

*Territory Insurance Office v Costa & Sortino* [2002] NTCA 1

PARTIES: TERRITORY INSURANCE OFFICE

v

CARLO COSTA by his next friend  
MASSIMO COSTA  
and  
GIANFRANCO SORTINO

TITLE OF COURT: COURT OF APPEAL OF THE  
NORTHERN TERRITORY

JURISDICTION: COURT OF APPEAL EXERCISING  
TERRITORY JURISDICTION

FILE NO: AP 19 of 2000 (9808742)

DELIVERED: 15 March 2002

HEARING DATE: 1 March 2002

JUDGMENT OF: MARTIN CJ, BAILEY & RILEY JJ

**REPRESENTATION:**

*Counsel:*

Applicant:	J Reeves QC
First Respondent:	P Barr
Second Respondent:	S Southwood QC

*Solicitors:*

Applicant:	Ward Keller
First Respondent:	Hunt & Hunt
Second Respondent:	Priestleys

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IN THE COURT OF APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Territory Insurance Office v Costa & Sortino* [2002] NTCA 1  
No. AP 19 of 2000 (9808742)

BETWEEN:

**TERRITORY INSURANCE OFFICE**  
Applicant

AND:

**CARLO COSTA** by his next friend  
**MASSIMO COSTA**  
First Respondent

AND:

**GIANFRANCO SORTINO**  
Second Respondent

CORAM: THE COURT

REASONS FOR JUDGMENT

(Delivered 15 March 2002)

**Background**

- [1] The first respondent (plaintiff) is an Italian national who suffered serious injuries in a motor vehicle accident in the Northern Territory on 14 August 1997. The first respondent suffers a condition known as “locked in syndrome” as a result of which he is totally incapacitated. His condition is likely to be permanent. The first respondent resides in a hospital in Italy and his affairs are managed by a guardian.

- [2] The second respondent (defendant) alleged that he was the driver of the motor vehicle in which the first respondent was injured and accordingly claimed indemnity from the applicant (third party), the Territory Insurance Office. The second respondent is an Italian national who resides in Italy.
- [3] The issues of liability and assessment of damages in the proceedings were ordered to be tried separately.
- [4] Following a trial of approximately one month, Riley J gave judgment for the first and second respondents on 17 August 2000.
- [5] On 11 September 2000, Riley J made orders with respect to payment of the first and second respondents' costs in the following terms:
- “1. The defendant and the third party pay the plaintiff's costs upon the issue of liability in this proceeding to 25 August 2000 including all reserved costs, such costs to be agreed or taxed forthwith and then payable immediately.
  2. The retainer of senior and junior counsel by the plaintiff was warranted.
  3. The third party pay the defendant's costs upon the issue of liability in this proceeding to 25 August 2000 including all reserved costs and costs to be agreed or taxed forthwith and then payable immediately.
  4. The parties have liberty to apply.
  5. The third party pay the costs of the plaintiff and of the defendant of and incidental to the argument relating to the costs issue certified fit for counsel.”
- [6] On 13 August 2001, the Court of Appeal unanimously dismissed an appeal by the applicant against the judgment of Riley J.

- [7] On 10 September 2001, the applicant filed with the High Court an application for special leave to appeal the judgment and orders of the Court of Appeal.
- [8] On 10 October 2001, the Court of Appeal ordered the applicant to pay the (taxed) costs of the appeal of the first and second respondents.
- [9] The hearing of the first respondent's claim for an assessment of damages is presently listed before Riley J in April 2002.
- [10] The applicant's application for special leave to appeal is likely to be heard in either mid-April 2002 or during the first week of May 2002.
- [11] The costs of the first and second respondents of the proceedings before Riley J and of the appeal are yet to be quantified fully, but are likely to be in the order of \$1 million.

### **The Present Application**

- [12] By a summons filed on 9 November 2001, the applicant sought a stay of the costs orders made by Riley J and the Court of Appeal, pending determination of the applicant's application for special leave to appeal to the High Court.
- [13] The applicant's summons came before Martin CJ on 4 December 2001. His Honour considered that in the light of counsel's review of relevant authorities, no clear guidance existed as to the principles upon which the

Court of Appeal should exercise the jurisdiction to grant or refuse a stay in the present circumstances. His Honour declined to deal with the matter as a single judge exercising the power of the Court of Appeal and required the matter to be dealt with by the Court of Appeal constituted by not less than three judges, pursuant to s 52 of the *Supreme Court Act*.

