SUPREME COURT OF QUEENSLAND

CITATION:	*Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2009] QCA 349
PARTIES:	**VIRGTEL LIMITED** (first applicant/first respondent) **VIRGTEL GLOBAL NETWORKS NV** (second applicant/second respondent) **v** **HARVEY ZABUSKY** (first respondent/first appellant) **AMALIA ZABUSKY** (second respondent/second appellant) **EREZ ZABUSKY** (third respondent/third appellant) **COMMSLOGIC PTY LTD (IN LIQ)** ACN 109 057 543 (fourth respondent/not a party to the appeal) **SOFTQUEST SOLUTIONS PTY LTD** ACN 057 679 599 (fifth respondent/fourth appellant) **VIRGIN TECHNOLOGIES LIMITED** (sixth respondent/not a party to the application or appeal)
FILE NO/S:	Appeal No 13518 of 2008 SC No 6547 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2009
JUDGE:	McMurdo P and Mullins and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – the appellants and respondents have been involved in complex litigation for a significant period of time – this litigation has involved a number of interlocutory applications and during these applications the respondents received four costs orders in their favour – the appellant applied to have these costs orders stayed until after the

primary proceeding was heard and determined – the trial judge refused the application and held that no special or exceptional circumstances existed to stay the costs orders – whether the trial judge erred – whether special or exceptional circumstances existed – whether the appeal should be allowed

APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – OTHER MATTERS – OTHER CASES – the appellants contend that the trial judge erred in not granting a stay – whether the trial judge erred – whether this Court should set aside the original orders and grant a stay

Uniform Civil Procedure Rules 1999 (Qld), r 740, r 737, r 800

Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685, cited
Croney v Nand [1999] 2 Qd R 342; [1998] QCA 367, cited
Di Carlo v Dubois & Ors [2003] QCA 415, considered
Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva) [1980] 1 All ER 213, cited
Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors [2008] QSC 36, considered

COUNSEL: T Sullivan for the appellant
G C Newton SC, and S Monks, for the respondents

SOLICITORS: Tucker and Cowen for the appellant
James Conomos Lawyers for the respondent

[1] **McMURDO P:** The first respondent to this appeal is Virgtel Limited, a company incorporated in the British Virgin Islands, and the second respondent is Virgtel Global Networks NV, a company incorporated in The Netherlands. The Virgtel companies have commenced an action against the first appellant, Harvey Zabusky, and others. They allege that the appellants breached various duties owed to the sixth respondent in the action, Virgin Technologies Limited,[1] by wrongfully diverting to themselves about $US11 million in payments which should have been made to Virgin Technologies Limited.

[2] There have been a myriad of interlocutory applications brought by both the appellants and the Virgtel companies resulting in various orders. These relevantly include the following. On 9 November 2005, Muir J (as he then was) made orders subjecting the appellants to a Mareva[2] injunction. On 6 April 2006, the Chief Justice granted the Virgtel companies leave to commence and continue their proceeding against the appellants as a derivative proceeding on behalf of Virgin Technologies Limited. His Honour dismissed the appellants' application seeking summary dismissal or stay of the Virgtel companies' proceedings and ordered the appellants to pay the costs of both applications to be assessed. On 2 August 2006, P D McMurdo J granted the Virgtel companies' application, ordering that the

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1 Virgin Technologies Limited, a company incorporated in Nigeria, is not a party to this appeal nor to the primary application the subject of this appeal.

2 *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1980] 1 All ER 213.

appellants provide them with specified affidavit material and pay their costs of the application to be assessed. On 1 September 2006, the Chief Justice dismissed the appellants' application to vacate or vary the Mareva order of 9 November 2005 and ordered that they pay the Virgtel companies' costs of the application to be assessed.[3] On 29 June 2007, the appellants again unsuccessfully applied to the Chief Justice to vary the Mareva order of 9 November 2005. The Chief Justice ordered that they pay the Virgtel companies' costs of the application to be assessed.

