

State Reporting Bureau



Queensland Government

Department of Justice and Attorney-General

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Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 52 of 2001

ANITA BERNSTROM

Applicant

and

NATIONAL AUSTRALIA BANK

Respondent

CAIRNS

..DATE 22/07/2002

JUDGMENT

As corrected

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act* 1999, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for the stay of execution of orders which were made initially by the Chief Justice sitting in the trial division. The Chief Justice's orders were the subject of appeal to the Court of Appeal of Queensland and that appeal was dismissed. This application seeks a stay of the execution of the order to allow the applicant to make application for leave to appeal to the High Court.

This application was filed in the Supreme Court at Cairns, returnable before me on this particular day. When the matter was called on two remarks were made, firstly by myself raising the concern as to whether I had jurisdiction to hear the application and, secondly, by counsel for the applicant asking me to disqualify myself from hearing the application on the basis that I was one of the Justices who participated in the decision of the Court of Appeal.

The jurisdictional question is one that is not free from doubt. Although I incline to the view that a Judge of a trial division does have jurisdiction to grant a stay in these circumstances it is tainted by sufficient doubt on my part to pause before making the decision. There is no doubt that the Court of Appeal of Queensland does have original jurisdiction, however, to hear this application. The question of whether I should disqualify myself was looked at in that context.

The preconditions for the granting of a stay are clear enough.

They are, whether the applicant will suffer serious or
irremedial loss if a stay is not ordered and, secondly, the
applicant's chances of ultimate success in the hearing of the
application for leave to appeal to the High Court.

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Whilst I have views about this matter, and particularly the
second of those two matters, there is a concern where a
request is made for me to disqualify myself that I would be
assessing the ultimate chances of success from a standpoint
where I participated in the decision from which the appeal is
sought to be made.

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Given those two concerns I have taken the view that I should
not hear the application but that the matter should be
commenced before the Court of Appeal, which will exercise its
original jurisdiction.

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Counsel appearing for the respondent seeks an order for costs,
doing so on the basis that for the applicant to make an
application which she was aware would be returned before me
and then to object to my hearing the matter necessarily
involves wasted costs if that application for me to disqualify
myself was successful. The counsel for the respondent says
that the request for me to disqualify myself was made without
notice and that consequently the applicant should bear the
costs. There is a countervailing argument by the applicant
that they were not made aware by the respondent that the
jurisdictional point would be raised. Concerning that latter
issue, the jurisdictional point has not been argued in such a

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way as to say that I have not had jurisdiction, it has only
been raised as a point for me to consider.

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In all those circumstances it does seem to me to be
unreasonable for a party to bring an application to be heard
by me and then, without notice to the other side, take
exception to my hearing the matter on the grounds of some
apprehended bias. In those circumstances I will order that
the applicant should pay the costs thrown away by this
adjournment of the application to allow the matter now to be
raised before the Court of Appeal exercising original
jurisdiction.

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JUDGMENT