### **Considerations**

- [14] A State or Territory Court of Appeal may stay proceedings on a judgment of the court pending an application to the High Court for special leave to appeal from the judgment: *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681; *John Fairfax & Sons Ltd v Kelly (No 2)* (1987) 8 NSWLR 510; *Sibuse Pty Ltd v Shaw (No 2)* (1988) 13 NSWLR 125; *McMillan v Hambledon Nominees Pty Ltd (No 2)* [1991] 1 Qd R 118; *J v L&A Services Pty Ltd* [1993] 2 Qd R 380.
- [15] Similarly, the High Court has inherent jurisdiction to grant a stay: *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*, *supra*; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 75 ALR 461; *Rahme v Commonwealth Bank of Australia* (1993) 117 ALR 618; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALR 28.
- [16] In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*, *supra* at 683, Brennan J held:

“The jurisdiction to grant a stay in the present case depends on whether a stay is necessary to preserve the subject-matter of the

litigation. If an application for special leave to appeal would be futile unless a stay is granted, the jurisdiction arises.”

His Honour continued at p 684:

“A stay to preserve the subject-matter of litigation pending an application for special leave to appeal is an extraordinary jurisdiction and exceptional circumstances must be shown before its exercise is warranted. If an order for a stay is made, the respondent is kept out of the benefit of the order of the court in which the matter is pending until the hearing of the application for special leave to appeal ...

When an application for special leave to appeal is made to this Court, a jurisdiction to stay may be exercised by the court below and it is to that court – the court in which the matter is pending and which is familiar with the matter – that an application to stay should first be made. In this case the Court of Appeal, not wishing to pre-empt the view that may be expressed in this Court, tailored its order accordingly. In future, there should be no inhibition on the court in which the matter is pending framing a stay order, if a stay be appropriate, to avoid the necessity for application to this Court.

In exercising the extraordinary jurisdiction to stay, the following factors are material to the exercise of this Court’s discretion. In each case when the Court is satisfied a stay is required to preserve the subject-matter of the litigation, it is relevant to consider: first, whether there is a substantial prospect that special leave to appeal will be granted; secondly, whether the applicant has failed to take whatever steps are necessary to seek a stay from the court in which the matter is pending; thirdly, whether the grant of a stay will cause loss to the respondent; and fourthly, where the balance of convenience lies.”

[17] In *Bryant v Commonwealth Bank of Australia* (1996) 70 ALJR 306 at p 308, Kirby J amplified the principles applicable to the grant of a stay by the High Court in the following terms:

“1. In an application for a stay, adjunct to an application for special leave to appeal, it is necessary to consider the applicant’s prospects of success in gaining special leave. But that consideration will not pre-empt the separate determination of that issue which is left to the Court, differently constituted,

usually with a fuller understanding of the issues involved and with the benefit (typically) of more detailed written, and (usually) more focused oral, submissions. A decision on a stay application should not become an occasion for a detailed analysis of the issues that will arise in the special leave application and, if granted special leave, the appeal. Necessarily, the evaluation of the prospects of success will involve a judicial impression. But it is one that does not pre-determine, one way or the other, the substantive application;

