SUPREME COURT OF QUEENSLAND

CITATION:	*Contempree v BS Investments Pty Ltd & Anor* [2021] QCA 243
PARTIES:	**MARK CONTEMPREE** (appellant) **v** **BS INVESTMENTS PTY LTD** **ACN 135 819 939 ATF B&G SMITH INVESTMENT TRUST** (first respondent) **TIRLEY HOLDINGS PTY LTD** **ACN 135 942 862 ATF GODDARD FAMILY TRUST** (second respondent)
FILE NO/S:	Appeal No 3799 of 2021 DC No 33 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport – Unreported, 5 March 2021 (Dann DCJ)
DELIVERED ON:	12 November 2021
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2021
JUDGES:	Morrison and Mullins JJA and Brown J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – GENERALLY – where the respondents obtained judgment against the appellant in one proceeding – where a company associated with the appellant sued the respondents in another proceeding which was not ready for trial – where the appellant applied to stay enforcement of the judgment pursuant to r 800(1) of the *Uniform Civil Procedure Rules 1999* (Qld) – where the primary judge treated the associated company's claim in the other proceeding as an unresolved counterclaim in the proceeding in which judgment was given for the respondents – whether the primary judge erred in considering the merits of the counterclaim – whether the primary judge erred in considering the delay in prosecuting the other proceeding and bringing the stay application – whether the primary judge erred in dismissing the stay application

Uniform Civil Procedure Rules 1999 (Qld), r 761, r 800

Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed) (1985) 2 NSWLR 685, considered
Burnet v Francis Industries PLC [1987] 1 WLR 802, cited
Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453; [2008] QCA 332, followed
Croney v Nand [1999] 2 Qd R 342; [1998] QCA 337, followed
Lee v Abedian & Ors [2017] QSC 22, cited
O'Connor & Ors v CWC Investors Pty Ltd & Ors (No 2) [2019] QSC 138, cited
Slater & Slater v Iama (Qld) Pty Ltd [1998] QCA 436, cited
State Bank of Victoria v Parry [1989] WAR 240, cited
Virgtel Ltd v Zabusky (No 2) [2009] QCA 349, considered

COUNSEL: J M Manner for the appellant
L D Bowden for the respondents

SOLICITORS: O'Sullivans Law Firm for the appellant
Provest Law for the respondents

[1] **MORRISON JA:** I have read the reasons of Mullins JA and agree with those reasons and the order her Honour proposes.

[2] **MULLINS JA:** The respondents obtained judgment in the District Court on 12 March 2020 against the appellant and the other defendants as guarantors in the amount of $528,555.40: *BS Investments Pty Ltd & Anor v Contempree & Ors* [2019] QDC 29 (the guarantee proceeding). The appellant's appeal against the judgment was dismissed by this court on 17 November 2020: *Contempree v BS Investments Pty Ltd & Anor* [2020] QCA 255 (the appeal decision). The guarantee proceeding had commenced in the Magistrates Court in May 2018 and was transferred to the District Court in February 2019. Bemon Pty Ltd, a company associated with the appellant, commenced proceeding number 199 of 2019 in the District Court at Southport (the catamaran proceeding) on 5 August 2019 against the respondents and Brainskills Pty Ltd in respect of a catamaran sold by the respondents, Brainskills and M J Securities Pty Ltd to Bemon. The appellant owns 99.9 per cent of the shares in Bemon and is its sole director.

[3] On 5 March 2021 the learned primary judge heard an application by Bemon in the catamaran proceeding at the same time as the appellant's application filed on 19 February 2021 in the guarantee proceeding seeking a stay pursuant to r 800 of the *Uniform Civil Procedure Rules 1999* (Qld) of the enforcement of the judgment dated 12 March 2020 obtained by the respondents against the appellant until such time as the catamaran proceeding has been finally decided by way of hearing or discontinued by either party. The primary judge dismissed the stay application and ordered the appellant to pay the respondents' costs of the application. Although Bemon was also unsuccessful in its application in the catamaran proceeding, this appeal is concerned only with the refusal of the primary judge to grant the stay of the enforcement of the judgment in the guarantee proceeding sought by the appellant and the associated costs order. The appellant applied for leave to adduce

further evidence in connection with this appeal, but that application was refused at the hearing of the appeal.

