

SUPREME COURT OF QUEENSLAND

CITATION: *McElligott v Boyce & ors* [2012] QSC 58

PARTIES: **LORAIN RONDA MCELLIGOTT (applicant)**
AND
PETER GERARD BOYCE (first respondent)
AND
ALAN WILLIAM CLARKE (second respondent)
AND
SIMONE ELIZABETH PEARCE (third respondent)
AND
GEOFFREY MCDERMOTT BARR (fourth respondent)
AND
BME UNIT TRUST (fifth respondent)
AND
TERRY GRANT VAN DER VELDE (sixth respondent)
AND
DAVID MICHAEL STIMPSON (seventh respondent)

FILE NO/S: 13837 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 29 February 2012

DELIVERED AT: Brisbane

HEARING DATES: 29 February 2012

JUDGE: Atkinson J

ORDERS: **1. Application dismissed.**
2. Applicant to pay the respondents' costs on a standard basis.

CATCHWORDS: PRACTICE AND PROCEDURE – ADJOURNMENT OR STAY – STAY OF ENFORCEMENT – STAY PENDING APPLICATION FOR SPECIAL LEAVE – where the applicant sought the stay of a costs order made by the Court of Appeal – where an application for special leave had been made – whether a judge of the trial division has jurisdiction

to stay an order of the Court of Appeal – whether the application for special leave has prospects of success – whether a stay should be granted

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Uniform Civil Procedure Rules 1999 (Qld), r 761.

Jennings Construction Limited v Burgundy Royale Investments Pty Ltd (1986) 161 CLR 681, followed *Remely v O'Shea and Vandenberg* [2008] QCA 119, considered

COUNSEL: The applicant appeared for herself
M Jones for the first, second, third and fourth respondents

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SOLICITORS: The applicant appeared for herself
Butler McDermott Lawyers for the first, second, third and fourth respondents

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HER HONOUR: The applicant, Lorain McElligott, has applied to a Judge of the Trial Division of this Court to stay an order made by the Court of Appeal pending the determination of an application for special leave to appeal which has been filed in the High Court against a decision made in the Court of Appeal refusing an application for an extension of time within which to file a notice of appeal from a decision made from a Judge of this Court.

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As rule 761 of the Uniform Civil Procedure Rules explicitly provides, the starting of an appeal does not stay the enforcement of the decision under appeal. However, the Court of Appeal, a Judge of Appeal, or, if the order which is appealed against was made in some other Court, a judge of that Court, may order a stay of the enforcement of all or part of a decision subject to an appeal.

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The relevant order in this case is the order made by the Court of Appeal and it is my view that I have no jurisdiction to make an order staying an order of the Court of Appeal. However, should I be wrong about that, it is important that I consider the application as if I had jurisdiction to grant it since all the arguments have been adumbrated in full by the parties.

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There is, of course, not as yet any appeal on foot against the order of the Court of Appeal. Merely, there has been the filing of an application for special leave to appeal. As Keane JA said in *Remely v O'Shea and Vandenberg*, an appeal to

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the High Court lies only upon the grant of special leave by the High Court and there will be no appeal until and unless special leave is granted.

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The High Court in *Jennings Construction Limited v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681 set out the matters to which a Court should have regard in determining whether or not a discretion to stay ought to be exercised.

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The first, and certainly the most significant for this application, is whether there is a substantial prospect that special leave to appeal will be granted. In order to examine that point, it is necessary to say something of the history of this case.

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On 14 October 2009, a Judge of this Court ordered the winding up in insolvency of a company, Westwood Enterprises (Queensland) Pty Ltd, ACN 083 054 139. Liquidators were appointed to that company. The company remains in liquidation and is therefore under the control of the liquidators and only the liquidators have authority to act on its behalf. The applicant before me is a former director of that company. She has no apparent standing to act on behalf of the company. That winding up order was made after a statutory demand was served upon the company on 8 July 2009.

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On 23 December 2010, that is, more than a year after that decision was made, the applicant, who, as I have said, is a former director of the company, applied for an extension of

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time within which to file a notice of appeal against the orders made winding up the company on 14 October 2009.

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The basis of the application for extension of time appears to be similar to the basis on which special leave to appeal to the High Court is now sought.

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The case was argued by counsel and it appears that comprehensive arguments were put up on behalf of the applicant, which were considered in great detail by the Court of Appeal. The Court of Appeal judgment comprehensively dismissed the application for leave to extend time on the basis of the lack of merits of the appeal were an extension of time granted. The reasons given by the Court of Appeal are extensive and compelling.

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I have read the application for special leave to appeal. It was itself filed well out of time and will require an extension of time. It, of course, seeks, in the end, to undo the winding up of a company that was wound up on 14 October 2009.

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It is not necessary to go into the arguments in great depth because they are dealt with comprehensively by the Court of Appeal. The applicant would appear to have only the remotest possibility of obtaining special leave to appeal, notwithstanding her commitment to the case and her belief that it has an important point. It would appear that the decision of the Court of Appeal is not attended with any doubt and her

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grounds for believing that this is an important precedent,
given the fact that the legislation had been changed and it
was early in the stages of the new provisions, seems entirely
misconceived.

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So even if this application had been brought before the
appropriate Court, in my view, the application for special
leave to appeal is almost certainly bound to fail. Given that
the test that she must meet in order to have the stay granted
is either that she has a substantial prospect of obtaining
special leave to appeal or at least that there are some
grounds for believing that that special leave will be granted,
the application for the stay seems absolutely bound to fail.

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There is no point in granting a stay of a decision which is
not attended by any doubt. The application has not been
brought in the correct jurisdiction. The application for a
stay is only against a costs order which was clearly correctly
made. The first to fourth respondents to the application are
entitled to the costs order made in their favour and,
notwithstanding all of the arguments put forward by the
applicant which I have attentively listened to and carefully
considered, in my view, the application for a stay must be
unsuccessful and, accordingly, I dismiss the applicant's
application.

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HER HONOUR: The applicant's application is dismissed with costs on the standard basis.

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