SUPREME COURT OF QUEENSLAND

CITATION:	*Crouch and Lyndon (a Firm) v IPG Finance Australia Pty Ltd & Anor* [2013] QCA 378
PARTIES:	**CROUCH AND LYNDON (A FIRM)** (applicant) **v** **IPG FINANCE AUSTRALIA PTY LTD** ACN 124 131 102 (first respondent) **IPG INVESTMENTS AUSTRALIA PTY LTD (ATF THE IPG INVESTMENT DISCRETIONARY TRUST)** 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:	Court of Appeal
DELIVERED ON:	Orders delivered ex tempore 9 December 2013 Reasons delivered 13 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	9 December 2013
JUDGES:	Morrison JA
ORDER:	**Delivered ex tempore on 9 December 2013:**

1. Upon the applicant, by his solicitor, giving undertakings:

a. in accordance with the letters dated 5 February 2009 and 27 July 2009, Ex PAL 11 to the affidavit of Paul Lutvey filed 5 December 2013, pending determination of the special leave application and any resultant appeal;

b. to proceed expeditiously with the application for special leave application and any resultant appeal.

2. The orders of the primary judge made on 15 October 2012 and 5 November 2012 (as varied on 16 October 2013) are stayed until the later of:

a. the determination of the applicant's application for special leave in the High Court; or

b. if special leave is granted, the determination of the appeal.

3. The costs of this application be the respondents' costs in the cause of the application for special leave.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – where the respondents claimed loss resulting from the conduct of the applicant's partner, pursuant to ss 8, 13 and 14 of the *Partnership Act* 1891 (Qld) – where judgment at first instance was given against the applicant on the basis of ss 8, 13 and 14 of the *Partnership Act* – where judgment on appeal to the Court of Appeal was given against the applicant on the basis of s 8 of the *Partnership Act* only – where the applicant has applied to the High Court for special leave to appeal – where the applicant contends the relationship between ss 8, 13 and 14 of the *Partnership Act* has not been given attention by the High Court of Australia for nearly 30 years – where the second respondent is in liquidation – where the applicant has undertaken to preserve his assets pending the appeal – where the applicant cannot pay the judgment sums without entering bankruptcy – where if the applicant enters bankruptcy he will may lose his certificate to practise law – whether a stay of execution pending special leave to appeal to the High Court should be granted – whether there is a substantial prospect that special leave to appeal will be granted – whether the balance of convenience lies in favour of the applicant or the respondents

Judiciary Act 1903 (Cth), s 35A
Legal Profession Act 2007 (Qld), s 68(1)
Legal Profession (Solicitors) Rule 2006 (Qld), r 87A
Partnership Act 1891 (Qld), s 8, s 13, s 14
Trade Practices Act 1974 (Cth)

Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd (1985) 155 CLR 541; [1985] HCA 13, considered
Crouch & Lyndon (a Firm) v IPG Finance Pty Ltd & Anor [2012] QCA 332, cited
Crouch and Lyndon (a Firm) v IPG Finance Australia Pty Ltd & Anor [2013] QCA 220, considered
Denning v Jet Development Pty Ltd [2007] QCA 63, cited
Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366; [2002] UKHL 48, considered
Hamersley Iron Pty Ltd v Lovell (No 2) (1998) 20 WAR 79; [1998] WASCA 304, cited
IPG Finance Aust P/L & Ors v Crouch and Lyndon & Anor [2012] QSC 312, considered
J v L & A Services Pty Ltd [1993] 2 Qd R 380; [1993] QCA 89, cited
Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1) (1986) 161 CLR 681; [1986] HCA 84, followed

Mercantile Credit Co Ltd v Garrod [1962] 3 All ER 1103; considered
Merton v Bank of Queensland Ltd [2013] NSWCA 159, cited
National Commercial Banking Corporation of Australia Ltd v Batty (1986) 160 CLR 251; [1986] HCA 21, considered
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, cited
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 2) (1998) 72 ALJR 869; [1998] HCA 32, cited
Rinehart v Welker (2012) 83 NSWLR 347; [2012] NSWCA 1, cited
Seiwa Australia Pty Ltd v Beard (2009) 75 NSWLR 74; [2009] NSWCA 240, considered
Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd [2013] VSCA 266, cited

COUNSEL: R Ashton for the applicant
C D Coulsen for the respondent

SOLICITORS: Mullins Lawyers for the Applicant
Reardon & Associates for the respondent

[1] This is an application for a stay pending an application for special leave to appeal to the High Court.

