SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Lawrence* [2011] QCA 301
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **MARK RICHARD LAWRENCE** (respondent)
FILE NO/S:	Appeal No 9609 of 2011 SC No 7468 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2011
JUDGE:	Fraser JA
ORDER:	**The order made in the trial division on 21 October 2011 be stayed until 4.00 pm on 4 November 2011 or earlier order**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where an order was made in the trial division under s 30(3) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) rescinding the respondent's continuing detention order and imposing a supervision order – where the primary judge refused an application for a stay of the order until determination of an appeal by the applicant – where the applicant filed a notice of appeal and applied to the Court of Appeal for a stay of execution of the order – where there were inconsistencies in the accounts given by the respondent to psychiatrists evaluating him pursuant to s 29 of the Act – where the appeal is listed for hearing within a fortnight – where the respondent would be housed at the Wacol precinct and subject to monitoring and reporting conditions – whether the order ought to be stayed until the hearing and determination of the appeal *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 27, s 30(3), s 30(4), s 41

Uniform Civil Procedure Rules 1999 (Qld), r 761(2)

Attorney-General v Francis [2007] 1 Qd R 396; [2006] QCA 324, considered
Attorney-General for the State of Queensland v Fardon [2011] QCA 111, applied
Attorney-General for the State of Queensland v Lawrence [2011] QSC 291, considered
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited

COUNSEL: W Sofronoff QC SG, with J Rolls, for the applicant
P E Smith for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

[1] **FRASER JA:** On 3 October 2008 it was ordered pursuant to s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) that Mr Lawrence be detained in custody for an indefinite term for control. Section 27 of the Act required the Attorney-General to apply for review of the continuing detention order at the end of one year after the order first has effect, and afterwards at yearly intervals.[1] On such a review, the first question is whether the prisoner is a serious danger to the community in the absence of an order under division 3 of the Act (a continuing detention order or a supervision order). If so, an order may be made under s 30(3) either that the prisoner continue to be subject to the continuing detention order or that the prisoner be released from custody subject to a supervision order. Section 30(4) provides that the paramount consideration in deciding whether to make either order is the need to ensure adequate protection of the community.

[2] On 4 October 2011, after the hearing of the first review of Mr Lawrence's continuing detention order, a judge in the trial division decided that the order should be rescinded and Mr Lawrence should be at liberty upon the conditions of a supervision order. The terms of the supervision order were finalised on 21 October 2011 and include numerous conditions relating to matters such as accommodation, monitoring, supervision, and the undertaking of treatment and counselling.

[3] The primary judge refused the Attorney-General's application to stay the supervision order pending the determination of an appeal, but granted an interim stay until 9.00 am on 24 October 2011, presumably to permit an application for a stay to be made in the Court of Appeal. Also on 21 October 2011, the Attorney-General filed a notice of appeal against the rescission of the continuing detention order and an application to the Court of Appeal for a stay until the determination of the appeal.

[4] When the application for a stay came on for hearing before me at 9.00 am on 24 October 2011, I ordered that the orders made in the trial division be stayed until the determination of the Attorney-General's application for a stay. That interim order was not opposed.

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[1] The relevant version of the section for current purposes is in Reprint 2B. However, see also the transitional provision in s 63 of the current version, Reprint 2C.

[5] The question for decision now is whether the order rescinding the continuing detention order and imposing supervision conditions should be stayed until the hearing and determination of the appeal. The Court is empowered to order a stay under s 41 of the Act and under r 761(2) of the *Uniform Civil Procedure Rules* 1999 (Qld).[2] The parties agreed that the principles which should be applied in deciding whether the continuing detention order should be stayed are those which were articulated by Chesterman JA in *Attorney-General for the State of Queensland v Fardon*:[3]

> "It is obvious that the case is very different from those involving claims for civil remedies with respect to which the courts have developed principles for determining whether execution of a judgment should be stayed pending appeal. Nevertheless some of the statements in those cases afford guidance as to the appropriate outcome of this application.
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> Keane JA pointed out in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455:
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> > "… it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending appeal is to ensure that the orders which might ultimately be made by the courts are fully effective … ."
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> Two principles commonly resorted to on stay applications are also relevant.
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> > "The first is that where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay … . Secondly, although courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them … making some preliminary assessment about whether the appellant has an arguable case."
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> The passage is from *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 695.
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> Applying these criteria to the present application the result is that the respondent's release on supervision should not be delayed

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2 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111 at [11].

