

# SUPREME COURT OF QUEENSLAND

CITATION: *Crouch and Lyndon (a Firm) v IPG Finance Australia Pty Ltd & Anor* [2012] QCA 332

PARTIES: **CROUCH AND LYNDON (A FIRM)**  
(applicant)  
v  
**IPG FINANCE AUSTRALIA PTY LTD**  
ACN 124 131 102  
(first respondent)  
**IPG INVESTMENTS AUSTRALIA PTY LTD**  
ACN 154 924 820  
(second respondent)

FILE NO/S: Appeal No 10596 of 2012  
SC No 2120 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 26 November 2012

JUDGE: Margaret McMurdo P

ORDERS: **1. Pursuant to r 761 Uniform Civil Procedure Rules 1999 (Qld), enforcement of the orders made in terms of the judgment of his Honour Justice Boddice on 15 October 2012 be stayed until the determination of the appeal or other order of the Court.**

**2. Costs reserved.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – where appeal from an order that applicant pay judgment sums to respondents – where respondents under present financial hardship – where applicant's principal cannot pay judgment sums without entering bankruptcy – where if judgment is enforced, applicant's principal may lose his certificate to practice law – where appeal is to be expedited – whether a stay of execution should be granted

*Partnership Act 1891 (Qld), s 13*  
*Uniform Civil Procedure Rules 1999 (Qld), r 761*  
*Deputy Commissioner of Taxation v Denlay & Anor* [\[2010\] QCA 217](#), cited

*Drew v Makita (Australia) P/L* [2008] QCA 312, cited  
*Duke Group Ltd (in liq) v Pilmer* [1999] SASC 373, cited  
*Elphick v MMI General Insurance Ltd & Anor* [2002]  
 QCA 347, cited

COUNSEL: R S Ashton with J K Meredith for the applicant  
 P J Pyle for the respondents

SOLICITORS: Mullins Lawyers for the applicant  
 Clayton Utz for the respondents

- [1] **MARGARET McMURDO P:** On 15 October 2012, the primary judge published his reasons for concluding that the applicant/appellant, Crouch and Lyndon, a firm of solicitors, was liable for the losses under s 13 *Partnership Act* 1891 (Qld) of the first respondent, IPG Finance Australia Pty Ltd, and the second respondent, IPG Investments Australia Pty Ltd. The judge found the losses were caused by the false representations of the second defendant, Anthony Scott Wood. He was a member of the applicant firm at the relevant time and is now serving a term of imprisonment. On 5 November 2012, his Honour made final orders which included that there be judgment for the first respondent against the applicant in the sum of \$3,932,572.45 and judgment for the second respondent against the applicant in the sum of \$1,218,032.46 and that the applicant pay each respondents' costs of and incidental to the proceeding including reserved costs. The applicant filed an appeal against those orders on 12 November 2012. On 13 November 2012, it applied for an order under r 761 *Uniform Civil Procedure Rules* 1999 (Qld) for a stay of the enforcement of those orders until the determination of the appeal or other order of the court.
- [2] The general rule is that successful litigants are entitled to the proceeds of their litigation despite the lodging of an appeal which does not act as a stay of the judgment. It is therefore for the applicant to demonstrate why that general rule should not apply here. The relevant considerations for this Court in the exercise of its discretion to grant or refuse a stay include whether there is an arguable case; whether the applicant will be disadvantaged if a stay is not ordered, especially where the refusal to grant a stay could result in any orders ultimately made on appeal being rendered nugatory; and whether there is some competing disadvantage to the respondents if the stay is granted which outweighs the disadvantage likely to be suffered by the applicant if the stay were not granted. See *Elphick v MMI General Insurance Ltd & Anor*.<sup>1</sup>
- [3] As to the first issue the respondents contend the applicant faces significant difficulties in its appeal. But in the preliminary assessment required for the present exercise, it is sufficient to note that the applicant's prospects on appeal are not so poor as to relieve the court of the need to concern itself to ensure that the appeal is not rendered nugatory by the refusal of the stay: *Drew v Makita (Australia) P/L*.<sup>2</sup>
- [4] The real issue in this application is the balancing of the competing advantages and disadvantages of granting or refusing the stay to the parties. Those competing considerations are particularly finely balanced in this case.
- [5] The applicant emphasised the precarious financial position of the respondents and expressed a fear that they may dissipate the proceeds of the judgment. If the

<sup>1</sup> [2002] QCA 347.

