume 1060 folio 408;
- (e) Lot 16271 on Deposited Plan 225546, being the whole of the land contained in Certificate of Title volume 1318 folio 295;
- (f) Lot 22958 on Deposited Plan 148044, being the whole of the land contained in Certificate of Title volume 1091 folio 883;

(Properties) or increase the debt secured by the Properties, other than to secure the proposed increase of the limit in Rabobank Facility Account no 1227863-00 to a total limit of \$1.3 million, without the written consent of the appellant or further order of this court, IT IS ORDERED that:

- (1) Subject to the first respondent filing a signed written undertaking in the above terms with the court by 4pm on 15 March 2018, the appellant's application in an appeal filed on 15 January 2018 is dismissed.
- (2) The first respondent have liberty to apply for an order giving him leave to withdraw the above undertaking in the event that the appellant does not strictly comply with all orders of the court with respect to the prosecution of the appeal.
- (3) There be liberty to apply generally.
- (4) The costs of the application incurred on or prior to 5 February 2018 be in the cause of the appeal.
- (5) The appellant is to pay the respondent's costs of the application incurred after 5 February 2018 in any event, to be taxed if not agreed.