

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA400/2024
[2024] NZCA 404**

BETWEEN

YONG SHENG BEI
Appellant

AND

B & Z TRADES COMPANY LIMITED
Respondent

Counsel: M S P Pang and C Liu for Appellant
E St John for Respondent

Judgment: 16 August 2024

Reasons: 26 August 2024
(On the papers)

**JUDGMENT OF GODDARD J
(Application for a stay of enforcement)**

A The application for a stay of enforcement is declined.

B Costs are reserved.

REASONS

Introduction and summary

[1] On 20 June 2024 the appellant, Yong Sheng Bei (Yong Sheng), filed a notice of appeal in this Court from the judgment of Associate Judge Brittain dated 6 June 2024. Summary judgment was entered in favour of the respondent, B & Z Trades Company Ltd (B & Z), requiring the appellant and two other defendants to provide

vacant possession of a property at 59 Galway Street, Onehunga (the property) by 1 July 2024.¹

[2] Yong Sheng applied to the High Court for a stay of enforcement of the possession order. On 1 July 2024 the Judge granted an interim stay of enforcement. But on 24 July 2024, having had an opportunity to consider the application for a stay and the undertakings offered by each party, the Judge declined a stay and ordered the defendants to provide vacant possession of the property by 4:00 pm on Friday 16 August 2024.

[3] On the morning of 16 August 2024 Yong Sheng applied to this Court for a stay of enforcement. I dismissed that application at 12.30 pm on 16 August 2024. This judgment sets out the reasons for doing so.

Background

[4] For the purposes of this judgment, the background to these proceedings can be taken from the High Court judgment. Yong Sheng is the father of Yao Ping Bei (Yao Ping), who is a director and minority shareholder of B & Z. B & Z was incorporated in 2000 and began its business of importing cars in 2005.² Yong Sheng says he is the beneficial owner of shares in, and is a shadow director of, B & Z, and that he should be the sole director and shareholder of the company. Yao Ping denies that Yong Sheng has any interest in the company.³

[5] B & Z has owned the property since 2010. Yong Sheng and his wife, Yan Xian Zhong (the second defendant in these proceedings), have lived in it since 2010.⁴ From 2010 until 2021, B & Z had in effect consented to Yong Sheng and his wife occupying the property.⁵ It is common ground that Yong Sheng and his family were not lessees or tenants of the property.

¹ *B & Z Trades Company Ltd v Bei* [2024] NZHC 1345 [High Court judgment]. The judgment was originally delivered on 27 May 2024 but was reissued on 6 June 2024.

² At [13] and [18].

³ At [3].

⁴ At [2].

⁵ At [4].

[6] In September 2022 Yong Sheng was informed by Yao Ping that B & Z was putting the property on the market for sale. In October 2022 B & Z unsuccessfully applied in the Tenancy Tribunal to evict Yong Sheng and his family from the property.⁶

[7] Yao Ping then applied in the High Court for summary judgment granting an order for possession of the property, on the basis that Yong Sheng and his wife were squatting on the property.⁷ Associate Judge Brittain considered the application on an urgent basis by reference to the principles provided by this Court in *Krukziener v Hanover Finance Ltd*.⁸

[8] As the Judge recorded, Yong Sheng advanced as his defence to the application for summary judgment that B & Z is a corporate vehicle for a partnership that existed between him and Yao Ping, and B & Z holds the property on trust for the partnership.⁹ The Judge noted that substantive proceedings for relief under the Partnership Law Act 2019 were commenced by Yong Sheng against Yao Ping and B & Z in October 2023 (substantive proceedings).¹⁰

[9] The Judge considered that it may be difficult for Yong Sheng to establish that there was such a partnership in the absence of any formal documents to that effect or evidence he received a share of the profits of B & Z.¹¹ There may however have been a joint venture between Yong Sheng and Yao Ping with B & Z being the corporate vehicle through which the joint venture operated.¹² It was arguable that Yong Sheng contributed capital to B & Z, as the corporate vehicle of the joint venture or a partnership between him and Yao Ping.¹³ But the Judge also considered that if there was a joint venture, it had been terminated by agreement between the parties,¹⁴ and if there was a partnership, Yong Sheng accepted that it had been dissolved in 2021.¹⁵

⁶ At [5].

⁷ At [6].

⁸ At [10]–[12], citing *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

⁹ High Court judgment, above n 1, at [28] and [32].

¹⁰ At [30].

¹¹ At [37].

¹² At [38].

¹³ At [40].

¹⁴ At [48].

¹⁵ At [30(f)] and [49].