Background

[4] Bemon purchased the catamaran from the respondents, Brainskills and M J Securities in 2013 and at the same time the backpackers' hostel in Innisfail owned by Bemon was transferred to the respondents with a lease back to Bemon for a term of 10 years expiring on 28 November 2023 (the lease). Each of the contract for the sale of the catamaran and the contract for the sale of the hostel was conditional on the simultaneous completion of the other contract. Both contracts settled on 29 November 2013. On 16 December 2016 Bemon assigned the lease to Foxworth Pty Ltd with the consent of the respondents and the obligations of Foxworth under lease were guaranteed by the directors of Foxworth and the appellant in a deed of covenant on the assignment of the lease. The judgment debt in the guarantee proceeding arose out of the enforcement by the respondents of the guarantee in that deed of covenant given in support of Foxworth's obligations against the appellant.

[5] While the catamaran was travelling from Coffs Harbour to the Gold Coast on 2 September 2014, it was damaged including structure failures and extensive delamination of the bridge structure. Bemon made a claim on its insurance policy, but the insurer denied liability in December 2014. The appellant then lodged a complaint with the Financial Ombudsman Service Australia (FOS) disputing the denial of the claim. FOS made a determination on 5 April 2017 in favour of the insurer on the basis there were significant faults and errors in the construction of the catamaran.

[6] In the catamaran proceeding, Bemon claims damages in the sum of $721,880 pursuant to the *Australian Consumer Law* for breach of the guarantee as to quality and breach of the guarantee as to fitness for disclosed purpose and for damages for misleading and deceptive conduct. It was not until 24 May 2020 that Bemon obtained an expert report from BlackPond Marine Consultants in support of its allegations made in the catamaran proceeding.

[7] On 27 November 2020 the respondents lodged with the Queensland Titles Registry a request to register an enforcement warrant over the real property in respect of which the appellant had an interest as a registered owner of the fee simple. The warrant was registered under dealing number 720425534 over six separate titles. The respondents' solicitors sent a letter to the appellant dated 2 December 2020 requesting him to complete a statement of financial position in Form 71. The appellant was aware of that letter by 9 December 2020. The appellant did not become aware that the enforcement warrant had been registered over the real property in which he owned an interest until 21 January 2021.

[8] At the time the applications were heard by the primary judge, Bemon was seeking further disclosure against the defendants in the catamaran proceeding and also enquiring about dates for the trial of the catamaran proceeding. The appellant's solicitor asserted the catamaran proceeding was "approaching readiness for trial". On 4 March 2021 the respondents and Brainskills filed an amended defence in the catamaran proceeding that claimed an equitable set off for damages of $720,000 which the respondents assert they suffered as a result of misleading and deceptive

conduct on the part of Bemon in respect of representations made prior to the respondents entering into the contract to purchase the hostel and a legal set off for moneys the respondents claim are owing to them by Bemon pursuant to the lease to 9 July 2020 which was the date the respondents allege they accepted Foxworth's repudiation of the lease and damages for repudiation. Annexure A to the amended defence in the catamaran proceeding set out the calculation of the respondents' legal set off. Apart from the amount of $528,555.40 for which the respondents had a judgment against the appellant in the guarantee proceeding, the claim was for rent from January to June 2020 of $77,000 and damages for the shortfall in rent from July 2020 to November 2023 of $264,000. There was also a claim for agent's commission for finding the new tenant of $7,480 and rates from January to July 2020 of $17,356. That made an additional amount claimed from Bemon (above the judgment debt in the guarantee proceeding) of $365,836.

[9] For the hearing on 5 March 2021, Mr Goddard who is the sole director of the second respondent filed an affidavit sworn on 4 March 2021 in the guarantee proceeding in which he swore that Bemon was indebted to the respondents in the sum of $894,391 for moneys owing under the lease and for breach of the lease which was one of the claims in the amended defence in the catamaran proceeding. In addition, Mr Goddard in that affidavit referred to the purchase price paid by the respondents for the hostel of $1.3m and exhibited the respondents' bank statement that showed $692,000 owed to its mortgagee, leaving equity in the hostel property which would be available to satisfy any judgment which Bemon might obtain in the catamaran proceeding.