[2] On such an application the principles to be applied are well established. The court is to follow the approach of Brennan J (as he then was) in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*.[1] That requires that exceptional circumstances be shown before a stay is warranted, as the grant of such a stay is an extraordinary jurisdiction. In this Court's exercise of that jurisdiction on this application, the following matters are material to the exercise of the discretion:[2]

1. first, whether there is a substantial prospect that special leave to appeal will be granted;

2. secondly, whether a grant of the stay will cause loss to the respondent; and

3. thirdly, where the balance of convenience lies.

[3] Courts have expressed the same thing in a variety of ways, for example, "the question raised is an arguable one and, more importantly, because unless the stay is extended there will be little or no point in the High Court proceedings".[3]

[4] It has frequently been phrased as being that a stay is warranted where the subject matter of the litigation needs to be preserved.[4] But the jurisdiction is wider than

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1 *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* [1986] HCA 84; (1986) 161 CLR 681 at 684. *Rinehart v Welker* [2012] NSWCA 1, at [41]; *Denning v Jet Development Pty Ltd* [2007] QCA 63; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 266.

2 *Jennings Construction* at 685; *Merton v Bank of Queensland Ltd* [2013] NSWCA 159, at [5]-[6].

3 *J v L & A Services Pty Ltd* [1993] 2 Qd R 380, at 381.

4 David O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 2nd ed, 2007), 167.

that. It can be invoked if a stay is necessary to prevent the exercise of rights of appeal being rendered futile, or their exercise in circumstances where restoration of the status quo cannot be achieved.[5] Further, a stay will be granted "when it is necessary to preserve the subject matter or integrity of the litigation, or where refusal of a stay could create practical difficulties in the relief available to the High Court, or where there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed".[6]

Chronology

[5] The chronology of steps is:

(a) judgment at first instance was given on 15 October 2012 and final orders were made on 5 November 2012;[7]

(b) a stay pending appeal was granted on 30 November 2012;[8]

(c) this Court's decision dismissing the appeal was handed down on 9 August 2013;[9]

(d) an application for special leave to appeal to the High Court was filed on 6 September 2013;[10]

(e) a draft notice of appeal and summary of argument were filed on 4 October 2013;[11]

(f) the respondents' summary of argument was filed on 25 October 2013;[12]

(g) the applicant's summary of argument in reply was filed on 1 November 2013;[13]

(h) on 12 November the High Court registry informed the applicant's solicitors that the leave application was a candidate for hearing on 14 February 2014;[14]

(i) on 30 October 2013 the respondents served Mr Scott with a bankruptcy notice;[15]

(j) on 1 November an application to extend time for compliance with the bankruptcy notice was filed; it was dismissed on 27 November 2013;[16] and

(k) as a result of non-compliance with the bankruptcy notice, an act of bankruptcy occurred on 4 December 2013.

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5 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 2)* (1998) 72 ALJR 869; [1998] HCA 32, at [3].

6 *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79, at 85.

7 *Crouch & Lyndon (a Firm) v IPG Finance Pty Ltd & Anor* [2012] QSC 312. The final orders were varied on 16 October 2013.

8 *Crouch & Lyndon (a Firm) v IPG Finance Pty Ltd & Anor* [2012] QCA 332.

9 *Crouch & Lyndon (a Firm) v IPG Finance Pty Ltd & Anor* [2013] QCA 220.