[10] The Judge determined that Yong Sheng and his wife's occupation of the property from 2010 must have been pursuant to a bare licence to occupy granted by B & Z, "whether acting for a joint venture or a partnership, or in its own right".¹⁶ But the Judge considered that, even if it was arguable that a partnership or joint venture existed, that could not sustain the continuation of the bare licence, because continuation would be inconsistent with the joint venture having been terminated by agreement, and the partnership having been dissolved in 2021. And if there had been no joint venture or partnership, B & Z was entitled to cancel the bare licence, which it did in September 2022 when Yao Ping advised Yong Sheng that B & Z was putting the property on the market for sale. Yong Sheng and the other defendants therefore did not have a right to occupy the property, and B & Z was prima facie entitled to an order for vacant possession.¹⁷

[11] Yong Sheng advised in further submissions that he was intending to file a counterclaim against B & Z, which sought, among other things, interim relief under the Companies Act 1993.¹⁸ The Judge considered that it would be more appropriate for this counterclaim to be added to the substantive proceedings.¹⁹ But it raised the issue of whether Yong Sheng should be allowed to remain in occupation of the property on the basis that he has a reasonably arguable claim for interim relief in the substantive proceedings.²⁰ The Judge held however that it was not the appropriate time to analyse the potential claim for interim relief, which had not yet been filed; and the potential for interim relief was not sufficient to justify the Court refusing summary judgment.²¹

[12] As already mentioned, the Judge ordered all three defendants to vacate the property by 4:00pm on 1 July 2024.²²

¹⁶ At [43].

¹⁷ At [46]–[51].

¹⁸ At [52].

¹⁹ At [53].

²⁰ At [54].

²¹ At [61].

²² At [65].

The appeal to this Court

[13] On 20 June 2024 Yong Sheng filed a notice of appeal in this Court from the High Court judgment.

[14] Although there were three defendants in the High Court, only Yong Sheng is named as an appellant. If the other defendants did not wish to be named as appellants then they should have been named as respondents. In those circumstances it appears that the appeal has not been properly brought.²³ If Yong Sheng wishes to continue to pursue the appeal, all the parties that were before the High Court will need to be named as appellants or respondents. An extension of time to appeal may now be required.²⁴

[15] However I have dealt with the application for a stay on the basis that Yong Sheng wishes to pursue an appeal before this Court, and any defect there may be in the appeal as presently constituted is capable of being remedied.

High Court judgment on application for stay of enforcement

[16] As already mentioned, Yong Sheng applied in the High Court for a stay of enforcement of the High Court judgment pending determination of the appeal. An interim stay was granted on 1 July 2024. The final judgment on the stay application was delivered on 24 July 2024.²⁵

[17] The Judge noted that bringing an appeal does not operate to stay the effect of any judgment being appealed: the general rule is that a successful party is entitled to enjoy the fruits of a judgment.²⁶ The Judge considered that, although Yong Sheng had brought his appeal in good faith, there are no novel or important questions involved in the appeal, there is no public interest in the outcome, and there are no third parties affected by the outcome.²⁷ Whether a stay should be granted therefore required consideration of the apparent strength of Yong Sheng's appeal; whether the appeal

²³ Court of Appeal (Civil) Rules 2005, r 31(1)(b).

²⁴ This could be dealt with on the papers, if all relevant parties agree and memoranda to that effect are filed on their behalf.

²⁵ *B & Z Trades Company Ltd v Bei* [2024] NZHC 2031 [High Court stay judgment].

²⁶ At [9].

²⁷ At [12].

would be rendered nugatory without a stay; what the effect of a stay would be on the parties; and where the balance of convenience lay.²⁸

[18] The Judge considered the merits of the appeal to be a neutral factor.²⁹ He also considered a stay would not render the appeal nugatory because Yong Sheng could obtain interim relief under the Land Transfer Act 2017 prohibiting B & Z from dealing with the property.³⁰

[19] The Judge convened a telephone conference with the parties, which led to an undertaking being given to the High Court by the directors of B & Z that it would not rent or sell the property, or make changes to the layout or configuration of the dwelling, pending determination of the appeal.³¹

[20] Thus the critical issue was where the balance of convenience lay in respect of possession of the property in the interim.³²

[21] As the Judge observed, the property is a residential dwelling, which lies at the front of a larger premises, the rear of which contained commercial premises which were destroyed by a fire. The commercial premises need substantial repair, which will involve a significant construction project. Access to the commercial premises is gained down the side of the property. The property also needs at least cosmetic repairs and may require the removal of asbestos.³³

[22] B & Z's primary motivation was recorded by the Judge as being to complete the reinstatement and remedial work to the property, including asbestos-related work. This weighed heavily in favour of allowing it undisturbed possession of the property.³⁴ While Yong Sheng and his wife would be inconvenienced in the short term by having to vacate, the Judge noted that Yong Sheng owns other residential properties; if he is

²⁸ At [13].

²⁹ At [14]–[17].

³⁰ At [18]–[20]. The Judge noted as well that Yong Sheng currently has a caveat against the title of the property pending appeal from the decision of Gardiner AJ declining his application to sustain that caveat: *Bei v B & Z Trades Company Ltd* [2024] NZHC 20, (2024) 24 NZCPR 820. See also High Court judgment, above n 1, at [27]–[29].