2. Although the provision of stays, to protect the utility of the appellate process, is generally more common today than was formerly the case, a stay is, by no means, granted simply for the asking. Considerations relevant to the grant of a stay, pending the hearing of an application to this Court for special leave to appeal, will include the applicant's satisfying the Court that 'a stay is required to preserve the subject matter of the litigation ... or that refusal of a stay would make it difficult for this Court, in the determination of the appeal, to grant the relief sought'. See *Manfal Pty Ltd v Trade Practices Commission* (1990) 65 ALJR 256 at 257.
3. At least in some jurisdictions of Australia, the frequency and normality of appeals have been reflected in the adoption of principles which relax somewhat the stringency of the necessity, previously required, to show 'special' or 'exceptional' circumstances to secure provision of a stay. See, eg, *The Annot Lyle* (1886) 11 PD 114; *Monk v Bartram* [1891] 1 QB 346; *Klinker Knitting Mills Pty Ltd v L'Union Fire Accident & General Insurance Co Ltd* [1937] VLR 142; *Scarborough v Lew's Junction Stores Pty Ltd* [1963] VR 129. As I was a party to one such decision *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 (with Hope JA and McHugh JA, as the latter then was) it will be unsurprising that I am generally sympathetic to the view that (subject to any particular provisions of any applicable Rules of Court) special or exceptional circumstances are not now generally required to afford a stay of the execution of orders the subject of an appeal, which lies as of right. The reasons for this shift in emphasis are explained by the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corp Ltd*, supra, at 693-694. Those principles have not, to this time, been adopted by this Court in respect of its own stay orders;
4. In the High Court, the old rule of stringency continues largely to be maintained, with particular force where no grant of

special leave to appeal has yet been secured. There are obvious reasons for a measure of greater stringency at this point. Ordinarily, the case will have proceeded through at least two tiers of the judicial process. The would-be appellant's arguments will have been rejected by the court whose orders are the subject of the special leave application. Only a relatively small proportion of the applications for special leave succeed. To succeed, something more than legal or factual error must usually be shown. These are reasons for maintaining a higher standard in this Court for the provision of a stay than would now usually be imposed by other Australian appellate courts in respect of invocations of their jurisdiction;"

- [18] His Honour then continued by reference to the passage quoted at para [16] above from the judgment of Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* and referred to principles applicable to categories of cases not relevant in the present circumstances.
- [19] In *Gold v Proprietors – Units Plan No 52* (1997) 72 ALJR 142 at 144, Kirby J made it clear that in referring to the higher standard required for the provision of a stay in the High Court "than would now usually be imposed by other Australian appellate courts in respect of invocations of *their* jurisdiction", his Honour was referring to the general appellate jurisdiction of State and Territory Courts of Appeal, *not* the approach adopted by such courts in relation to a grant of a stay pending an application for special leave to appeal to the High Court.
- [20] In relation to the principles to be applied by State Courts of Appeal in considering an application for a stay pending an application to the High Court for special leave to appeal, Ipp J (with whom Pidgeon J agreed) of the

Western Australia Court of Appeal in *Hamersley Iron Pty Ltd v Lovell*

(No 2) (1998) 20 WAR 79 observed at p 85, after a review of the High Court authorities:

“The above examination reflects a uniform approach expressed by different Justices in the High Court over a period of several years. In terms thereof, a stay of execution pending an application for special leave to appeal to the High Court will only be granted in ‘special’ or ‘exceptional’ or ‘extraordinary’ circumstances. Generally speaking, the court will only stay proceedings 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.

In my opinion, the approach of this Court in determining whether to grant a stay of execution pending an application for special leave to appeal to the High Court should be no different. After all, as Dawson J stated in *Commissioner of Taxation (Cth) v Myer Emporium Ltd (No 1)*, the *High Court Rule*, O 70, r 12 ‘is the counterpart of similar rules in other jurisdictions’. In particular, it is the counterpart of the rule in this State. Under O 70, r 12, the High Court has held that the discretion to order a stay of proceedings is only to be exercised where special circumstances exist. In my view, this Court is required to adopt the same approach (and it has done so: see *Greenco Pty Ltd v Wilden Pty Ltd* (unreported, Supreme Court, Full Court, WA, Library No 970606, 14 November 1997), where it was accepted by Kennedy and Pidgeon JJ that a stay, pending an application for special leave to appeal to the High Court ‘will only be granted in exceptional circumstances’). In my view, the relevant considerations do not differ depending on whether the application for a stay is made to the High Court or this Court. The approach will be the same irrespective of whether the application is brought under O 47, r 13(1) or the inherent jurisdiction of this Court.”

- [21] In Queensland a similar approach has been adopted, namely, that the Court of Appeal will apply the same test as the High Court would apply were application for a stay made to that court: *McMillan v Hambledon Nominees Pty Ltd* [1991] 1 Qd R 118.