3 [2011] QCA 111 at [12] - [16], [21].

> pending appeal unless the applicant shows that his appeal is arguable on substantial grounds *and that* the appellant may well lose the benefit of a successful appeal if the primary judgment is not stayed. In applications under the Act the Attorney-General is only likely to lose the benefit of a successful appeal if the prisoner commits a serious sexual offence in the period between judgment at first instance and on appeal. If that should happen the community would not have been adequately protected and the means of ensuring that protection will have been lost.
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> The magnitude of the risk that a prisoner might commit a serious sexual offence before an appeal against his release on supervision can be heard is therefore the critical factor on an application for a stay of judgment.
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> …
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> In practical terms, in order to justify the stay, the Attorney-General must demonstrate a degree of likelihood that the order appealed against will not adequately protect the public and that a greater degree of protection than that provided by the order appealed from is necessary pending the appeal. The relevant risk against which the community is to be protected is that of the respondent committing serious sexual offences. For the purposes of the Act and this application the risk of committing other offences, or of breaking the terms of the supervision order, is irrelevant, save to the extent that that risk indicates an increased risk of sexual re-offending."

[6] In order to appreciate the issues that arise in applying those principles in this case it is necessary to refer to some of the evidence adduced before the primary judge. There was a great deal of evidence. It is impractical in this interlocutory application to refer to all of the relevant material. I will refer only to those aspects of the evidence which I consider to be of particular significance.

[7] Mr Lawrence's criminal history was summarised as follows:[4]

Date	**Description of Offence**	**Sentence**
09.05.78 Ipswich Childrens Court	• Aggravated assault on a male child under the age of 14 years (on 4.05.78)	Admonished and discharged
02.11.78 Ipswich Magistrates Court	• Aggravated assault on a male child under the age of 14 years (on 20.12.78) (*sic*)	Probation for a period of 2 years
23.02.79 Ipswich Magistrates Court	• Aggravated assault on a female child under the age of 17 years (on 22.02.79)	Probation for a period of 3 years To undergo any psychiatric treatment as directed by probation officer, including necessary institutional treatment

[4] *Attorney-General for the State of Queensland v Lawrence* [2011] QSC 291 at [27].

23.12.80 Ipswich Magistrates Court	• Aggravated assault on a male child under the age of 14 years (on 21.12.80)	Fined $75.00
03.09.81 Brisbane District Court	• Conspiracy to commit a crime (on 11.04.81) • Assault with intent to steal and threatened to use actual violence whilst armed with a dangerous weapon and in company (on 11.04.81)	On each charge: 4 months imprisonment, concurrent. In addition to the 2nd charge: probation 3 years.
07.02.85 Brisbane Supreme Court	• Unlawful killing on grounds of diminished responsibility (on or about 26.12.83)	15 years imprisonment
03.09.91 Beenleigh Magistrates Court	• Found in an enclosed yard without lawful excuse (on 2.09.91) • Escape legal custody (on 31.08.91)	Convicted and sentenced 2 months imprisonment Convicted and sentenced 1 year imprisonment
04.04.02 Brisbane District Court	• Rape (on or about 14.10.99) • Sexual assault including a circumstance of aggravation (on or about 14.10.99)	Imprisonment 7 years Imprisonment 3 years, to be served concurrently. Recommended not to be eligible for PPCBR. Declared to be a serious violent offender. Time spent in pre-sentence custody deemed as already served (07.02.01 – 04.04.02)

[8] Mr Lawrence committed the first four offences between May 1978 and December 1980, a period which commenced shortly before his 17th birthday and which concluded some months after his 19th birthday. By far the most serious offences were committed in December 1983 and in October 1999. Mr Lawrence committed the 1983 offence whilst he was a patient at Wolston Park Hospital and in company with another male patient. The victim was also a patient. According to one account in the evidence, Mr Lawrence planned to rape and kill his victim. Mr Lawrence in fact killed her by cutting her throat when she continued screaming after he and his co-offender had grabbed her, dragged her down to a river bank and choked her, and Mr Lawrence had hit her with a bottle which broke. Mr Lawrence's most recent offences were committed in 1999 whilst he was in prison. Mr Lawrence maintained that he was innocent of the 1999 offences, but the primary judge proceeded on the basis that his convictions for those offences were correct and Mr Lawrence's statements of his innocence of them should not be accepted.