10 Affidavit of Mr Lutvey, filed 5 December 2013, ("**Lutvey 4**") Ex PAL-4.

11 Lutvey 4, Ex PAL-5.

12 Lutvey 4, Ex PAL-6.

13 Lutvey 4, Ex PAL-7.

14 Lutvey 4, para 12.

15 Lutvey 4, para 3, Ex PAL-1.

16 Lutvey 4, paras 14-16.

Prospects of special leave

[6] The respondents claimed loss resulting from the conduct of one partner of Crouch & Lyndon ("**the Firm**"), Mr Wood. He made representations about the Firm having, as part of its business, arranged finance between borrowers and lenders sourced by it. They included: that the Firm would assess the viability of each proposed transaction, and recommend the borrower to clients; the Firm would do all the loan and security documentation; loan funds would be put into the Firm's trust account and only dispersed on execution of proper documents; and, the Firm's trust account would be used for the payment of interest and repayment of the loans.

[7] The respondents relied on the representations and lent money through Mr Wood. The loans turned out to be shams. Mr Wood misappropriated the money. Mr Scott had no knowledge of, or involvement in, the conduct of Mr Wood. The claim was against the Firm (in effect, Mr Scott, as the only remaining partner) on the basis that it was liable for the wrongful acts of Mr Wood, under ss 13 and 14 of the *Partnership Act* 1891 (Qld), because they occurred in the ordinary course and within the scope of the Firm's business. The issue of whether Mr Wood had apparent authority under s 8(1) was also raised.

[8] The claims were also based on the torts of deceit, and negligence, breach of contractual warranty, and misleading or deceptive conduct under the *Trade Practices Act* 1974 (Cth).

[9] The trial judge upheld the claim based on ss 13 and 14, as well as s 8. Judgment was entered for more than $5 million. Mr Wood was held to have apparent authority because three necessary conditions had been proved: first, each of the loan transactions involved work within the scope of the kind of business carried out by Crouch & Lyndon; second, each transaction was undertaken in the usual way; and third the respondents knew that Mr Wood was acting as a partner of Crouch & Lyndon and were not aware that he lacked authority.[17]

[10] On appeal the main issues concerned whether the trial judge erred in identifying Mr Wood's wrongful acts, in finding that Mr Wood committed the wrongful acts in the ordinary course of the firm's business or with its apparent authority for the purposes of s 13(1), and in finding that the firm received the respondents' money in the course of its business for the purpose of s 14(1)(b).[18]

[11] The Court of Appeal held that:

1. Mr Wood's representations were not in the ordinary course of the Firm's business for the purposes of s 13;[19]

2. a breach of the contractual warranty was not a "wrongful act" for the purposes of s 13;[20]

3. the other wrongful acts were not done in the ordinary course of the applicant's business;[21] and

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17 [2012] QSC 312, at [102].
18 [2013] QCA 220, at [6].
19 [2013] QCA 220, at [46], [49].
20 [2013] QCA 220, at [30].
21 [2013] QCA 220, at [50].

4. the representations and the other wrongful acts constituted doing acts for carrying on in the usual way of business of a kind carried on by the firm for the purposes of s 8(1), and were therefore within Mr Wood's apparent authority.[22]

[12] Thus the Court of Appeal held that the very same conduct that was **not** done in the ordinary course of the applicant's business, was "doing acts for carrying on in the usual way of business of a kind carried on by the firm" for the purposes of s 8(1).

[13] The applicant does not seek to challenge findings of fact in the proposed High Court appeal. There were findings at trial of unusual features of the transactions proposed by Mr Wood. They included: Mr Wood proposed to set up a company controlled by Wood to be financed by the respondents; payment of private commissions to Mr Wood; the first loan was an undocumented anonymous loan; loan processes were not followed; and loans made to Mr Wood's company.[23]

[14] The central point which the applicant seeks to advance for special leave concerns the findings made by the Court of Appeal in respect of s 8 of the *Partnership Act*. The applicant refers to the established authorities which say that s 8 effectively states the common law as to apparent authority.[24] The contention is that reliance is a central element of apparent authority at common law,[25] and that when it comes to the question of reliance in terms of s 8(1), the representations and acts of the firm, and not those of the errant partner, are the basis to decide what the business of the firm seems to be.[26] Once the kind of business is established, s 8(1) then draws attention to the act of the errant partner and whether it is for the carrying on of that kind of business in the usual way.