Ground of appeal

[10] The appellant relies on a broad ground of appeal that essentially alleges the primary judge erred in the exercise of the discretion conferred by r 800. As part of that ground, the appellant asserts that the primary judge applied the incorrect test as to whether a stay should be granted, but then submits that, even on the test that was applied, on the evidence before the primary judge the exercise of the discretion should have been in favour of granting the stay.

[11] Apart from the question of the test to be applied as to whether a stay should be granted, the appellant focussed on the following aspects of the primary judge's consideration of the issue: (a) the issue of the merits of Bemon's claim in the catamaran proceeding was relevant only to the extent of showing that it was arguable and not vexatious and the primary judge erred in considering the merits by reference to the amended defence in the catamaran proceeding; and (b) the primary judge placed too much weight on the delay of Bemon in pursuing the catamaran proceeding and of the appellant in applying for the stay in the guarantee proceeding, when the issue of any prejudice to the respondents in enforcing the judgment debt in the guarantee proceeding could be addressed by conditions attached to the stay order.

The primary judge's reasons

[12] The primary judge referred to the observations of McMurdo P (with whom Mullins and Philippides JJ agreed) in *Virgtel Ltd v Zabusky (No 2)* [2009] QCA 349 at [19] for the proposition that, ordinarily, an enforcement creditor is entitled to the fruits of their victory by enforcing final orders, unless the enforcement debtor shows special

or exceptional circumstances warranting a stay and the enforcement debtor bears the onus to demonstrate why the court should grant that stay. The primary judge also relied on *Virgtel* (at [19] and [23]) for the propositions that relevant factors on an application for a stay include doing justice between the parties by balancing their competing rights, whether the assets of one party may be disposed of if the stay were not granted, and the delay in bringing the application for a stay. The primary judge noted the appellant's reliance on the principles in *Burnet v Francis Industries PLC* [1987] 1 WLR 802 that were applied in *State Bank of Victoria v Parry* [1989] WAR 240, 246.

[13] The primary judge dealt with each of the appellant's arguments that were formulated by reference to the principles in *Burnet*. The primary judge was prepared to accept for the purposes of the application, without finally deciding it, that Bemon's claims in the catamaran proceeding could be regarded as an unresolved counterclaim in the guarantee proceeding. The primary judge observed, however, that the catamaran proceeding was not commenced until more than two years after the FOS' decision and has not been expeditiously progressed. It was not explained by the appellant why 10 months elapsed between Bemon's receiving the BlackPond report and the application for the stay, when the District Court judgment in the guarantee proceeding was given on 12 March 2020. The primary judge noted that neither Bemon nor the appellant sought to agitate the matters now asserted to be effectively a counterclaim in the guarantee proceeding and the failure to do so was not explained.

[14] The primary judge noted the deficiencies in the drafting of the amended defence to the catamaran proceeding filed on 4 March 2021 and noted that the amended defence raised issues which it was neither appropriate nor possible to determine on the stay application. The primary judge did note, however, that if either claim made by way of set off in the amended defence were successful, Bemon was unlikely to be owed significant amounts in the catamaran proceeding, even if it were successful in its claim for damages against the defendants in that proceeding. The primary judge considered that reduced the force of Bemon's submission that, if it were successful in the catamaran proceeding, it would obtain damages against the respondents in excess of the judgment amount in the guarantee proceeding. On the basis of the affidavit of Mr Goddard filed on 4 March 2021 in the catamaran proceeding, it was not clear to the primary judge that Bemon's claim in the catamaran proceeding was "unarguably strong".

[15] The primary judge also did not accept the catamaran proceeding was ready for trial. The primary judge accepted that the effect of the registration of the enforcement warrant was that the judgment debt in the guarantee proceeding was secured in such a manner that a stay would not jeopardise the respondents' ability to recover their judgment. The primary judge proceeded on the basis that, if the relevant properties were sold, but Bemon was ultimately successful in the catamaran proceeding, the appellant could not retrieve the properties.

[16] The primary judge weighed all the matters that were urged by both parties and concluded that there were no exceptional or special circumstances which would warrant a stay in the guarantee proceeding.

