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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE COURT OF APPEAL (WA)

**CITATION** : FIELD -v- CORALIE ANN CORLETT as Executor  
of the Will of FERENC KOCSIS [2018] WASCA 184

**CORAM** : MURPHY JA  
MITCHELL JA

**HEARD** : 19 OCTOBER 2018

**DELIVERED** : 19 OCTOBER 2018

**PUBLISHED** : 22 OCTOBER 2018

**FILE NO/S** : CACV 86 of 2018

**BETWEEN** : RAYMOND FIELD  
First Appellant

ALLEN FIELD  
Second Appellant

MARIA CARMEN FIELD  
Third Appellant

AND

CORALIE ANN CORLETT as Executor of the Will  
of FERENC KOCSIS  
CORALIE ANN CORLETT as Executor of the Will of  
FERENC KOCSIS who was the Executor of the Will  
of ELISE KOCSIS  
Respondents

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**ON APPEAL FROM:**

**Jurisdiction** : SUPREME COURT OF WESTERN AUSTRALIA  
**Coram** : LE MIERE J  
**Citation** : CORALIE ANN CORLETT as Executor of the Will of  
FERENC KOCSIS -v- FIELD [2018] WASC 243  
**File Number** : CIV 1585 of 2015

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*Catchwords:*

Practice and procedure - Application for stay - Not a proper case for stay - Turns on own facts

*Legislation:*

Nil

*Result:*

Application dismissed

*Category:* B

**Representation:**

*Counsel:*

First Appellant : In Person  
Second Appellant : In Person  
Third Appellant : In Person  
Respondents : Ms DPH Engelter & Ms DPH Engelter

*Solicitors:*

First Appellant : In Person  
Second Appellant : In Person  
Third Appellant : In Person  
Respondents : Williams & Hughes

**Case(s) referred to in decision(s):**

Coralie Ann Corlett as Executor of the Will of Ferenc Kocsis v Field [2018]  
WASC 243

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

**REASONS OF THE COURT:**

**Introduction**

1 This matter came to hearing by way of a registrar's notice to attend dated 19 September 2018 to consider the appellants' application filed 5 September 2018 for the following orders (Application):

1. The decision of the primary court be set aside until the hearing of the appeal.
2. The orders of the primary court be set aside until the hearing of the appeal.
3. Costs to be in the course [sic].

2 At the conclusion of the hearing, we made the following orders:

1. The appellants' application filed 5 September 2018 is dismissed.
2. The appellants pay the respondents' costs of the application to be assessed.

3 We said we would provide written reasons. These are our reasons for making those orders.

4 The appeal within which the Application was brought is against the decision of Le Miere J in *Coralie Ann Corlett as Executor of the Will of Ferenc Kocsis v Field*<sup>1</sup> (primary decision). Le Miere J ordered the sale (in lieu of partition) of certain land in Waggrakine (Property), pursuant to s 126 of the *Property Law Act 1969* (WA) (PLA).

5 Section 126(1) of the PLA provides that where a party or parties interested, individually or collectively, to the extent of a half share or upwards in land, requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.

6 The first appellant (Raymond) and the second appellant (Allen) are brothers. The third appellant (Maria) is Allen's wife. Ms Corlett is the daughter of Mrs Elsie Kocsis, and the step-daughter of Mr Ferenc Kocsis. She is the first respondent in her capacity as executor of the

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<sup>1</sup> *Coralie Ann Corlett as Executor of the Will of Ferenc Kocsis v Field* [2018] WASC 243.

will of Mr Kocsis, and second respondent in her capacity as executor by the representation of the will of Mrs Kocsis.

7 As at 9 November 1995, the registered parties of the Property were:

1. Mr Kocsis as to two undivided one-eighth shares.
2. Mrs Kocsis as to two undivided one-eighth shares.
3. Raymond as to two undivided one-eighth shares.
4. Allen as to one undivided one-eighth share.
5. Maria as to one undivided one-eighth share.

8 Following the deaths of Mr and Mrs Kocsis, Ms Corlett, in her executorial capacities, became the registered proprietor of Mr Kocsis' two undivided one-eighth shares and Mrs Kocsis' two undivided one-eighth shares in the Property.