[9] There was expert opinion evidence by Professor Nurcombe and Dr Lawrence, who had examined the respondent as required by s 29 of the Act, and Professor Morris, who gave evidence on behalf of Mr Lawrence. Each of the three psychiatrists gave evidence of a diagnosis which included sexual sadism.

[10] Dr Lawrence was of the opinion that Mr Lawrence remained at a high risk of recidivism were he to be free in the community, that the risk could only be reduced to acceptable levels by virtually constant close surveillance and intensive efforts at re-socialising, and that a supervision order could not be formulated with conditions that could manage his multiple and complex risk factors.

[11] The evidence of Professor Nurcombe and Professor Morris, whilst agreeing that Mr Lawrence was dangerous, was more favourable to him. Professor Nurcombe considered that Mr Lawrence must be regarded as at a high risk of violent sexual re-offending if static, historical factors alone were considered, but if recent apparent improvements following therapy were considered and proved to be authentic and durable, Mr Lawrence would be at a moderate risk of re-offending. Professor Nurcombe posed the question:[5]

> "How much reliance can be placed on improvements professed by the offender, and how much improvement would be possible after treatment, given Mr Lawrence's personality, his difficulty coping with the concepts of relapse prevention, and his low average intelligence? … Although I consider that Mr Lawrence has been genuine in his attempts to address his problems, reason suggests the need for caution."

Professor Nurcombe considered that the overall risk of re-offending could be reduced to moderate by the imposition of conditions upon Mr Lawrence's release. The conditions mentioned by Professor Nurcombe (which, so I understood to be accepted in the submissions for the Attorney-General, are appropriately reflected in the supervision order) were:

> "
> - Supervised accommodation
> - Close probationary supervision
> - Assistance with obtaining employment
> - Continued counselling following release
> - Participation in the Sexual Offender Maintenance Program in the community
> - Anti-androgenic treatment under psychiatric supervision
> - A curfew with electronic monitoring
> - The maintenance of distance from places where children congregate, schools, and from families with young children".

[12] Professor Morris considered that Mr Lawrence's sexual sadism was in remission and that he had a moderate risk of sexual violence recidivism. He recommended that Mr Lawrence be released from prison under a supervision order.

[13] Mr Lawrence gave evidence. He made contradictory statements in his evidence to the effect that he had not had any sexual fantasy involving sadism for some three or four years and that when he got such fantasies he used coping mechanisms to bring them to an end. The primary judge found that Mr Lawrence was not being dishonest but that the contradiction instead reflected limitations upon his capacity to express himself well. His Honour understood that Mr Lawrence was attempting to say that for several years he had not positively maintained or promoted such fantasies and he successfully used strategies to bring them to an end.[6]

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5 Professor Nurcombe's report dated 28 April 2011, p 2.

6 [2011] QSC 291 at [102].

[14] The primary judge was satisfied that, consistently with the views expressed by Professor Nurcombe and Professor Morris, the risk that the respondent would re-offend had reduced. His Honour held that the attempts made by Mr Lawrence over a substantial period of time to change his conduct and the success he had had to date, together with the support that he could expect on his release and the imposition of appropriate requirements, were sufficient to ensure the adequate protection of the community.[7]

[15] It was submitted for the Attorney-General that the primary judge wrongly discounted the evidence of Dr Lawrence by rejecting her conclusions that there were inconsistencies in accounts given by Mr Lawrence of his past of a kind which adversely affected the credibility of his descriptions of his current sexual fantasising. In that respect, the primary judge considered that the better view was that Mr Lawrence experienced:[8]

> "concerning deviant sexual fantasies less frequently and with less intensity than was the case when he committed offences in the past; and to the extent that he experiences them, he manages to control them with the benefit of what he learnt at courses undertaken in his time in prison … ."

The primary judge considered that Dr Lawrence's more adverse assessment was affected by "a negative view of Mr Lawrence's honesty" and that Dr Lawrence did not provide any "convincing basis" for that view or identify any inconsistencies in the accounts given by Mr Lawrence of his past.[9]

[16] It is arguable that the primary judge was mistaken in concluding that Dr Lawrence did not provide any convincing basis for her negative view of Mr Lawrence's honesty. In Dr Lawrence's report dated 2 November 2009 she referred to a personal history Mr Lawrence was said to have given to Professor Nurcombe and Dr Beech and which was recorded in their reports of 4 December 2006 and 27 December 2007 respectively. This was to the effect that: when Mr Lawrence's grandmother died when he was aged about seven, he spent days fending for himself in the bush before being found by authorities and placed in Stuart House in Sydney; he remained there until the age of 14; he was bashed and raped by staff and inmates, treated violently and neglectfully, received little or no schooling, and attempted suicide; his father claimed him at age 14 and he spent the rest of his adolescence in the care of his father and step-mother, with some six or seven step-siblings; when aged 17 he took out his frustrations on a young boy he had seen at a railway station; and at age 19 "it was reported that he told a Psychologist that he chose to sexually assault children because they are vulnerable, can't fight back and it is exciting to sexually assault them so that he does so when possible."