[3] This appeal is from Daubney J's order on 5 December 2008 refusing the appellants' application to stay the costs orders made by the Chief Justice on 6 April 2006,[4] 1 September 2006 and 29 June 2007, and by P D McMurdo J on 2 August 2006.

[4] Essentially, the appellants contend that Daubney J erred in two ways. First, his Honour was wrong to conclude that, if he granted an interim stay of those costs orders, he would be required to go behind the discretion of the judges who made them. Second, his Honour erred in not finding that there were special circumstances in this case which warranted a stay of the costs orders. This Court should allow the appeal, set aside Daubney J's orders and instead grant the stay.

[5] The Virgtel companies contend that Daubney J's reasons support the orders he made, but they have also filed a notice of contention. They submit that Daubney J could have dismissed the appellants' application on the ground that the costs orders in issue were all final orders. The costs orders were made after the determination of discrete contested applications that were not the subject of any appeals or applications by the appellants for a stay of execution. The appellants had participated actively in the assessment and objection process relating to all five costs orders, including the appointment of a costs assessor. They did not bring their stay application until after the deputy registrar made orders under *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) r 740 on 27 June 2008. For these reasons, as well as for those given by Daubney J, they contend his Honour rightly dismissed the application: the material filed in support did not justify a stay.

Daubney J's reasons

[6] Before discussing and resolving these competing contentions, it is helpful to refer in some detail to Daubney J's reasons for refusing the stay.

[7] Daubney J noted that the Virgtel companies delivered costs statements to the appellants in respect of all the costs orders the subject of the stay application. The appellants responded by delivering notices of objection to each cost statement. The parties then agreed to the appointment of a costs assessor. On 15 February 2008, the appellants filed notices of objection in relation to the assessments. The parties then made submissions to, and put further material before, the costs assessor. The costs assessor's appointment was formalised by the deputy registrar's order on 17 June 2008. The costs assessor filed a certificate in respect of each of the relevant costs orders on 19 June 2008 as required by UCPR r 737. On 27 June 2008, the deputy registrar issued an order under UCPR r 740 in respect of each of the certificates of assessment, totalling in all $282,307.19.

[8] The appellants did not file their application until 4 September 2008. The application was not made under UCPR r 740(3), pending review of the costs

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3 *Virgtel Limited & Anor v Zabusky & Ors* [2006] QSC 241.

4 In respect of two applications.

assessment. It was made under either UCPR r 800 or the inherent jurisdiction to stay enforcement of the amount in each of the orders made by the registrar in the assessment on 27 June 2008.

[9] The appellants contended that interlocutory costs orders like these should not be amenable to assessment and payment until the determination of the principal proceeding in which the interlocutory costs orders were made. That is the position in proceedings in the Federal Court of Australia under O 62 r 3 of the *Federal Court Rules*. But Queensland does not have such provisions.

[10] This application was different to that in *Di Carlo v Dubois & Ors*,[5] an application for a stay pending appeal. *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors*,[6] where a consequential order was made to stay the enforcement of one party's costs order, was also distinguishable. It was not an application to stay an interlocutory costs order but an application to set off costs ordered to be paid by one party against costs ordered to be paid to that party by another party.

[11] His Honour observed that, under UCPR r 740, the registrar makes an order after the filing of a certificate of assessment. There is then a 14 day moratorium on the enforcement of that order with provision for a party to apply for a stay of its enforcement pending review of the assessment. Following the moratorium period and in the absence of an order for a stay pending review, the order becomes effective. His Honour added:

> "[15] The fundamental difficulty, in point of principle, with the approach urged by the [appellants] is that, not only is it contrary to the costs regime established under the *UCPR*, but it effectively involves going behind the exercise of the discretion of each of the judges who made the costs orders in question. Had each of the judges intended to make orders which would have had the effect now sought by the [appellants], i.e. being postponed until determination of the proceedings, the appropriate orders which the judges could (and undoubtedly, if so minded, would) have made would have been for the [Virgtel companies'] costs on each application to be [their] costs in any event. Such an order would have entitled the [Virgtel companies] to recover their costs in respect of each of those applications, regardless of the ultimate outcome of the proceeding, but, importantly, [they] would not have been entitled to an immediate assessment of those costs orders and would have been required to wait until the ultimate assessment of costs in the proceeding [*Allied Collection Agencies Ltd v Wood* [1981] 3 All ER 176].
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> [16] None of the costs orders in respect of which the [appellants] now seek stays were orders for costs 'in any event'. I would be loathe to accede to this application which would, as I have said, have the effect of going behind the exercise of discretion undertaken by each of the judges who made the relevant costs orders.
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> [17] The [appellants] pointed to a number of discretionary factors which, it was submitted on their behalf, would justify the grant of

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5 [2003] QCA 415.

6 [2008] QSC 36.

a stay in respect of these costs orders. In particular, it was asserted that:

(a) the [appellants] cannot pay the costs awarded primarily because of freezing orders obtained against them by the [respondents] which have severely compromised the [appellants'] ability to deal with their assets advantageously or at all. The complete answer to this objection is that the [Virgtel companies] have indicated their consent to the [appellants] disposing of such assets as may be required to enable them to meet the outstanding costs orders;

(b) execution of the orders 'would inevitably stifle the further prosecution of these proceedings which would be unjust to the [appellants] who have expended, and incurred, legal costs in excess of $1,500,000'. Given that the [appellants] do have assets, including a business, at their disposal, and that a regime is in place for the legal costs they are incurring to be secured, it is difficult to see how the 'inevitable stifling' to which reference is made would actually result;

(c) it is impossible for the Court to determine at this stage where the overall merits lie. I agree, but that is not the point for present purposes. Rather, the relevant point is that each of the judges who made the costs orders exercised the discretion vested in each of those judges to make the particular costs order with the particular consequences which flowed from each costs order."[7]

[12] Daubney J noted that, although the precise monetary liability of either party had not been finally determined, discrete costs orders had been made in favour of the respondents on interlocutory applications. This was not affected by the 19 or so other orders either reserving costs or making them costs in the proceedings. The fact that the appellants were "obtaining expert advice with a view to seeking a review of the four costs assessments" may be relevant to an application for stay under r 740 but that was not the application for determination. His Honour noted that it:

> "might be perceived as a curiosity in the timing of the present application, namely it having been made only after [the appellants] participated (as they were entitled to do) in the assessment and objection process, including in relation to the appointment of the costs assessor, and only after the making of the order by the Registrar under Rule 740."[8]

[13] The judge concluded that the appellants had not demonstrated any basis for staying the execution of the costs orders, adding: "Nor is there any reason why I should go behind the exercises of discretion with respect to the costs orders" made by the Chief Justice and P D McMurdo J.[9]

[14] In the appellants' separate application to vary the Mareva orders, Daubney J determined that they should have access to their assets to defend the proceedings

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7 *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2008] QSC 316 at [15]-[17].

8 [2008] QSC 316 at [19].

9 [2008] QSC 316 at [20].

and that their solicitors should be entitled to increase the limit of their mortgage over those assets the subject of the Mareva order to $700,000.