9 In the primary proceedings, Ms Corlett sought an order under s 126 of the PLA that the Property be sold and the proceeds be distributed between the parties, on the basis that they are interested (collectively) to the extent of a half share in the Property and there is no good reason for directing a division instead of a sale.<sup>2</sup> Ms Corlett relied on a deed entered into by Mr Kocsis and the appellants, executed on 25 August 1995, pursuant to which the appellants (collectively) acquired their half share in the Property (1995 Deed). The 1995 Deed was prepared by a solicitor, Mr Rock, who gave evidence in the primary proceedings.

10 The appellants resisted the order for sale sought by Ms Corlett on the following bases:

1. Ms Corlett and the appellants each own a defined portion (1.1947 ha and 3.224 ha respectively) of the Property as defined on a sketch attached to the 1995 Deed. The 1995 Deed was not the deed executed by them. Rather, a deed executed by them provided that they were to purchase 3.224 ha of the Property. Someone within Mr Rock's office fraudulently (the appellants

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<sup>2</sup> Primary decision [2], [6].

alleged) substituted the pages in the 1995 Deed for the pages in the deed executed by them.<sup>3</sup>

2. The appellants own 3.224 ha of the Property in adverse possession.<sup>4</sup>
3. The Property was held by Mr and Mrs Kocsis and the appellants as joint tenants. Hence the appellants succeeded to Mr and Mrs Kocsis' interest by survivorship.<sup>5</sup>

### **Primary decision**

11 The judge accepted 'in ... totality' the evidence of Mr Rock, the solicitor who had prepared the 1995 Deed.<sup>6</sup>

12 The judge found as follows:<sup>7</sup>

1. Mr Kocsis and the appellants executed the 1995 Deed.
2. The interest of Mr Kocsis and the appellants in the Property was determined by the terms of the 1995 Deed.<sup>8</sup> Pursuant to the 1995 Deed, Mr Kocsis sold and the appellants purchased a one half undivided share in the Property.<sup>9</sup>
3. Mr and Mrs Kocsis were the registered proprietors of one undivided half share in the Property. On their deaths, Ms Corlett, as executor, was registered as the proprietor of one undivided half share in the Property.<sup>10</sup>
4. The appellants repudiated the agreement constituted by the 1995 Deed by refusing to do things necessary for the Property to be subdivided. Ms Corlett accepted the repudiation. The 1995 Deed was terminated, with the consequence that the agreements in the 1995 Deed for partition and the rights of pre-emption are no longer in force.<sup>11</sup>
5. The appellants are not entitled to possession of their claimed portion of the Property by adverse possession. The appellants'

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<sup>3</sup> Primary decision [7], [11], [26].

<sup>4</sup> Primary decision [7].

<sup>5</sup> Primary decision [7].

<sup>6</sup> Primary decision [11].

<sup>7</sup> Primary decision [8].

<sup>8</sup> Primary decision [58].

<sup>9</sup> Primary decision [8].

<sup>10</sup> Primary decision [59].

<sup>11</sup> Primary decision [66] - [67].

possession had been with the licence of Mr Kocsis contained in the 1995 Deed.<sup>12</sup>

6. Mr and Mrs Kocsis and the appellants were proprietors of the Property as tenants in common, not as joint tenants.<sup>13</sup> The appellants have not acquired any rights to the half share of Mr Kocsis or his estate by survivorship.<sup>14</sup>
7. There is no good reason to direct the division of the Property instead of its sale. The appellants did not propose a division, have refused to cooperate to take the steps necessary to subdivide and have no means to pay half the costs of subdivision.<sup>15</sup>

<sup>13</sup> The judge accordingly made orders on 17 August 2018 for the sale of the Property and ordered that a liquidator, Mr Ian Francis, be appointed as trustee for the sale of the Property.

#### **The nature of the appellants' proposed case**

<sup>14</sup> On 8 October 2018, the appellants sought to file an appellant's case dated 4 October 2018, which contained five grounds of appeal, to the effect that:

1. Le Miere J had no jurisdiction to conduct the trial (grounds 1 - 2);
2. Ms Corlett's solicitor in the litigation, Mr Engelter, is not entitled to practise law (ground 3);
3. Le Miere J erred in basing his judgment on the 1995 Deed 'knowing that it did not meet the requirements of law in relation to contracts and was Totally Ambiguous' (ground 4); and
4. Le Miere J erred in not appreciating that Ms Corlett and her solicitor were conspiring to pervert the course of justice, and seeking, fraudulently, to deprive the appellants of their land (ground 5).