[17] Mr Lawrence was then said to have give a different version of his history to Dr Lawrence. Her report records that he told her (and she reported that this was confirmed in part in a telephone conversation with Mr Lawrence's sister, L, in January 1985) that: he was left with his grandmother at the age of three months; he was subsequently collected by his father who had married his step-mother at what Mr Lawrence thought was "pre-school age", although reports indicated that it was at

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7 [2011] QSC 291 at [116].
8 [2011] QSC 291 at [112].
9 [2011] QSC 291 at [103].

about 12 months of age; Mr Lawrence was then reared as their own child by his father and step-mother, having a step-brother and six half-brothers and sisters; by 1973, when aged 12, he had reached grade four in school; he was then transferred for three years to an opportunity school; and from 1976 until he was aged 17 and a half in February 1979 he had a job in a butter factory at Ipswich, during which time he was "convicted of 3 offences of a sexual kind."

[18] Dr Lawrence records that when she subsequently queried Mr Lawrence's current statement that he would prefer a female partner to a male partner, pointing out that three of Mr Lawrence's child victims had been male and only one female, Mr Lawrence "vigorously denied that the attacks on the children were sexual at all. He said that they were aggravated assault, by which he means that he would 'just push the child'. He denies absolutely any sexual involvement with those children or sexual intent … ."

[19] On the face of these statements, it is arguable that Mr Lawrence gave radically different versions of his history at different times, including as to his family background and whether his past offending included sexual offending against children. Particularly in light of the primary judge's finding that the reliability and honesty of Mr Lawrence's statements to the psychiatrists generally were of "some significance",[10] it is also arguable that this might be of some importance in the assessment of Mr Lawrence's risk of re-offending.

[20] It was submitted for Mr Lawrence that the primary judge took the suggested inconsistencies into account and they did not falsify his Honour's ultimate conclusions. That may be so. The primary judge pointed out that it was not inevitable that inconsistencies of the kind mentioned by Dr Lawrence would reflect dishonesty by Mr Lawrence, and that Mr Lawrence had otherwise made apparently frank disclosures which rendered it unlikely that he had been dishonest in his current descriptions of his sexual functioning. His Honour also took many other matters into account on this issue.[11] Much earlier in the reasons, the primary judge had also observed that it was unnecessary to reach a concluded view as to whether there was a sexual component to any or all of the aggravated assaults between 1978 and 1980. His Honour noted that neither party asked Mr Lawrence questions about the nature of the offences, the sentences imposed for the four offences were not severe, and certain evidence was not referred to or elaborated upon in the proceedings.[12]

[21] To succeed in the appeal, the Attorney-General must persuade the Court, not merely that it should prefer a different result over that favoured by the primary judge, but that the primary judge made some error of fact or law which influenced the primary judge's decision.[13] It is also necessary to bear in mind the principle that "[i]f supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the

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10 [2011] QSC 291 at [100].

11 [2011] QSC 291 at [103] - [108].

12 [2011] QSC 291 at [28] - [29].

13 See *Attorney-General v Francis* [2007] 1 Qd R 396 at 402 [34], citing *Norbis v Norbis* (1986) 161 CLR 513 at 518 - 519; *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111 at [19].

liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such restraint."[14]

[22] The primary judge's reasons for judgment are lengthy and, so far as I have been able to determine in the time available to me, they appear to be comprehensive and precise. Counsel for the respondent undertook a careful analysis of the grounds of the Attorney-General's appeal and the reasons and submitted that the analysis demonstrated that no error could be shown. However, whilst that might be demonstrated to be correct at the hearing of the appeal, upon the basis of the material available for my consideration in this interlocutory application, it is reasonably arguable that, whilst the primary judge took into account that Mr Lawrence maintained his innocence of the 1999 offences in prison despite the jury verdicts of guilty, his Honour wrongly excluded from consideration Dr Lawrence's negative view of Mr Lawrence's honesty on the basis that he made false denials of having committed sexual offences against children and gave a false explanation for his conduct in which he blamed his early family situation.