The relevant provisions of the UCPR

[15] Chapter 17A UCPR deals with costs, Pt 3 of which concerns the assessment of costs other than under the *Legal Profession Act* 2007 (Qld). Division 6 of Pt 3 deals with the process after costs have been assessed. Rule 740 requires the registrar to make an order after a certificate of assessment is filed.[10] The order takes effect as a judgment of the court.[11] The order is not enforceable until at least 14 days after it is made, and the court may stay enforcement pending review of the assessment.[12]

[16] Chapter 19 UCPR deals with the enforcement of money orders. Rule 800 provides:

> "**Stay of enforcement**
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> (1) A court may, on application by an enforcement debtor—
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> (a) stay the enforcement of all or part of a money order, including because of facts arising or discovered after the order was made; and
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> (b) make the orders it considers appropriate, including an order for payment by instalments.
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> …"

The appellants' contentions

[17] The appellants' contentions in this appeal are as follows. The appellants have so far expended or incurred legal costs in excess of $1.5 million. The appellants dispute the Virgtel companies' claim against them. As Daubney J noted in his reasons, it was impossible for the court to determine at this stage where the overall merits of the claim lie. Apart from the costs orders made by the Chief Justice and P D McMurdo J in favour of the Virgtel companies, there are 27 other orders reserving costs or making them costs in the proceedings. The Virgtel companies are foreign companies without assets in the jurisdiction. If the appellants are ultimately successful in the principal proceeding but they are unsuccessful in this appeal, they will not be able to set off any ultimate costs order in their favour against the costs orders the subject of this appeal. The security for costs order against the Virgtel companies in favour of the appellants is inadequate to cover any final costs order that might be made in the appellants favour. The amount involved in the costs orders the subject of the appeal is very substantial, almost $300,000. To pay them would require the appellants to sell assets presently the subject of the Mareva order. The Virgtel companies would not be disadvantaged by a stay as they are protected by the Mareva order and will ultimately recover the unpaid costs, together with interest under s 48 *Supreme Court Act* 1995 (Qld). The material before Daubney J demonstrated that the appellants were struggling financially and would have great difficulty in paying the costs orders the subject of this appeal. The execution of these costs orders could stymie their defence of the principal proceeding. The interests of justice favoured the granting of the stay and the primary judge erred in not so doing.

[18] The judge also erred in considering that the granting of the stay would be "going behind the exercise of the discretion of each of the judges who made the costs

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10 UCPR, r 740(1).

11 UCPR, r 740(2).

12 UCPR, r 740(3).

orders in question".[13] The appellants in applying for the stay did not ask the judge to go behind the exercise of the discretion of the judges who made the original costs orders. They accept their responsibility for those costs orders. A consideration of the applicable legal principles did not require the judge to go behind the costs orders. This error affected Daubney J's exercise of discretion in determining to refuse the stay. This Court should now exercise its own discretion. The costs would always have to be assessed at some point so that the application for a stay after their assessment does not mean the stay must be refused. A consideration of all the relevant circumstances set out in the previous paragraph demonstrates that the interests of justice warrant the granting of the stay. This Court should allow the appeal, set aside the orders made by Daubney J and grant the stay.

Conclusion

[19] The appellants' application before Daubney J, in its terms, was brought under both UCPR r 800 and the court's inherent jurisdiction. Nothing turns on which basis the application is considered as each provides the court determining the application with a broad and unfettered discretion to grant a stay according to legal principle. The UCPR does not contain a provision like O 62 r 3 *Federal Court Rules*, although, where appropriate, Queensland judges commonly order that interlocutory costs orders are to be paid "in any event", that is, at the conclusion of the action. The costs orders the subject of this appeal are final orders. It follows that, ordinarily, the Virgtel companies are entitled to the "fruits of their victory" by enforcing those final costs orders before the conclusion of the action, unless the appellants show "special or exceptional circumstances" warranting a stay: *Alexander v Cambridge Credit Corp Ltd*;[14] *Croney v Nand*.[15] The onus is on the appellants to demonstrate why the court should grant the stay and deny the Virgtel companies the benefit of the orders in their favour.[16] Factors pertinent in this case include doing justice between the parties by balancing their competing rights; and whether the assets of one party may be disposed of if the stay is not granted: *Croney v Nand*.[17]

[20] As this Court noted in the Virgtel companies' unsuccessful application to strike out this appeal, and as the appellants rightly contend, had Daubney J granted their application for a stay, this would not have altered the substantive legal rights and liabilities of the parties in relation to the costs the subject of those orders.[18] The appellants submit that the extract from Daubney J's reasons set out earlier[19] shows that his Honour did not comprehend this.