[15] The contention is that the act of the errant partner "in the usual way" must also be the subject of reliance. Support is drawn for this proposition from the decision of Mocatta J in *Mercantile Credit Co Ltd v Garrod*:[27]

> "I must have regard in deciding this matter to what was apparent to the outside world in general and Mr Bone in particular, and to the facts relevant to businesses of a like kind to that of the business of this partnership so far as it appeared to the outside world and Mr Bone."

[16] The contention is that there was no reliance by the respondents, as they took no account of the outside world and were not induced by any "usual authority" representation.[28] Their evidence was that:

(a) they regarded the work agreed to be done by Mr Wood as being finance broking, a view also expressed by the expert witness they called;[29]

(b) they gave no thought to whether such work was part of the practice of solicitors;

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22 [2013] QCA 220, at [56], [64], [67].
23 [2012] QSC 312 at [105]-[110]; [2013] QCA 220, at [65].
24 *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1984-1985) 155 CLR 541, at 547-548.
25 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451.
26 *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74, at [301]-[302].
27 *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103, at 1106 F.
28 Applicant's special leave summary of argument, para 31.
29 [2013] QCA 220, at [21].

(c) they thought it was the business of the applicant only because Mr Wood said it was; and

(d) they had never themselves experienced solicitors being involved in such work.

[17] In this respect, the applicant points out an apparent overstatement of the position in the Court of Appeal's reasons at [14]. In the last sentence reference is made to evidence from the respondents that "lawyers in New South Wales and Victoria with whom [Salameh] dealt also arranged loans in the manner described in the protocol". The protocol is a reference to the pleaded way in which the loans would be arranged.[30] According to the applicant, the evidence was that the respondent had sourced its own arrangements in those States, and the solicitors were not involved in introducing client borrowers, which was a critical element of the protocol.[31] The transcript shows that the criticism has some force.

[18] The applicant does not seek to challenge findings related to the evidence summarised above at [16]. Rather, the point is that the Court of Appeal did not deal with the question of reliance necessary for the purposes of s 8(1). In essence the applicant says that two things need to be proved for the purpose of s 8(1), namely that there was reliance on Mr Wood's acts, and that there was reliance on the fact that those acts were like the acts of other solicitors. Whilst the former may have been there, there was evidence contrary to the latter, and no finding by the Court of Appeal as to the latter.

[19] Paragraphs [14] and [44] of the Court of Appeal's reasons form the basis of the Court's conclusion that s 8(1) was engaged.[32] In circumstances where the relevant clients believed that the work agreed to be done was not solicitors' work but rather finance broking or mortgage broking, and they had no basis of their own experience to think that there were other solicitors who did that work,[33] then (on the interpretation of s 8(1) contended for by the applicant) it is arguable that s 8(1) has not been engaged. It may be that there were other solicitors who carried on similar work, but if the respondents did not know that, and took what was said by Mr Wood as their only source of the represented work, then arguably that does not meet what is required by *Seiwa* and *Mercantile Credit Co Ltd v Garrod*.

[20] Further, whilst it is true to say that the High Court will not have had the benefit of findings of fact about the evidence summarised above at [16], equally that evidence was not the subject of challenge and came from the respondents themselves. There is nothing restraining the High Court embarking on the matter, as those facts do not require resolution of any dispute.

[21] The respondents sought to demonstrate that the Court of Appeal did effectively find that there was reliance, pointing to the fact that instructions were given to the firm to prepare and administer the documentation underpinning the loan transactions. However, that submission advanced a narrower basis of the business rather than as it was found by the Court of Appeal. It was not limited to matters which might classically be regarded as the stuff of solicitors, namely the preparation and processing of the necessary documentation. It was wider, and included the

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30 [2013] QCA 220, at [8].

31 Trial transcript at 4-2 ll 45-55, 3-36 ll 18-60.

32 [2013] QCA 220, at [57] and [61].

33 Particularly in the detailed way represented in the protocol.

soliciting of borrowers, the introduction to lender clients and other matters more akin to mortgage broking or finance broking.