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<sup>12</sup> Primary decision [70].

<sup>13</sup> Primary decision [71].

<sup>14</sup> Primary decision [72].

<sup>15</sup> Primary decision [73].

15 The submissions in support contain conclusory statements,  
scandalous in nature, in relation to the conduct of the judge and  
Ms Corlett and her solicitor.

16 The appellants' case was not accepted for filing.

**The Application**

17 On 5 September 2018, the appellants filed the Application.

18 On 5 September 2018, the appellants filed an affidavit sworn on  
4 September 2018 by Allen in support of the Application. Amongst  
other things, the affidavit deposes that:

1. the primary decision 'was made on an ambiguous document' and  
was 'bias [sic] in its application in relation to the division of  
property';
2. the appellants are 81, 84 and 78 years old respectively and  
would 'find it difficult to move off the property in the time  
frame given';
3. if the orders were carried out, with the effect that the appellants  
were removed from the Property, and the decision and orders  
were not reversed on appeal, the appellants would lose  
'everything we had worked for and paid over the last 23 years';  
and
4. the beneficiaries of the will would not be disadvantaged 'by  
waiting until the Appeal is heard'.

19 On 26 September 2018, the respondents filed, in response to the  
Application, the affidavit of Mr Engelter, solicitor, sworn on  
26 September 2018. The affidavit deposes, amongst other things, to the  
following:

1. Mr Engelter had visited the Property. There are three houses  
(and other buildings) on the Property.
2. The first appellant, Raymond, lives in one of them, but there is  
no planning approval for it to be used as a residence.
3. Planning approval was granted in 1998, and it was a condition  
of the approval that the then proposed office not be used as a  
residence.



4. Raymond signed a statutory declaration, in connection with the grant of planning approval, stating that the proposed office would not be used as a residence, but despite this, he has used it as a residence.
5. The Property is not the only land owned by Raymond and Allen. They are also co-proprietors of 1 and 3 Sharpe Street, Pindar.

20 On 26 September 2018, the respondents also filed an affidavit by Ms Corlett sworn on 26 September 2018. The affidavit deposes to the following:

1. Ms Corlett is the executor of the deceased estates of Mr Kocsis and Mrs Kocsis.
2. There are five beneficiaries of the two estates: Mr Kocsis' children (Andrew and Ferenc James) and Mrs Kocsis' children (Maxwell, Brian, and Ms Corlett).
3. The Property is the main asset of the estate. The sale of the Property would allow Ms Corlett to finalise the two estates, make distributions to the beneficiaries, and recover some of the legal costs incurred by the estate and Ms Corlett personally.
4. Ms Corlett is 65 years old. She had stopped working but, about 12 months ago, had to start working again as a hairdresser because of the financial drain relating to the legal costs of the dispute with the appellants. She is still paying off legal bills from the trial in January 2018. She does not want to work but needs to, to pay her family's debts.
5. Her husband is 67 years old and has been diagnosed with a heart condition. He has kept working on a casual basis to help financially support the family. It is labouring work, and ideally he would not be working because of his health.

21 On 10 October 2018, the respondents filed their submissions in response to the Application, to the effect that:

1. none of the five grounds of appeal has any reasonable prospects of success;
2. the Court of Appeal should dismiss the appeal at the hearing of the Application;

3. the appeal would not be rendered nugatory if a suspension order was not granted; and
4. the respondents and third parties would suffer hardship if the suspension order was granted.

**Procedural chronology**

22 On 3 September 2018, the appellants filed an appeal notice.

23 On 11 September 2018, the respondents filed a lawyer's notice of acting, and a notice of respondents' intention take part in the appeal.

24 On 21 September 2018, solicitors acting for Mr Francis, in his capacity as trustee for the sale of the Property, wrote to the Court of Appeal and the parties:

1. advising that the trustee sought to be joined as a respondent to preserve his right to recover remuneration pursuant to Le Miere J's orders made on 17 August 2018; and
2. attaching a notice of 'third respondent's intention' (notwithstanding that there is no third respondent).