[21] I am not persuaded his Honour mistakenly apprehended that the appellants were disputing their obligation to pay the costs orders the subject of this application, or that the granting of it would require him to go behind those orders. Although not perhaps expressed in the optimal sequence, Daubney J's reasons[20] make adequately clear that his Honour understood that he had a broad discretion to exercise in

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13 *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2008] QSC 316 at [15], and see also [20].

14 (1985) 2 NSWLR 685 at 693.

15 [1999] 2 Qd R 342 at 348.

16 *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694.

17 [1999] 2 Qd R 342.

18 *Virgtel Ltd & Anor v Zabusky & Ors* [2009] QCA 92 at [11], [12]; *L Joseph Pty Ltd v Gray* [1939] WN (NSW) 190 at 195; *Maniotis v Valimi Pty Ltd* (2002) 4 VR 386 at [37].

19 See [11] of these reasons.

20 Set out at [7]-[14] of these reasons.

determining the stay application. His Honour did refer to "going behind the exercise of the discretion of each of the judges who made the costs orders in question". But he did so in the context of considering the appellants' contention, that not granting the stay would prevent them from setting off the costs orders against a much larger costs order in their favour if ultimately successful in the principal proceeding. Daubney J then fairly observed that, if the Chief Justice and P D McMurdo J felt that the appellants ought not pay the costs orders in favour of the Virgtel companies until the end of the action, then they would have so ordered. When Daubney J's reasons are read in their full context, they do not show that his Honour considered he was constrained in exercising his discretion as to whether to grant the stay by the discretionary exercise undertaken by the Chief Justice and P D McMurdo J. In my view, his Honour considered the relevant competing considerations in determining the appellants' application.

[22] In case I am wrong in that conclusion and it is necessary for this Court to now re-exercise its discretion in determining the appellants' application for a stay, I will state how I would approach the application.

[23] It is highly relevant that the appellants did not apply to stay these orders until after the costs had been assessed, a certificate of assessment filed and the registrar ordered they take effect as judgments of the court. It is true that these steps would have to be taken at some point regardless of when a stay was granted. But if the Virgtel companies are to be denied the benefit of final orders, they should be informed of this as early as possible. The lateness of the appellants' application, in the absence of any pressing new facts arising or discovered after the order under UCPR r 740 took effect,[21] is a telling, though not conclusive, factor against its success. The appellants' principal argument is that, were the stay not granted, they could not set off the costs orders in favour of the Virgtel companies against the much larger costs order which would be made in their favour if they are ultimately successful in the principal proceeding. That argument was open long before the late stage at which they brought this application. As Daubney J observed, it was open even when the Chief Justice and P D McMurdo J were making the costs orders. The appellants' delay in bringing the application is a factor against the granting of the stay.

[24] It is not presently possible to express a view as to the merits of the Virgtel companies' action. This factor neither favours nor hinders the appellants' application for a stay.

[25] The Virgtel companies are foreign companies without assets in Queensland. But they have provided security for costs and security for their undertaking as to damages in respect of the Mareva order totalling, to date, $650,000. If, as the appellants now contend, that amount is insufficient to cover their costs should they be successful in defending the Virgtel companies' action, they should apply to increase that security. On its own, it is no reason to withhold from the Virgtel companies their entitlement to costs under final orders.

[26] As the appellants contend, s 48 *Supreme Court Act* 1995 provides for interest to accrue on unpaid costs orders after 21 days. If the stay is granted, the Virgtel companies will receive interest on the costs orders. But that factor, in the absence of other persuasive reasons to grant the stay, is not a factor which justifies denying the Virgtel companies the benefit of the costs orders in their favour.