[22] The applicant's summary of argument for special leave also focuses on the alleged artificiality of the Court of Appeal's approach.[34] The contention is that the unusual features were part of the business that Mr Wood was conducting illegally, without Mr Scott's knowledge or approval, and outside the ordinary course of the firm's business. That therefore informs the "kind of business" for the purpose of s 8(1). The business that Mr Wood was carrying on was really that of a mortgage broker, not a solicitor. The contentions point to the evidence below, that the respondents' expert described the business as "brokering finance between lender clients and borrower clients", and the respondents themselves agreed that Mr Wood was doing the work of a finance broker.[35]

[23] The Court of Appeal identified, as part of its reasoning that s 8(1) was engaged, the evidence summarised in [44] of the reasons. That, in turn, picked up the evidence summarised in [14]. That led to the finding that "acting in mortgage lending transactions in which the solicitor introduced borrowers to lender clients was within the scope of work done in Queensland and elsewhere by solicitors who, like Wood, acted in commercial matters".[36]

[24] Yet that was "insufficient … to establish that such work was part of Crouch & Lyndon's business".[37] Of significance to that conclusion was the finding that "such work by solicitors was illegal in the absence of compliance with rule 87A [of the *Legal Profession (Solicitors) Rule* 2006]".[38]

[25] The Court of Appeal then held that, not only was the excluded mortgage work not part of Crouch & Lyndon's business, but also (relying on *Dubai Aluminium Co Ltd v Salaam*[39]) "no element of Wood's representation had such a close connection with acts which Wood was authorised to do that his wrongful conduct might 'fairly and properly be regarded as done by [the partner] while acting in the ordinary course of the firm's business'".[40]

[26] The point sought to be agitated in the High Court involves the inter-relationship between ss 8, 13 and 14, and how it can follow that the same course of conduct which falls outside the firm's ordinary course of business for the purposes of s 13 and 14, can at the same time come within s 8(1). Specifically, how it can be said that the firm's ordinary business does not comprehend acts done by way of mortgage broking, but acts done by way of mortgage broking are acts done "for carrying on in the usual way of business of the kind carried on by the firm".

[27] The applicant's contention receives some support from the terms of ss 8(1) and 13. The Court of Appeal recognised this when it said: "The requirements for apparent authority for the purposes of s 13(1) reflect the second limb of s 8(1) of the *Partnership Act* 1891".[41]

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34 Applicant's special leave summary of argument, para 21.
35 Noted at [2013] QCA 220, [21].
36 [2013] QCA 220, at [44].
37 [2013] QCA 220, at [45].
38 [2013] QCA 220, at [45].
39 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.
40 [2013] QCA 220, at [46].
41 [2013] QCA 220, at [37], citing *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541, at 547-548, and *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74, at [244]-[245].

[28] The applicant contends that the question of the relationship between ss 8, 13 and 14 has not been given attention by the High Court since 1986 when *National Commercial Banking Corporation of Australia Ltd v Batty*[42] was decided. Further, since then the decision in *Dubai Aluminium Co Ltd v Salaam*[43] was handed down by the House of Lords. The Court of Appeal applied *Dubai Aluminium* to reach the conclusion as to s 13, and *Batty* (as explained by the New South Wales Court of Appeal in *Seiwa Australia Pty Ltd v Beard*[44]) to reach the conclusion as to s 8.

[29] In my respectful opinion, the points sought to be agitated have substantial prospects of a grant of special leave. They have wide application given it seeks to examine the correct application of various sections of the *Partnership Act*. Further, it provides the opportunity for the Court to examine this aspect of partnership law in the light of recent overseas authority. These are aspects which could well attract a grant of special leave.[45]

Balance of convenience

[30] This question must examine a number of features but can be conveniently expressed as balancing two competing interests: what is the damage that the respondent will suffer if a stay is granted, and does that outweigh the damage that the applicant might suffer if a stay is refused. Thus, in the course of considering this matter that of whether a grant of stay will cause loss to the respondent will also be considered.

[31] In examining the balance of convenience it must be noted that if a stay is granted it will only be operative until the hearing of the application for special leave and, if special leave is granted, potentially until the resolution of the subsequent appeal.