The test for the grant of a stay order under r 800

[17] The primary judge proceeded on the basis that the formulation of the test in *Virgtel* was the last word of this court on the test to be applied for the grant of a stay under r 800, but the appellant submits that the court in *Virgtel* overlooked that the New South Wales Court of Appeal had reconsidered the formulation of the test for the grant of a stay pending appeal of the establishment of special or exceptional circumstances and instead approved the test that it was sufficient that the appellant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in the applicant's favour: *Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed)* (1985) 2 NSWLR 685, 693, 694. To the extent that *Virgtel* suggests that the test for the grant of a stay under r 800 is the establishment of special or exceptional circumstances, it should not be followed, as that part of the decision was inconsistent with the conclusion of *Alexander* at 694 and *Croney v Nand* [1999] 2 Qd R 342 at 348 [33] which was also cited in *Virgtel* at [19]. Unlike the rule in *Burnet* which expressly provided that special circumstances must be shown before the court would stay the execution of the judgment, r 800(1) does not specify that special or exceptional circumstances are required before the exercise of the discretion conferred by that rule to stay enforcement.

[18] In *Croney* an application was made by the unsuccessful defendant for a stay of execution on the basis the defendant had appealed against the judgment. The judgment was for damages for personal injuries on the basis the defendant was the employer of the plaintiff. The appeal was pursued on the basis the judge was in error in finding that the defendant was the employer at the relevant time. In respect of the stay of execution, a warrant of execution had been executed against the defendant's interest in the land on which the matrimonial home was situated. The plaintiff was, at all times after the judgment was entered, entitled to seek payment of the judgment from WorkCover. The court referred (at [33]) to earlier authority in the Court of Appeal that the correct test was "that the applicant bears the onus of showing that it is an 'appropriate' case for a stay to be granted".

[19] That test is consistent with that subsequently applied by the Court of Appeal in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 in respect of the power of the court pursuant to r 761 of the *UCPR* to stay the enforcement of all or part of a decision subject to an appeal. Keane JA (with whom McMurdo P and White AJA agreed on this aspect) stated at [12]:

> "The decision of this Court in *Berry v Green* suggests that it is not necessary for an applicant for a stay pending appeal to show 'special or exceptional circumstances' which warrant the grant of the stay. Nevertheless, 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: the power to grant a stay should not be exercised merely because immediate compliance with orders of the court is inconvenient for the party which has been unsuccessful in the litigation." (*footnotes omitted*)

[20] Rule 761 which sets out the general power of the court to order the stay of a decision under appeal is similar to r 800 in that it does not specify the circumstances in which the discretion to order a stay should be granted. The differences between r 761 and r 800 are that r 800 applies at a specific time in the process of enforcement which is after the enforcement of the order has commenced and r 800 is not limited to staying enforcement pending appeal. There is no justification in applying a different test for the exercise of the power to order the stay of a judgment or the enforcement of a judgment, provided the stage at which the power is exercised and the circumstances that apply to that stage are taken into account. *Cook's Construction* was applied in relation to the test for a stay pursuant r 800(1) of the *UCPR* in *Lee v Abedian & Ors* [2017] QSC 22 at [4] and *O'Connor & Ors v CWC Investors Pty Ltd & Ors (No 2)* [2019] QSC 138 at [23] and the respective judges in each case recognised the inconsistency between the test espoused in *Virgtel* and that applied in *Cook's Construction*. The test that the primary judge should have applied to the question of whether the discretion conferred by r 800(1) should be exercised in favour of staying the enforcement against the appellant of the judgment obtained by the respondents in the guarantee proceeding was whether it was appropriate to grant a stay in the particular circumstances of the case.

[21] It is not surprising that the primary judge applied the test of whether the appellant had shown there exceptional or special circumstances to warrant a stay, when both parties before the primary judge had urged that was the test to be applied.