[22] In the Northern Territory, the issue was considered by the Full Court of the Supreme Court in *Somerville v The Law Society of the Northern Territory*, (1995) 1 NTJ 238, unreported, delivered 1 March 1995 (Kearney, Thomas and Gray JJ). Kearney J (with Thomas J concurring) after a review of High Court authorities including *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*, *supra*, observed at p 248:

“It seems clear from these authorities that where a stay is sought in the High Court an assessment is made of the prospects of success of the application for special leave, which must be ranked as ‘substantial’ before a stay will be granted. However, I consider that the approach does not obtain when the Court below is considering the grant of a stay pending the hearing by the High Court of an application for special leave; I consider that the approach in that case is as outlined in *Sibuse Pty Ltd v Shaw (No 2)* (1988) 13 NSWLR 125.”

[23] His Honour adopted the following observations of Kirby P (dissenting in the result) in the New South Wales Court of Appeal in *Sibuse Pty Ltd v Shaw (No 2)*, *supra* at 126-128:

“The relief sought [there a stay of execution of an order by the trial judge] is given, essentially, for the purpose of protecting the utility of the appellate process. It is thus offered as an attribute of the administration of justice in our society. Save in a respect which will be mentioned, it is not concerned with the merits of the appeal as such.

The stated purpose of the stay was to protect the position of the claimant whilst it prosecuted its proposed application for special leave to appeal to the High Court of Australia against the order of this Court.

...

Until 1987, this Court had a fairly uniform approach to applications for a stay such as the claimant now makes. Save for the exceptional circumstances where a short stay was necessary to provide protection for a day or so, it was the practice of the Court normally to deny such applications. This left it to a justice of the High Court of Australia, protecting the process of that Court, to decide whether or not he or she would grant a stay or other relief in support of a summons for special leave to appeal from the order of this Court.

In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681, Brennan J expressed the view that applications for a stay as ancillary to proceedings in the High Court, should first be made to the court from which special leave to appeal was sought. His Honour said that such courts should not feel inhibited in considering such applications. He stated that such courts would often have an advantage over the High Court of being familiar with the matter and therefore able to tailor their orders to meet the particular fact situations of each case.

After these observations were reported, the usual practice of this Court was presented for review in *John Fairfax & Sons Ltd v Kelly (No 2)* (1987) 8 NSWLR 510. ... It acknowledged that there were special difficulties in applications to the High Court from outlying parts of the Commonwealth (such as was the case in *Jennings Construction Ltd v Burgundy Royale*, an appeal from the Northern Territory). ...

The Court also mentioned the added consideration that appeals now lie to the High Court from this Court only by special leave. There are no appeals as of right from this Court or from other Federal and State Full Courts. As disclosed in the reports to Parliament of the High Court of Australia, the numbers of successful applications for special leave to appeal are comparatively few. ...

From these figures it is plain that most applications for special leave to appeal to the High Court from this Court are either refused or discontinued. Yet, *for those who seek such special leave, the protection of a stay of execution of the judgment challenged (and sometimes other relief) can often be vital. Without such relief, the utility of the facility of seeking special leave to appeal to the High Court, which is provided by the law, may be frustrated or rendered nugatory in the particular circumstances of the case.*

In the light of an analysis of these competing considerations, and of the observations of Brennan J in *Jennings Construction Ltd v*

*Burgundy Royale*, the Court in *John Fairfax & Sons Ltd v Kelly* (No 2) indicated (at 512) a change from its former practice. It did so in these terms:

‘... mindful of the position of the High Court of Australia and of the observations of Brennan J to which we should respond, it is clear that the Court should adopt a more discriminating approach to applications for the grant of a stay pending application for special leave to the High Court, than it has in the past.

Accordingly, upon signification to the Court of the intention of a party to an appeal to this Court that it will seek special leave to appeal to the High Court of Australia, this Court will in future not insist, as in the past, that any such stay (except in exceptional circumstances) should be granted by a justice of the High Court of Australia. Instead *the Court will normally grant a stay of twenty-one days* from the date of the judgment of this Court, to permit an application to be made for special leave to appeal to the High Court of Australia. *Such a stay will normally endure until such application is made or, if leave be granted, the appeal pursuant to such leave is disposed of by the High Court or until the High Court itself otherwise orders.*

Any such stay, granted by this Court, will be conditional upon:

- (i) the application for special leave being made in accordance with the rules of the High Court of Australia;
- (ii) an undertaking by the applicant to prosecute with due diligence; and
- (iii) where appropriate, undertakings being given as to any damages suffered in consequence of the stay by the opponent.