[32] The respondent succeeded at first instance, and on appeal. It has a substantial argument that it is entitled to the fruits of the judgment, which was obtained over a year ago. The judgment sum, according to the bankruptcy notice, exceeds $5.6 million.

[33] The applicant contends that there is a real risk of dissipation of the assets of the principal of the applicant legal firm, if they are passed to the respondents. The second respondent is in liquidation[46] and the respondents own no property and little share capital.[47] This contention needs no further consideration because the applicant has little cash, the bulk of his assets are in the form of real estate and superannuation,[48] and the proposed method of enforcement at present is by way of bankruptcy, in which event the assets will pass to the trustee in bankruptcy, not to the respondents.

[34] By contrast the applicant's principal has undertaken to preserve his assets pending the appeal. That undertaking was given in a letter dated 5 February 2009, as amended by a letter dated 27 July 2009. It was an undertaking not to deal with, dissipate or cause a reduction in value of his assets, save within existing overdraft facilities and for legal costs.[49]

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42 *National Commercial banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251.
43 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.
44 *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74.
45 *Judiciary Act* 1903 (Cth), s 35A.
46 Affidavit of Mr Lutvey, filed 13 November 2012, ("**Lutvey 1**") para 6.
47 Lutvey 1, paras 10-11.
48 Lutvey 4, paras 20-21, Ex PAL-10.
49 Lutvey 4, para 22, Ex PAL-11.

[35] The applicant contends that this is a case where irreparable loss will be occasioned to the principal of the applicant firm, Mr Scott. He does not have the resources to meet the judgment which is in excess of $5 million.[50] If execution of the judgment involves the issue of a creditor's petition that will trigger a "show cause event" under the *Legal Profession Act* 2007 (Qld). As a result Mr Scott would be called upon to show cause why his practising certificate should not be cancelled, suspended or amended. Even if there is no cancellation or suspension he will not be permitted to conduct a trust account nor to practice as a principal on his own behalf. It is contended that "These professional regulatory imposts and the opprobrium associated with them are irreversible even through special leave being granted and the appeal being successful."[51]

[36] An application for a stay pending the appeal to this court was determined by McMurdo P on 30 November 2012.[52] At that time the undertaking by Mr Scott was noted, as was the fact that he did not have the assets or funds to meet the judgment.[53] President McMurdo granted the stay, holding that there was a risk, if Mr Scott became bankrupt, that he would lose his practising certificate, and therefore his income.[54]

[37] On 30 October 2013 Mr Scott was served with a bankruptcy notice issued on 22 October 2013. The debt claimed is now over $5.6 million.[55] As a consequence of non-compliance with the bankruptcy notice an act of bankruptcy occurred on 4 December 2013. The respondents say they intend to serve Mr Scott with a bankruptcy petition.

[38] The evidence of Mr Scott's financial position is that he has net assets of approximately $2.1 million.[56] The bulk of that is in the form of real estate and superannuation entitlements; about $1.6 million is in real estate, and superannuation is about $1.3 million. Those assets are the subject of the undertakings provided in February 2009, and Mr Scott offers to continue those undertakings for the duration of any stay.[57]

[39] The respondents filed an affidavit which is the basis for a contention that Mr Scott has moved or encumbered assets in breach of his undertaking.[58] The material deals with two areas: pre-litigation movement of assets,[59] including a transfer of a property at Mt Tamborine in 2008,[60] and movement and encumbrance of assets during the proceedings.[61]

[40] One difficulty with the pre-litigation category is that the two transfers, of about which complaint is made, took place before the undertaking was given, namely the transfer of the Tamborine property on 15 September 2008 and the Evans Heads property on 22 January 2009. Furthermore, it seems the respondents have been

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50 Lutvey 4, para 21.
51 Applicant's outline of argument, filed 5 December 2013, para 24.
52 *Crouch & Lyndon (a Firm) v IPG Finance Pty Ltd & Anor* [2012] QCA 332.
53 [2012] QCA 332, at [8].
54 [2012] QCA 332, at [10].
55 Lutvey 4, para 3, Ex PAL-1.
56 Lutvey 4, paras 20-21, Ex PAL-10.
57 Lutvey 4, para 24.
58 Affidavit of Mr Salameh, filed 6 December 2013 ("**Salameh**").
59 Salameh, paras 14-27, 46-48.
60 Salameh, paras 36-45.
61 Salameh, paras 53-56.