³¹ High Court stay judgment, above n 26, at [27]–[30].

³² At [21].

³³ At [22]–[23].

³⁴ At [33].

successful on appeal, he will be entitled to reoccupy; and B & Z cannot sell or rent the property pending determination of the appeal.³⁵ Any inconvenience to Yong Sheng is outweighed by the prejudice that would be caused to B & Z if it is frustrated in completing the remedial works because of a stay.³⁶

[23] The Judge therefore dismissed the application for a stay and ordered Yong Sheng and the other defendants to vacate the property by 4:00pm on 16 August 2024.³⁷ The Judge did however make orders (reflecting B & Z's undertaking) that, pending determination of Yong Sheng's appeal, and on condition that Yong Sheng pursues the appeal with diligence, B & Z shall not:³⁸

- (a) dispose of [the property];
- (b) grant a residential tenancy in respect of the property or otherwise grant any right of possession to any person;
- (c) carry out any work to the residential dwelling on the property other than repair of damage or reinstatement following damage;
- (d) make any changes to the layout or configuration of the residential dwelling on the property. ...

Application in this Court for a stay of enforcement

[24] At approximately 9:30am on 16 August 2024, Yong Sheng filed an application in this Court for a stay of enforcement of the High Court judgment pending appeal. In summary, the grounds for seeking a stay are:

- (a) This Court has jurisdiction under r 12(5) of the Court of Appeal (Civil) Rules 2005 to make such an order under r 12(3) of the Rules.
- (b) The balance of convenience lies in favour of Yong Sheng.
- (c) The appeal may be rendered nugatory if a stay is not granted.

³⁵ At [34].

³⁶ At [35].

³⁷ At [36].

³⁸ At [37].

- (d) Yong Sheng has brought the appeal in good faith, which favours granting a stay.
- (e) B & Z will not be injuriously affected by granting a stay.
- (f) There is no effect on third parties.
- (g) The appeal raises novel or important questions of law. Yong Sheng suggests there is a need to clarify what the correct approach is for a first instance court in the context of an application for summary judgment when there is an underlying partnership or company law dispute and the arguments which provide the rebuttal to the application for summary judgment can only be determined at trial, given the nature of the underlying dispute.
- (h) The public interest of the proceeding, which Yong Sheng suggests is neutral.

[25] B & Z opposed the application, primarily on the basis that the application was brought too late without explanation.

Discussion

[26] The application to this Court was made on the morning of the day when Yong Sheng was due to vacate the property, more than three weeks after the High Court declined to grant a stay. No explanation of any kind was provided by Yong Sheng for this delay. The application should have been made within a few days at most of the High Court decision, to enable B & Z to respond and to provide this Court with sufficient time to consider the application on its merits after hearing from all parties.

[27] The substantial unexplained delay in making the application in itself justifies declining that application. A party cannot expect to benefit from creating a situation where there is insufficient time for the respondent to respond to an application, and for the Court to consider the application with the benefit of submissions and evidence

from both parties. Absent a convincing explanation for a last-minute application of this kind, a party should expect it to be declined.

[28] Nor is there anything in the material filed in support of the application to suggest that the Judge erred in his description of the circumstances in which a stay is sought, or in his assessment that in those circumstances the appeal will not be rendered nugatory in the absence of a stay. If Yong Sheng is successful on appeal and establishes an entitlement to occupy the property, he will be able to return to live there. Meanwhile, work can proceed on rebuilding the commercial property and remediating the property itself. I note that Yong Sheng has not provided this Court with a less-qualified version of the undertaking that he offered to give in the High Court to enable the remedial work to proceed, which the Judge rightly saw as lacking in practicality.³⁹ The absence of a suitable undertaking not to hinder the necessary remedial work on the property and the rebuilding of the adjoining commercial property is another factor that counts strongly against granting a stay.

[29] Finally, Yong Sheng does not appear to have filed in this Court an undertaking as to damages in support of the stay application. I would not have contemplated granting a stay without such an undertaking, in the circumstances of this case.

Result

[30] For all of the reasons set out above, and in particular the significant unexplained delay in making the application, a stay of enforcement was declined.

[31] Costs were reserved.

[32] The respondent did not file any formal documents in connection with the application, but counsel emailed the Court registry to advise it was opposed. In those circumstances it seems unlikely that any question of costs arises: any award that the respondent might be able to justify seems unlikely to be worth the time and cost involved in seeking it. But if (despite this indication) costs are sought by the respondent, a memorandum not exceeding three pages setting out the claim for costs

³⁹ At [31]–[32].

should be filed within five working days. The appellant may then, within five working days, file a memorandum not exceeding three pages in response. If such memoranda are filed, costs will be determined on the papers.

Solicitors:

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Heritage Law, Auckland for Respondent