Necessarily, *the above course will not modify the discretion of the Court of Appeal to refuse such a stay where, for example, it deems such an application to be plainly hopeless.* Nor will it affect this Court’s consideration of the position of the opponents when determining any conditions to be imposed or whether it is proper, in the circumstances to decline the stay, requiring any such stay to be granted, as in the past, by a justice of the High Court.’

The principles stated in *John Fairfax & Sons Ltd v Kelly (No 2)* have been applied in a number of cases in the Court since that judgment was handed down: see, eg, *Jesasu Pty Ltd v Minister for Mineral Resources* (1987) 11 NSWLR 110. It was my view that the principles were applicable to the present application and warranted the stay sought.” (emphasis added by Kearney J)

[24] At first sight, the approach adopted by Kirby P appears to adopt a less stringent test than that applied by the High Court and the appellate courts of Western Australia and Queensland. However, it is apparent that despite his Honour’s reference to the Court “normally” granting a stay pending the determination of an application for special leave, Kirby P expressly maintained the Court’s discretion to refuse a stay in appropriate cases. his Honour did not limit such refusals to applications that the Court considers “plainly hopeless” but maintained the general discretion to determine “whether it is proper, in the circumstances to decline the stay, requiring any such stay to be granted, as in the past, by a justice of the High Court”. Kirby P did not provide guidance as to the circumstances where it might be proper to decline the grant of a stay beyond referring to a number of examples of decided cases where applications had been refused.

[25] The majority (Hope and Priestley JJA) in *Sibuse Pty Ltd v Shaw (No 2)*, supra, adopted a similar approach to Kirby P (and applying *John Fairfax and Sons Ltd v Kelly (No 2)*, supra) as to the principles applicable to the grant of a stay pending an application for special leave to the High Court. However, in their joint judgment, the case before their Honours was one in which it

was not appropriate to grant a stay. Hope and Priestley JJA refused a stay principally on the following basis (at p 132):

“On the footing on which this Court had inescapably, in our opinion, to approach this application, that is that criminal offences were probably being committed in consequence of the use of the premises as a brothel, we did not think that the usual considerations flowing from the desirability of preserving the subject matter of litigation pending a possible appeal could have any significant weight.”

[26] It is clear that the probability of a criminal course of conduct continuing (if a stay was granted) was the determining factor in the judgment of Hope and Priestley JJA. In the circumstances, their Honours did not consider it necessary or relevant to address the applicant’s prospects of success with the application for special leave. However, their Honours did acknowledge that such considerations might be relevant in other circumstances:

“It seems to us that applications for orders in the nature of a stay of judgment should be dealt with by this Court on the footing that the judgment it has just handed down is right, but also with a realistic recognition that it is open to reversal by the High Court. This Court’s view of the likelihood of that happening will vary from case to case. As already indicated, orders in the nature of stays are frequently made because of this Court’s recognition of the arguability of an appeal in the High Court, if that Court were to grant special leave.

We do not see how such considerations could avail Sibuse Pty Ltd in the present case.”

[27] In *Sibuse Pty Ltd v Shaw (No 2)*, supra the majority of the New South Wales Court of Appeal considered that the grant of a stay would probably have permitted the continuance of criminal activity. In *Somerville v The Law*

*Society of the Northern Territory*, supra, the majority of the Full Court considered (at p 10) that:

“... a stay is necessary to preserve the subject matter of the litigation. A refusal to stay will render nugatory any appeal, should special leave be granted.”

[28] Kearney J was of the opinion that to secure a stay (at p 12):

“... it is sufficient that (the applicant) demonstrate an appropriate case to warrant the exercise of the discretion in his favour.”