aware of at least some of the transactions for a number of years, notably the transfer of the Mt Tamborine property.[62]

[41] The Tamborine property was transferred to Mitojo Pty Ltd, as trustee for The Scott family Trust, for consideration of $560,000 and remains an asset of the trust.[63] Mitojo Pty Ltd has given an undertaking in the same terms as that of Mr Scott. Mr Scott owned a one fifth interest in the Evans Head property, as tenant in common with his siblings, as a result of his mother's will. The transfer to his siblings records that $84,000 was the consideration. There is no evidence to suggest that transfer, or that in respect of the Tamborine property, was not for proper value.

[42] The respondents have, over the years since 2008, written complaints and requests for information but never taken the step of seeking relief such as a mareva injunction. That is notwithstanding that on 2 September 2008, well prior to any proceedings, Mr Salameh was told by Mr Scott that he (Mr Scott) did not have the money to meet the lost loan funds.[64] I am left with the impression that the undertakings were regarded (at least for a time) as sufficient to meet any genuine concern.

[43] The movement or encumbrance of assets during the proceedings was the subject of correspondence between the solicitors for both sides. The applicant's explanation is that it was to secure legal fees for the litigation at its various stages.[65] Again, the respondents did not apply for relief but have contented themselves with the debate over the purpose of the dealings and whether it was within the terms of the undertakings. The respondent now seeks to argue that it is beyond the terms of the undertaking,[66] but that is a matter of dispute not apt for resolution on an application such as this. At least part of the respondents' argument is that the undertaking was limited to legal fees at first instance, a proposition which is not sustainable on a reading of the letters.[67]

[44] Part of the complaint about movement of assets is that on 30 June 2010 the Crouch & Lyndon business name and business was transferred by Mr Scott to a newly formed entity, Crouch & Lyndon Pty Ltd, and then Mr Scott deregistered the business name of Crouch & Lyndon.[68] There is no evidence that the change resulted in a diminution of available assets.

[45] I do not consider that the evidence as to the transfer or encumbrance of assets demonstrates that the undertakings are insufficient to protect the assets until the High Court has heard the application for special leave. Put another way, I am unpersuaded that the evidence of transfer and encumbering of assets weighs against the grant of a stay.

[46] Obviously interest continues to accrue on the judgment sum. That means that the sum to be recovered (assuming no special leave is granted, or the subsequent appeal fails) is ever increasing. However the pool of assets from which recovery might be

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62 This was the subject of a complaint to the Legal Services Commission on 19 December 2008: Salameh, para 49, Ex HNS-32. It was also the subject of correspondence in January 2009: Salameh, para 20, Ex HNS-15.

63 Salameh, para 71.

64 Salameh, paras 28-29.

65 Salameh, para 55, Ex HNS-37.

66 Salameh, para 64.

67 Salameh, paras 63-64; Lutvey 4, Ex PAL-11.

68 Salameh, para 53.

made is finite, and protected by the undertakings. Even if Mr Scott was made bankrupt in the near future, the actual realisation of his assets would not be immediate. Given about $1.6 million is in real estate, it would obviously take some time to market, and for any sale to settle. Recovery based on Mr Scott's interest in the superannuation is more problematic.

[47] The potential damage or inconvenience to the respondents, if a stay is granted, falls to be assessed in light of the limits on the available pool of recoverable assets. In my opinion whatever damage accrues in the period between now and the hearing of the special leave application, or any subsequent appeal, is not compelling on the question of balance of convenience, given that even if recovery occurred now the judgment sum could not be met. Indeed, if the bankruptcy method of enforcement is following there is little prospect of any return to the respondents within the life of the application for special leave, or any appeal. Counsel for the respondents said the hearing of an application for a bankruptcy petition was unlikely to be heard until February 2014. Then any return would be dependent on the trustee selling the real estate assets, and also dependent on satisfying the secured creditors.

