

**COURT OF APPEAL**

**FRASER JA**

**Appeal No 5508 of 2018  
DC No 165 of 2016**

**ALAN NEVILLE WILLI  
ANN ROBYN WILLI**

**Applicants**

**v**

**DMITRY BRODSKY  
FIONA KATE HEALY**

**Respondents**

**BRISBANE**

**TUESDAY, 4 DECEMBER 2018**

**JUDGMENT**

**FRASER JA:** The applicants, who are the appellants in an appeal against a judgment in the District Court, seek a stay of enforcement of that judgment pending the determination of their applications for an extension of time within which to apply for leave to appeal and that application for leave to appeal and, if those are successful, the determination of the appeal.

The dispute between the parties arose out of a disagreement about the rights and duties created by an easement in which the applicants own the dominant tenement and the respondents own the servient tenement. The trial judge found in favour of the respondents and ordered damages against the applicants in an amount of around \$50,000.

It appears upon the evidence before me that in order to pay the judgment the applicants will need to sell their house. Indeed in earlier correspondence, the applicants appeared to be agreeable to selling the house. Further disputes have arisen between the parties concerning the question whether or not the applicants or the respondents have been responsible for some difficulties in the sale of the house. It is still, it seems, a bitter dispute between the parties.

On the face of it the respondents are entitled to enforce their judgment and the circumstance that an appeal is filed against the judgment is not in itself a ground for staying execution of a judgment. Rather, the test which has been articulated requires as a justification for staying a judgment pending appeal that it is necessary to grant the stay to ensure that the orders which might ultimately be made by the Courts are fully effective. The power to grant a stay pending appeal is not exercised merely because immediate compliance with the judgment under appeal is inconvenient for the unsuccessful party. See *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at [12]. The focus in this application therefore must be upon the question whether the proposed appeal might be rendered nugatory by a refusal of the stay and whether the applicants would be irremediably prejudiced if the stay were not granted and their appeal was ultimately upheld.

There is a further consideration that this is not an appeal and the applicants' require an extension of time and leave to appeal. The application for leave is to be heard at the same time as the appeal in the first quarter of next year. In *Simonova v Department of Housing and Public Works* [2018] QCA 60, Justice McMurdo followed the decision in *Upton v Westpac Banking Corporation* [2016] QCA 55, in which I cited authority for the proposition that the Court has an inherent power to grant a stay notwithstanding that an appeal has not yet been instituted and that the applicants for a stay have merely filed an application for leave to appeal. Justice McMurdo added that in such a case:

“...the circumstances must be exceptional before an order in the nature of a stay will be granted, pending an application for leave to appeal.”

The applicants have focused upon what they submit is the strength of their proposed appeal. The most significant ground in that respect is the applicants' ground of their proposed appeal

that upon the proper construction of the easement and the proper view of the evidence, the primary judge was wrong in failing to find that the applicants' conduct the subject of the judgment was authorised by the rights implied in the easement. The resolution of that question is not one which is appropriate to be considered in this summary application. There is a great deal of evidence and the Court is yet to hear full argument upon it. Notwithstanding the submissions on behalf of the respondent, I am prepared to assume for present purposes that the appeal is fairly arguable. However, the applicants have not adduced any evidence that a successful appeal by them would be rendered nugatory if a stay is not granted. Nor have they adduced any evidence to demonstrate that they will be irremediably prejudiced if the stay is not granted.

Mrs Willi, who represented both herself and her husband today, argues that there is an apprehension that if the judgment is paid but an appeal is ultimately allowed and an order is made that the respondents repay the judgment, then the respondents may not comply with that order. There is no evidence to support that submission. Just as significantly, the respondents by their counsel have offered an undertaking to the effect that any money received in satisfaction of the judgment will be held in the respondent's solicitor's trust account pending a further order of the Court upon the final determination of the appeal. That undertaking extends also to any costs which the applicants would be entitled to recover after paying such costs as have been ordered against them. That being so, there is no arguable basis for finding that the refusal of a stay would cause any irremediable prejudice to the applicants or that they may not obtain the full benefit of a successful appeal.

I should add that Mrs Willi confirms that a bankruptcy notice which had been issued in reliance upon the judgment, will not lead to bankruptcy prior to the determination of the appeal because the time for compliance with the bankruptcy notice has been extended until after the determination of the appeal.

Upon the respondents, and the respondents' solicitors, by their counsel, undertaking that any money received by them in satisfaction of the judgment under appeal and any costs orders will

be held in the respondents' solicitor's trust account pending determination of the applicants' applications for an extension of time and for leave to appeal, and if those applications succeed, the determination of the appeal, I refuse the application for a stay.

Costs are reserved. Adjourn the court.