[23] It has not been demonstrated that this is a strong ground for setting aside the order, but it is reasonably arguable. It is therefore necessary merely to record the Attorney-General's further submissions. They were that: the primary judge's reasons revealed uncertainty about the meaning of the expression "adequate protection of the community" in s 30(4) of the Act in the context of the psychiatric assessment of Mr Lawrence's risk of re-offending as "moderate"; the primary judge's reasons did not deal with significant facts and evidence which identified how support, counselling, supervision, monitoring and the provision of accommodation would provide adequate protection to the community from a risk that Mr Lawrence would commit a sexual assault involving violence which could escalate to a life threatening level; and the primary judge failed to take into account relevant evidence, particularly evidence of Dr Lawrence and Professor Nurcombe, which counselled caution on the basis that the purported gains made by the respondent in managing his risk of recidivism might not be durable or realistic.

[24] It is necessary now to consider the magnitude of the risk that Mr Lawrence might commit a serious sexual offence before the appeal can be heard. Even on the assumption that the Attorney-General's appeal might succeed, this is a difficult exercise, particularly because the magnitude of the risk must be assessed, in part at least, by reference to psychiatric evidence the effect of which is in issue in the appeal.

[25] The reasons given by the primary judge for refusing to stay the order are not yet available. In what follows I have referred to a summary of those reasons given in an affidavit filed on behalf of Mr Lawrence. The primary judge referred to the evidence given by Professor Nurcombe and Dr Lawrence set out in [54] and [88] of his Honour's reasons and held that the likelihood of Mr Lawrence sexually re-offending was not imminent. In the relevant passage in Professor Nurcombe's report dated 21 October 2009, he expressed the opinion that the risk of re-offending was not "imminent". I note that in the same passage, however, Professor Nurcombe expressed the opinions that: the risk of violence was chronic and particularly likely to occur if Mr Lawrence experienced rejection, loneliness or boredom; and whilst Mr Lawrence had made genuine attempts to change the psychological basis of his

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14 *Attorney-General v Francis* [2007] 1 Qd R 396 at 405 [39].

offences, it was likely that his sadistic urges were "dormant rather than defunct". The primary judge also referred to Dr Lawrence's acknowledgment in cross-examination that if Mr Lawrence experienced difficulties it was more likely that he would abscond than immediately proceed to commit a serious offence. However, Dr Lawrence immediately added that "what might happen if he absconds is another matter."[15]

[26] If the appeal were to succeed on the basis I have discussed, the evidence of Dr Lawrence about the magnitude of the risk that Mr Lawrence might re-offend could assume more prominence than the primary judge attributed to it. Her evidence was much less favourable to Mr Lawrence.

[27] In refusing a stay the primary judge also noted that Mr Lawrence would be housed at the Wacol precinct and, in accordance with the supervision order, would be subject to monitoring and reporting conditions. Those are, of course, very relevant considerations. It may be that any risk of re-offending in the period between now and the hearing of the appeal could be effectively managed, but in the end the efficacy of the conditions may depend in significant respects upon Mr Lawrence's compliance with them, and the determination of the nature and extent of any risk that Mr Lawrence would not comply with important conditions is itself bound up with the issues in the appeal.

[28] There is one further factor which is significant. The appeal has been set down for hearing on 4 November 2011, which is less than a fortnight distant. Mr Lawrence's counsel acknowledged that, as was submitted for the Attorney-General, the imminence of this hearing date favoured the grant of a stay. If a stay is granted but the appeal ultimately fails, Mr Lawrence will have been prejudiced by being required to remain in prison when he should have been at liberty under a supervision order. Despite the length of time that Mr Lawrence has already been in prison, that is a very severe prejudice, but the imminent hearing date for the appeal nonetheless reduces the extent of any such prejudicial effect.

[29] For these reasons, the primary judge's order should be stayed at least until the Court has had the opportunity of examining the record and hearing full argument on 4 November 2011. Judgment may not be given immediately upon the conclusion of the hearing, but in that event the judges hearing the appeal will certainly be in a good position to consider whether or not the appeal has sufficient merit to justify any further extension of the stay. If necessary, the application for a stay pending judgment can be renewed at that time.

Order

[30] I order that the order made in the trial division on 21 October 2011 be stayed until 4.00 pm on 4 November 2011 or earlier order.

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15 Transcript 9 April 2010, 1-77, L 20.