25 The Court of Appeal did not accept this document for filing.

26 On 2 October 2018, the appellants attempted to file an affidavit dated 1 October 2018. Also on 2 October 2018, Allen wrote to the Supreme Court advising that he would be undergoing on operation on 16 October 2018 and 'may not be on deck until 20/10/2018'.

27 On 4 October 2018, the registrar wrote to the parties advising that:

1. the appellants' affidavit dated 1 October 2018 had not been accepted for filing because no order, nor application, was made to file any further affidavit; and
2. the appellants would need to seek leave to rely on the affidavit during the hearing of the Application.

28 On 9 October 2018, the registrar:

1. wrote to the appellants advising that the appellants' case dated 4 October 2018 did not comply with r 32 of the *Supreme Court (Court of Appeal) Rules 2005 (WA)*; and

2. ordered that the time for the appellants to file and serve their appellants' case be extended to 17 October 2018.

29 On 9 October 2018, Allen wrote to the registrar asking that the hearing of the Application on 19 October 2018 be moved 'to something like 30<sup>th</sup> of October or similar?' as he would not be fit to travel to Perth after his operation scheduled for 16 October 2018.

30 On 9 October 2018, the Court of Appeal office wrote to Allen advising that the Application remained listed for 19 October 2018 and that he would need to file an application and supporting affidavit in support of an adjournment.

31 On 17 October 2018, the appellants sent to the Court of Appeal a document entitled 'Answer to Your Threatening Letter Dated 9<sup>th</sup> of October 2018', which includes:

There is no authority granted for the Parliament to take control of Our Courts by making rules and then you apply those as law to control us.

In short your rules are Nonsense, Decisions of your Purported Courts are Nonsense, Your Purported Judges that have no sworn the Lawful Oath are Nonsense. Anyone who exercises authority over the people of this state are required by Chapter III of Our Constitution to show where their authority comes from and every one of them including you are required to swear the Lawful Oath You know the one the Purported Government Unlawfully repealed from the so called State Constitution contrary to Section 106 of the Commonwealth Constitution.

...

We will rely on this letter on Appeal to the High Court and then to the Privy Council after that if Our High Court rules against Our Constitution.

32 There was no application to adjourn and all the appellants were in attendance at the hearing on 19 October 2018.

### **Principles relevant to stay application**

33 Although the Application sought orders that the primary decision be 'set aside', in substance the appellants sought a stay, and it was appropriate to treat the Application on that basis.

34 In *Eastland Technology Australia Pty Ltd v Whisson*,<sup>16</sup> the court outlined the relevant principles in the following terms:

1. The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.
2. It is for the applicant for a stay to move the court to a favourable exercise of its discretion.
3. It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.
4. 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.
5. 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.
6. 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.

### **Disposition**

35 It may be accepted that if the Property is sold prior to the disposition of the appeal, the appeal (the purpose of which is to seek orders preventing the sale of the Property) will be rendered nugatory.

36 However, the grounds of appeal and submissions in support of the case the appellants sought to file on 4 October 2018 involved vague conclusory statements, scandalous in nature, and failed to engage with

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<sup>16</sup> *Eastland Technology Australia Pty Ltd v Whisson* [2003] WASCA 307; (2003) 28 WAR 308 [9].

the particular findings made by the judge on the evidence before him. The appellants' case upon which the appellants sought to rely disclosed no arguable error by the judge. Nor had the appellants filed, by 17 October 2018, a proper appellants' case pursuant to the court's orders of 9 October 2018.

37 On the material as it stood before the court, the appeal had no reasonable prospects of success.

38 Further, the appellants' evidence as to prejudice was expressed in generalised assertions, and lacked particularity of the kind which is ordinarily required on the part of an applicant moving for the exercise of the court's discretion to grant for a stay. On the other hand, there was evidence that the delays in the completion of the estate are causing hardship to Ms Corlett.

39 In these circumstances, the appellants had not established any basis for the grant of a stay, and the application was dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CL  
ASSOCIATE TO THE HONOURABLE JUSTICE MURPHY

22 OCTOBER 2018