[22] The appellant's submissions before the primary judge were based on the factors set out in Bingham LJ's judgment in *Burnet* (at 811). That concerned the application of the English rule to the effect that where a judgment is given or an order made for the payment by any person of money, the court may on the application of the judgment debtor stay the execution of the judgment where there are "special circumstances" which render it inexpedient to enforce the judgment or order. The appellant relied on *Burnet* because it concerned the analogous situation to the interests of the appellant and Bemon that was described by Bingham LJ (at 811) as:

> "A sues B and obtains judgment. B is associated with C, C has an unresolved claim against A. B seeks a stay of execution of A's judgment to await the outcome of C's claim against A."

[23] The respondents before the primary judge relied on *Virgtel* at [19] to submit that it was only in special or exceptional circumstances that a stay should be granted under r 800.

[24] Even though the primary judge applied the incorrect test to the question of whether the stay should be granted, both parties made submissions on the hearing of the appeal as to what the outcome should have been, if the correct test had been applied by the primary judge. It is therefore appropriate to consider the other matters in respect of which the appellant submits the primary judge erred, before considering the application of the correct test.

Did the primary judge err in considering the merits of Bemon's claim in the catamaran proceeding?

[25] On the basis that Bemon's claim against the respondents and Brainskills in the catamaran proceeding was equivalent to an unresolved counterclaim in the

guarantee proceeding, the appellant submits that the only issue for the primary judge in respect of the merits of Bemon's claim was whether it was arguable and not vexatious. The appellant relies on the observation of White J in *Slater & Slater v Iama (Qld) Pty Ltd* [1998] QCA 436 that a stay of the judgment was the appropriate course in that case whilst the counterclaim which appeared genuine was pursued.

[26] The observation in *Slater* was made in circumstances where the plaintiff had obtained summary judgment against the defendants for cost of goods sold and delivered and the defendants' counterclaim was struck out as an abuse of process. The appeal was in respect of the striking out of the counterclaim. The counterclaim related to the purchase of a sprinkler system prior to the period of the supply of the goods by the plaintiff which was the basis for the plaintiff's judgment. The defendants' counterclaim sought damages on the basis the sprinkler system was neither fit for its stated purpose nor of merchantable quality and also for breach of the *Trade Practices Act 1974* (Cth). The plaintiff had alleged on the summary judgment application that the sprinkler system was supplied by a related company and not the plaintiff. There was therefore an issue between the parties as to whether the counterclaim was properly brought against the plaintiff. It was held by Pincus and Thomas JJA (at [18]) that it was erroneous to strike out the counterclaim as an abuse of process, as it was not demonstrated with the necessary degree of clarity that the claim was groundless. It was in these circumstances that execution of the judgment in favour of the plaintiff was stayed pending the determination of the counterclaim. The observation made by White J in her Honour's separate judgment in *Slater* agreeing with the reasons and orders of the other members of the court was in the context of the appeal against the striking out of the counterclaim as an abuse of process. *Slater* is not authority for the proposition advanced by the appellant on this appeal that the only consideration for the primary judge on the stay application was whether Bemon's claim in the catamaran proceeding was genuine or arguable.

[27] Treating Bemon's claim against the respondents and Brainskills in the catamaran proceeding as equivalent to an unresolved counterclaim in the guarantee proceeding did not make the amended defence in the catamaran proceeding irrelevant. Unlike the circumstances in *Slater*, Bemon's "counterclaim" which was its claim in the catamaran proceeding was subject to the amended defence in the proceeding. In other words, there was a response to the unresolved counterclaim that was in addition to the judgment the respondents already had in the guarantee proceeding (even though the respondents were also proposing to pursue Bemon on the lease for the same rent of $528,555 for which there was judgment in the guarantee proceeding against the appellant). The primary judge therefore did not err in considering the effect of the amended defence of the respondents and Brainskills on the merits of Bemon's claim in the catamaran proceeding to the extent that the merits were able to be assessed on an interlocutory application.

[28] As Mr Bowden of counsel submitted on this appeal, the primary judge considered the merits of Bemon's claim in the catamaran proceeding in the context of the amended defence in that proceeding, as that was the analysis that was urged on the primary judge by Mr Manner of counsel who appeared for the appellant before the primary judge.

[29] In the circumstances of this case, there was no error by the primary judge in considering the merits of Bemon's claim in the catamaran proceeding to the extent

that her Honour did so to form the view that the stay application should not be determined on the basis that Bemon's claim has "significant" merits and "significant" prospects of success.