<sup>2</sup> [2008] QCA 312, [8].

applicant is successful in the appeal, the proceeds will have gone in repaying debts and the appeal will be rendered nugatory.

- [6] The respondents answer that they consented to the security for costs order below and that the fraudulent conduct of Wood, then a partner in the applicant's firm, is the reason they had to borrow moneys from overseas entities resulting in their present impecuniosity. They have ongoing financial commitments to service these loans at interest rates in excess of the standard 10 per cent pertaining to the judgment sums pending the determination of the appeal should the stay be granted. They are suffering on-going hardship by being held out of the proceeds of their favourable judgment.
- [7] They also are prepared to undertake not to dissipate any of the judgment moneys pending the determination of the appeal and are content for such funds to be held in the trust account of their solicitors pending judgment in the appeal. Alternatively, they are content for the judgment moneys to be paid into the trust account of the applicant's solicitors pending the outcome of the appeal, in which event they will agree not to enforce the judgment pending the outcome of the appeal. Either undertaking would allay all fears of dissipation.
- [8] Unfortunately, the applicant's principal, Philip Bruce Scott, has informed his lawyers that he does not have sufficient funds or assets to pay the judgment sum. He has liquid assets of only \$1,504 and overall assets of about \$2 million, held in real estate (some of which is mortgaged) and superannuation. He has additional contingent liabilities in the form of claims from other clients defrauded by Wood but no other proceedings are currently on foot. Mr Scott considers himself still bound by a 2009 undertaking given to the respondents not to deal with, dissipate or cause a reduction in value of his assets, save within existing overdraft facilities and for legal costs. This undertaking is recorded in the letter to the respondents' solicitors from the applicant's solicitors of 5 February 2009,<sup>3</sup> as amended by the letter of 27 July 2009.<sup>4</sup> It seems clear that enforcement of the judgment debt will cause Mr Scott to become bankrupt. This would place him at risk of losing his practising certificate as a solicitor so that he would be unable to earn an income. Mr Scott is no longer a sole practitioner and now has a partner, Mr Johnson, so that the prospect of his practising certificate being withdrawn without qualification upon his bankruptcy is diminished, but remains a real possibility. The applicant contends that, in the event the appeal is successful, the resulting financial loss it and Mr Scott would suffer if a stay is not granted would be irreversible and irreparable.
- [9] The applicant at the hearing of this application agreed to cooperate in the expedition of the hearing of the appeal. When told the matter could come on later that week because of an unexpected adjournment, the applicant's counsel stated that it was ready to proceed. Senior counsel for the respondents, however, was unavailable.
- [10] Were a stay not granted, Mr Scott is likely to be declared bankrupt, placing him at risk of losing his practising certificate as a solicitor and his income. Were that to happen and the applicant were to succeed in the appeal, Mr Scott could not easily be restored to his present position. The appeal can be heard in mid-February. In these circumstances, the balancing of the competing considerations favour the granting of the stay: see, for example, *Duke Group Ltd (in liq) v Pilmer*<sup>5</sup> and *Deputy*

<sup>3</sup> MJH 5 to the affidavit of Mitchell James Hardy filed 23 November 2012.

<sup>4</sup> Above.

<sup>5</sup> [1999] SASC 373, [42], [50].

*Commissioner of Taxation v Denlay & Anor.*<sup>6</sup> Any disadvantage suffered by the respondents through being held out of their judgment sums is not so grave. I therefore consider that a weighing of the competing considerations favours the granting of the stay, especially as the parties can have an expedited hearing in mid-February 2013. This early hearing will minimise the financial disadvantage to the respondents flowing from the granting of the stay should the appeal be successful.

[11] The orders are:

1. Pursuant to r 761 *Uniform Civil Procedure Rules* 1999 (Qld), enforcement of the orders made in terms of the judgment of his Honour Justice Boddice on 15 October 2012 be stayed until the determination of the appeal or other order of the Court.
2. Costs reserved.

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<sup>6</sup> [2010] QCA 217, [24].