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21 See UCPR, r 800(1)(a).

[27] The appellants' claim that refusing the stay and requiring them to pay the costs orders in favour of the Virgtel companies risks stymieing their defence of the action. Daubney J amended the Mareva order to permit the appellants to increase the security their lawyers have over their assets for reasonable legal expenses. As Daubney J noted, the appellants:

> "do have assets, including a business, at their disposal, and … a regime is in place for the legal costs they are incurring to be secured, [so that] it is difficult to see how the 'inevitable stifling' to which reference is made would actually result".[22]

[28] A consideration of the factors relied on by the appellants in support of their application for a stay, individually and collectively, leaves me unpersuaded that, on balance, the application should be granted. The appellants have failed to show the required special circumstances which might warrant giving them the benefit of such an extraordinary order at this late stage.

Summary

[29] The primary judge did not wrongly consider that if he granted a stay he would be going behind the discretionary exercise undertaken by the Chief Justice and P D McMurdo J in making the costs orders the subject of this application. In the impugned observations, his Honour was merely addressing the appellants' contention that they should be granted the stay so as to set off the costs orders against a potential costs order in their favour if ultimately successful in the principal proceeding. As his Honour observed, had the Chief Justice and P D McMurdo J in making their costs orders intended that consequence, they would have so ordered. Nor did the primary judge err in his consideration of the relevant factors and in exercising his discretion to refuse the appellants' application for a stay. In any case, were I required to exercise that discretion afresh, I would refuse the appellants' application to stay the costs orders in question. It follows that the appeal should be dismissed with costs to be assessed.

[30] The gargantuan amount of costs expended by the appellants in this matter before the action has even commenced ($1.5 million at the time of the application before Daubney J) is concerning. It is a stark example of the unacceptable cost of access to justice in commercial matters. The former Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC, recently observed that the cost of legal services can be a practical barrier to access to civil justice.[23] More affluent litigants can use it to oppress their opponents. Some litigants may wish to delay the final hearing of matters and to deliberately run up costs through tactical pre-trial applications. A more interventionist approach to the judicial management of cases is essential to ensure that the justice system operates with reasonable fairness, both to the litigants in the case and to other litigants who wish to use the courts' limited resources. The recent placement of this matter on the supervised case list will ensure it is now optimally case-managed. But, in my view, the parties' lawyers also have an obligation, not just to their clients but also to the administration of justice, to do everything possible to ensure the matter is soon concluded in a timely and cost efficient way.

ORDER:

Appeal dismissed with costs to be assessed.

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22 *Virgtel Ltd & Anor v Zabusky & Ors (No 2)* [2008] QSC 316 at [17].

23 Hon Murray Gleeson AC, 'The Purpose of Litigation' (2009) 83 *ALJ* 601 at 608.

[31] **MULLINS J:** I agree with the President.

[32] **PHILIPPIDES J**: I agree that the appeal should be dismissed with costs to be assessed for the reasons stated by the President.

[33] The appellant has failed to demonstrate any error in principle in the approach taken by Daubney J in respect of the exercise of his discretion to stay the various costs orders. As to that issue, the primary focus of the appellants' submission centred on the proposition, said to be derived from para 16 of his Honour's judgment, that his Honour approached the exercise of the discretion erroneously, because he did so from the standpoint that he would be loathe to award a stay as that would have the effect of going behind the exercise of the discretion of the judges who made the original costs orders. However, a fair reading of the passage in its context, as the President has explained, does not support the appellants' contention. Moreover, as is apparent from his Honour's reasons, Daubney J considered the application for a stay after properly taking into account the relevant considerations in accordance with the orthodox approach to the exercise of the broad discretion conferred on him.

[34] In any event, even if the discretion were required to be exercised afresh, I agree with the President that the appellants have not discharged the onus of demonstrating that the discretion ought to be exercised in their favour.