[48] As against that Mr Scott's position is more troubling. If a bankruptcy petition is served he will be obliged to notify the Queensland Law Society under s 68(1) of the *Legal Profession Act* 2007. The Law Society's Bankruptcy/Insolvency Guidelines[69] show what will probably follow.

[49] Upon being notified the Law Society also notifies the Legal Services Commission. It is likely that a "show cause" notice would issue, calling on him to show cause why his practising certificate should not be cancelled, suspended or amended. Even if there is no cancellation or suspension he may be prevented from operating a trust account, and there is a risk that he will not be able to practice as a principal on his own behalf.

[50] Were that to happen the impact on Mr Scott's ability to practise his profession, and on his firm, is obvious. Further it is not difficult to see that his reputation would be affected. The applicant contends that the regulatory imposts and the opprobrium are irreversible, even if special leave is granted and the appeal is successful. I accept that submission.

[51] In addition, the effect of a bankruptcy may well lead to irreversible harm to his financial interests. If there is no stay and he becomes bankrupt, his assets will pass to his trustee in bankruptcy. The special leave application is, on the latest information from the High Court, likely to be heard in February 2014. If it is successful, in the absence of orders for expedition the appeal is not likely to be heard, let alone determined, for some time. It would not be unusual for as much as six months to elapse before a hearing, and then there is the time for determination. In that time the trustee is likely to have realised the real estate. Mr Scott's loss of that property, even if successful in the High Court, is probable and irreversible, unless a stay is granted.

[52] In my opinion the balance of convenience weighs in favour of the grant of a stay pending the special leave application and resolution of any High Court proceedings.

Exceptional circumstances

[53] As outlined above, in particular at [35] and [36], were a stay of execution not to be granted, Mr Scott would be forced to enter into bankruptcy, which in turn would

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69 Bankruptcy/Insolvency Guidelines, 14 June 2013; Lutvey 4, Ex PAL-9.

most likely result in the applicant irreversibly losing his practising certificate, and consequently his income. In my opinion, such circumstances are exceptional in nature (as envisaged by the authorities traversed at [4] above) and thus sufficient to trigger this Court's jurisdiction to grant a stay pending special leave.

Terms of the stay

[54] I have given consideration to whether the stay should only last until determination of the special leave application, leaving it to the applicant to renew the application before the High Court if special leave is granted. The alternative is a stay until determination of the special leave application, and if successful, the appeal.

[55] The limited order would seem, at first blush, to be appropriate because this Court only makes an assessment of the chance of the grant of special leave, whereas the High Court will determine that very question on the hearing of the application. Further, a grant of special leave may be subject to conditions that affect the question of a stay.

[56] However, I have come to the view that the better course is to make any stay until determination of the special leave application, and if successful, the appeal. There is no good reason for this Court to create an unnecessary further cost burden on the parties, by making them engage in a second application if leave is granted. The respondents can, if circumstances change, apply to the High Court to revoke the stay.

[57] As I have said above, the undertakings of the applicant have been continued to this time, and are offered again. Those undertakings should be made a condition of the stay being granted, and be given to this Court. Another appropriate condition would be that the applicant must proceed expeditiously with the application for special leave, and any appeal should leave be granted.

Disposition

[58] For the reasons above I will grant a stay of the primary judge's orders.

[59] The orders are:

1. Upon the applicant, by his solicitor, giving undertakings:

   (a) in accordance with the letters dated 5 February 2009 and 27 July 2009, Exhibit PAL-11 to the affidavit of Paul Lutvey filed 5 December 2013, pending determination of the special leave application and any resultant appeal; and

   (b) to proceed expeditiously with the application for special leave application and any resultant appeal.

2. The orders of the primary judge made on 15 October 2012 and 5 November 2012 (as varied on 16 October 2013) are stayed until the later of:

   (a) the determination of the applicant's application for special leave in the High Court; or

   (b) if special leave is granted, the determination of the appeal.

3. The costs of this application be the respondents' costs in the cause of the application for special leave.