[29] While His Honour also indicated that he did not consider that the applicant must make out “special or exceptional circumstances” to secure a stay, we do not interpret his judgment as purporting to lay down general principles applicable to all applications for stay pending determination of applications for special leave to appeal to the High Court. The weight to be afforded to the particular considerations identified by Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*, supra must necessarily vary with the circumstances of the case. In some cases, a “substantial prospect” that special leave to appeal will be granted may be a significant factor in the application, while in others the inability to restore the parties to their respective positions if a stay is refused might need to be afforded particular weight.

[30] In our view, the numerous authorities of the High Court and intermediate appellate courts concerning the grant or refusal of a stay pending

applications for the grant of special leave must be read in the light of the circumstances of the individual case.

[31] In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 2)* [1998] 72 ALJR 869 at 870 Hayne J described the jurisdiction to grant a stay pending an application for special leave to appeal as “ample”. His Honour observed at p 871:

“[17] In the course of argument counsel adverted to many of the large number of reported decisions in this Court about the grant or refusal of stay pending application for the grant of special leave. All of those decisions must be read in the light of the circumstances of the individual cases. Nothing that is said in them is to be read as identifying immutable principles which fetter the Court’s jurisdiction to grant a stay. The jurisdiction is ample. The relevant question which falls for decision is whether it should be exercised in this case.”

[32] With respect, we agree with that observation.

[33] *Patrick Stevedores Operations No 2 Pty Ltd v MUA (No 2)*, supra is an example of an application where the High Court did not consider it necessary to embark on a detailed examination of the applicant’s prospects of success in obtaining special leave to appeal. Hayne J observed at p 872:

“[18] The present applicants applied to the Full Court of the Federal Court for a stay of proceedings pending their application to this Court for special leave. That application for stay was refused. In considering whether now to grant a stay, it is important to consider first whether there is a substantial prospect that special leave to appeal will be granted, to consider also what effects the grant or refusal of stay would have, and to consider where lies the balance of convenience.

[19] Various matters were canvassed in the course of argument which were said to be possible grounds warranting the grant of

special leave to appeal to this Court. Notwithstanding that the orders which it is sought to challenge are in the first instance interlocutory orders, I consider that the applicants' prospects of obtaining special leave are not insignificant. Since that application has yet to be argued, it is, in my view, inappropriate to say more.

[20] Again, lest it be misunderstood, I emphasise that I express no concluded view that the matters which were canvassed in argument arise in the proceeding or that it is only the matters that were mentioned in argument which might attract a grant of special leave, or for that matter that the applicants should succeed in their application for special leave. Those are all questions that must await full argument and upon them *I express no view greater than that I am of the opinion that the applicants' prospects of obtaining leave are not insignificant.*

[21] ...

[22] ...

[23] I am persuaded that the harm to be suffered by the respondents being kept out of the fruits of the orders which they have obtained is outweighed by the disruption that would be caused were the position to be changed after proceedings were heard on Monday next. Importantly, I consider that there is a real risk that it would not be possible for the present applicants, if ultimately successful in an appeal to this Court, to be restored substantially to their former position if the orders made by North J were now to be executed.” (emphasis added)

[34] *Tait v R* (1962) 108 CLR 620 is perhaps the most extreme example of the High Court exercising its jurisdiction to grant a stay pending an application for special leave to appeal. Tait was convicted of murder and sentenced to death. His execution was scheduled to take place at 8 am on 1 November 1962. On 31 October 1962, the High Court granted a stay to prevent execution of the sentence:

“... without giving any consideration to or expressing any opinion as to the grounds upon which (the substance of the application was) to be based, but entirely so that the authority of this Court may be maintained and we may have another opportunity of considering it.”

[35] In summary, we consider that there are no immutable principles governing the grant of a stay pending the hearing of a special leave application. The guidance provided by the High Court in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*, supra is to be applied in relation to the facts of an individual case. An applicant for a stay is required to establish “special” circumstances, which depending on the facts of the particular case will usually require a finding that a stay is necessary to preserve the subject matter of the litigation or to avoid the appeal being rendered nugatory. In all applications, the Court is also to have regard to whether the applicant has substantial prospects that special leave will be granted, where the balance of convenience lies and whether the grant of a stay will cause loss to a respondent. The weight to be afforded to such factors is a matter to be assessed with regard to the facts of the individual case.

