Federal Court of Australia

Henley Arch Pty Ltd v Henley Constructions Pty Ltd (No 3) [2022] FCA 408

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| File number(s): | VID 1240 of 2018 |
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| Judgment of: | **ANDERSON J** |
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| Date of judgment: | 20 April 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for a stay of orders pending appeal – stay granted |
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| Cases cited: | *Australian Workers’ Union v Pilkington (Aust) Ltd* (2000) 101 FCR 35; [2000] FCA 1169 *In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd (No 2)* [2020] FCA 772*Philip Morris (Aust) Ltd v Nixon* [1999] FCA 1281 |
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| Division: |  |
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| Registry: | Victoria |
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| National Practice Area: | Intellectual Property |
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| Sub-area: |  |
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| Number of paragraphs: | 17 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | Mr T Cordiner QC with Ms L Davis |
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| Solicitors for the Applicant: | Ashurst |
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| Counsel for the Respondents: | Mr T Bannon SC and Mr A Sykes |
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| Solicitors for the Respondents: | Gestalt Law |
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ORDERS

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|  | VID 1240 of 2018 |
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| BETWEEN: | HENLEY ARCH PTY LTDApplicant |
| AND: | HENLEY CONSTRUCTIONS PTY LTDFirst RespondentPATRICK SARKISSecond Respondent |

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| order made by: | ANDERSON J |
| DATE OF ORDER: | 20 April 2022 |

THE COURT ORDERS:

1. A stay of order 9 of the orders made on 25 November 2021 until the latter of the determination of the appeal VID737/2021 or the appeal VID164/2022.
2. A stay of orders 1 and 2 of the orders made on 17 March 2022 until the latter of the determination of the appeal VID737/2021 or the appeal VID164/2022.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ANDERSON J:

1. By interlocutory application dated 6 April 2022, the Respondents and Cross-Claimant seek a stay of order 9 of the orders made on 25 November 2021 until the latter of the determination of the appeal VID737/2021 or the appeal VID164/2022. The Respondents and Cross-Claimant also seek a stay of orders 1 and 2 of the orders made on 17 March 2022 until the latter of the determination of the appeal VID737/2021 or the appeal VID164/2022 (collectively, the **Cost** **Orders**).
2. I made the Cost Orders after determining liability in favour of the Applicant and Cross-Respondent in [*Henley Arch Pty Ltd v Henley Constructions Pty Ltd* [2021] FCA 1369](https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca1369) (**Liability Judgment**) on 25 November 2021.
3. The Respondents and Cross-Claimant have since appealed or sought leave to appeal the orders in the Liability Judgment together with the Cost Orders.
4. The Respondents and Cross-Claimant, in support of their application to stay the Cost Orders, rely upon an affidavit of Lance Newman Scott affirmed 6 April 2022 together with written submissions dated 12 April 2022.
5. The Applicant and Cross-Respondent filed written submissions opposing the stay of the Cost Orders on 12 April 2022.
6. The parties agreed that I would determine the stay application in chambers and on the papers.

# consideration

1. The Court’s discretion to grant a stay pending appeal is “only circumscribed by the need to be satisfied that there be a reason sufficient in the circumstances to warrant the exercise of the discretion in favour of the grant of a stay”: *Australian Workers’ Union v Pilkington (Aust) Ltd* (2000) 101 FCR 35; [2000] FCA 1169 per Goldberg, Finkelstein and Weinberg JJ at [10]. Special circumstances need not be shown, merely a “sufficient reason” for a grant. In determining whether to grant a stay, and its fair terms, the Court should weigh “considerations such as the balance of convenience and the competing rights of the parties, in particular whether prejudice will be caused by reason of the grant or withholding of a stay”: *Philip Morris (Aust) Ltd v Nixon* [1999] FCA 1281 per Sackville, Hely and Gyles JJ at [17].
2. The principles to be applied in considering a stay were more recently considered by Katzmann J in *In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd (No 2)* [2020] FCA 772 at [25]:

The Court has a broad discretion and special circumstances are not required. But the judgment is not to be treated as provisional. The successful party is entitled to its benefit and the presumption that it is correct. Consequently, the applicant for a stay carries the burden of demonstrating that a stay is appropriate. A stay should not be granted unless the appeal is at least arguable, although speculation as to its prospects of success is usually inappropriate. Without more, however, an arguable case is not sufficient justification for a stay. In the exercise of the discretion, the court will weigh up such factors as the balance of convenience and the competing rights of the parties, including, in particular, any prejudice to the parties that would be caused by granting or refusing a stay. A substantial factor in favour of a stay is the risk that, without a stay, the appeal would be rendered nugatory.

1. Mindful of the above principles, I am satisfied that this is an appropriate case in which to grant a stay of the Cost Orders pending the determination of the appeals VID737/2021 and VID164/2022. This is so for the reasons that follow.
2. The appeals are to be heard by the Full Court in about three weeks’ time, on 4 and 5 May 2022. The Applicant and Cross-Respondent presently estimate the assessable costs under the Cost Orders would be approximately $1,530,000 exclusive of GST and any applicable interest. I accept the evidence of the Respondents and Cross-Claimant’s solicitor, Lance Newman Scott, that considerable work and legal costs will be involved together with the resources of the Registrar of the Court in assessing a lump sum cost order.
3. Mr Scott, in an email sent 7 February 2022, has identified various financial information of the Respondents and Cross-Claimant which indicates that as at 30 June 2020 those entities had a net asset position of $2,276,356. Mr Scott, in this email also, identifies other unencumbered assets together with bank statements from 1 November 2021 to 3 February 2022 which disclose case balances of over $230,000.
4. Mr Scott also deposes to there being no reason to doubt the Respondents and Cross-Claimant being more than capable of paying any costs that are the subject of the Cost Orders if the appeals are unsuccessful.
5. The issues in the Liability Judgment are complex and the Respondents and Cross-Claimant’s appeal is at least arguable on that basis.
6. Weighing such factors as the balance of convenience and the competing rights of the parties and any prejudice that will be caused by granting or refusing the stay, I am satisfied that such factors weigh in favour of granting the stay of the Cost Orders. That is so, because it is likely that the appeals, which are to be heard on 4 and 5 May 2022, will be determined sometime this year. The Respondents and Cross-Claimant have the financial resources to meet the Cost Orders. In those circumstances, the prejudice to the Applicant and Cross-Respondent is minimal. The costs of assessing the lump sum Cost Orders are likely to be not inconsiderable and will occupy the resources of the Court in the form of the Registrar’s time to hear and determine the Cost Orders which will be wasted in the event that the appeals are successful.
7. For these reasons I am satisfied that it is appropriate to exercise the Court’s discretion to grant a stay pending appeal.

# disposition

1. I will grant a stay of order 9 of the orders made on 25 November 2021 until the latter of the determination of the appeal VID737/2021 or the appeal VID164/2022.
2. I will grant a stay of orders 1 and 2 of the orders made on 17 March 2022 until the latter of the determination of the appeal VID737/2021 or the appeal VID164/2022.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 20 April 2022