Did the primary judge err in considering the question of delay?

[30] *Virgtel* remains authoritative for the proposition set out at [23] that it is "highly relevant" that the party seeking the stay of the costs orders did not apply for the stay until after the costs had been assessed, a certificate of assessment filed and the registrar ordered that they take effect as judgments of the court. McMurdo P observed that "if the Virgtel companies are to be denied the benefit of final orders, they should be informed of this as early as possible".

[31] The period that has elapsed since the entry of the judgment must be a relevant consideration in deciding whether it is a proper case for a stay of the enforcement of the judgment.

[32] The more significant delay identified by the primary judge was Bemon's delay in pursuing the catamaran proceeding which had the result that the trial of the guarantee proceeding proceeded to trial and judgment even before Bemon had obtained its expert report to support its claim in the catamaran proceeding.

[33] The appellant's written submissions for the appeal make a statement to the effect that an application was made in the guarantee proceeding to have the guarantee proceeding and the catamaran proceeding joined which was rejected by the court. This submission was not supported by any reference to material before the primary judge. The only brief reference to such an application having been made is in the transcript before the trial judge on the first day of the trial of the guarantee proceeding on 3 December 2019 where the trial judge referred to having a vague recollection of the appellant wanting to pursue a counterclaim where the parties were different, but the trial judge was proactive in getting an early trial date for the guarantee proceeding.

[34] There can be absolutely no criticism of the primary judge in not referring to an earlier interlocutory application for joinder of the guarantee and catamaran proceedings which was not expressly the subject of submissions before the primary judge. In any case, the fact that an unsuccessful application was brought did not detract in any way from the primary judge's accurate summary of the delays of Bemon in prosecuting the catamaran proceeding.

[35] There was no error of the primary judge in taking into account the various delays by Bemon in connection with the catamaran proceeding or by the appellant in seeking the stay of enforcement of the judgment in the guarantee proceeding.

Application of the correct test

[36] The factors that were weighed up by the primary judge in deciding whether or not to grant the stay were:

(a) the respondents were entitled to enforce the judgment in the guarantee proceeding;

(b) the appellant's claim in the catamaran proceeding could be regarded as an unresolved counterclaim in the guarantee proceeding;

(c) the delays in pursuing the claim for damages in the catamaran proceeding;

(d) there was no explanation why 10 months elapsed between Bemon's obtaining the expert report of BlackPond and the hearing of the stay application;

(e) even though the amended defence in the catamaran proceeding needed to be regularised so that the drafting was intelligible, if either of the claims made by the amendments in the defence were successful, that reduced the strength of Bemon's claim in the catamaran proceeding;

(f) the catamaran proceeding was not ready for trial;

(g) the judgment debt in the guarantee proceeding was secured by the enforcement warrant; and

(h) if the properties over which the enforcement warrants have been registered were sold, the appellant could not retrieve the properties.

[37] Taking into account the considerations that were weighed up by the primary judge in deciding whether or not to grant the stay, the appellant has failed to show that any different result should be reached by the application of the correct test of whether this was an appropriate case to stay the judgment obtained in the guarantee proceeding. The appeal must be dismissed.

Costs

[38] Before the primary judge, the appellant had submitted that the appropriate order for costs in respect of the unsuccessful stay application was no order as to costs, as the respondents succeeded on the application by filing the amended defence that raised the equitable and legal set offs supported by Mr Goddard's affidavit only the day prior to the hearing of the application. That is also the basis on which the appellant seeks to overturn the costs order made by the primary judge. The appellant had the option of applying for an adjournment of the stay application due to the late service of the material relied on by the respondents to oppose the stay. The appellant chose to proceed with the stay application, notwithstanding that late material was relied on by the respondents before the primary judge. In those circumstances, it was within the primary judge's discretion to order the costs to follow the event of the refusal of the stay application. The appellant therefore does not succeed on its appeal against the costs order made by the primary judge.

Order

[39] There is no reason why costs should not follow the event of the appeal being dismissed. The order that should be made is: Appeal dismissed with costs.

[40] **BROWN J:** I agree with the reasons for judgment of Mullins JA and the order proposed by her Honour.