### **Application of the Principles**

[36] In the present case, the applicant submits that if costs ordered in favour of the respondents are paid, the applicant’s right of appeal will be rendered nugatory because it is highly unlikely that such monies would be recovered from the respondents if the applicant is ultimately successful on the issue of liability.

[37] The respondents are Italian nationals who reside in Italy. In addition to the difficulties of enforcing a judgment extraterritorially, the first respondent is

likely to be permanently disabled, has no present or foreseeable earning capacity and any award of costs in his favour will be the subject of demands by his solicitors, counsel, expert witnesses and continuing medical expenses. The second respondent is unlikely to have any ability to repay costs awarded to him having regard to the likely demands of his solicitors, counsel and Italian legal representatives.

[38] There is no evidence that the respondents either could or would repay an award of costs in their favour. There is also no evidence that the respondents would be prejudiced in any way by the grant of the present application. There is no suggestion that the applicant would not be in a position to pay the costs (including interest) awarded in favour of the respondents at any future date.

[39] It was submitted on behalf of the respondents that refusal of the present application would not render the appeal nugatory in the event that the applicant succeeds both with the application for special leave and ultimately on the issue of liability. Far from being rendered nugatory, such an outcome would avert a substantial judgment in damages amounting in all probability to several millions of dollars. While that may be so, the reality is that all the available evidence suggests that the applicant could not be restored to its former position in relation to having paid out somewhere close to \$1 million in costs (assuming that to occur) if the present application is refused. In short the subject matter of the present application would be irretrievably

lost to the applicant in the absence of a stay, albeit the appeal as a whole would not be rendered futile.

[40] The present application is not a situation where the grant of the application for a stay would deprive the respondents of the fruits of victory. It is a situation where if the applicant was to succeed ultimately, the refusal of a stay could unjustifiably enrich the respondents by around \$1 million.

[41] In the present application, counsel for the applicant and respondents did not address the merits of the special leave application in any detail. The applicant relied on the (amended) written summary of argument it proposes to present to the High Court. The first respondent similarly relied upon its written summary of argument. Both documents are substantial. It is evident from the available written materials that the applicant has put forward at least an arguable case, albeit that the respondents submit that the issues raised are not such as to justify a grant of special leave to appeal to the High Court.

[42] In the present application, it cannot be said that the applicant has established the “substantial prospect that special leave to appeal will be granted” referred to by Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)*, supra. We do not, however, consider that fatal to the applicant’s case in the present circumstances. Brennan J suggested only that “it is relevant to consider ... whether there is a substantial prospect that special leave to appeal will be granted” not that establishment of such a

prospect was a prerequisite to every successful application for a stay. In the case before him, Brennan J noted at p 685:

“... the respondent submits that special leave is unlikely to be granted. It is undesirable to canvass the arguments in advance. I do not, however think that the prospects of a grant of special leave is insubstantial.”

[43] The same might be said of the present application. However, we are disposed to grant the application for a stay having regard in particular to the lack of any prejudice to the respondents, the impossibility of restoring the applicant to its former position (in relation to any costs paid) in the event of its ultimate success on the issue of liability and the very short period for which the order will endure. The special leave application is to be heard within a period of seven to nine weeks. In the particular circumstances of this case, we are satisfied that it would be appropriate to grant a stay of the costs orders notwithstanding the applicant’s failure to establish that it has a “substantial prospect” of securing a grant of special leave to appeal to the High Court.

[44] The formal order we have in mind making is as follows:

“Upon the applicant, by its counsel, undertaking to prosecute the application for special leave to appeal to the High Court from the judgment of the Court of Appeal with all reasonable expedition and further undertaking to pay the respondents such damage or loss whether legally enforceable or not as this Court or a Judge thereof may think

just and fair as compensation to the respondents for any disadvantage they may sustain by reason of this order, we order that so much of the orders of Riley J in the proceedings in the Supreme Court and the orders of this Court in the appeal as ordered the applicant to pay the costs of the respondents be stayed until the hearing and determination of the applicant's application for special leave to appeal to the High Court from the judgment of the Court of Appeal. And we further order that the costs of this application be the respondents' costs in the cause of the application for special leave. We certify the matter as one appropriate for senior counsel."

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