

update

11 May 2007

Friday Facts: Appeal does not operate as a stay

A common misconception is that if an appeal is filed with the Court in relation to a judgment, then the successful party cannot take steps to enforce the judgment until the appeal has been heard and determined. That is not the case.

An appeal does not operate as a stay of execution of the judgment. In order to obtain a stay it is necessary to make application to the Court and convince it to exercise its discretion to stay the judgment pending appeal. The ordinary principle is that a successful party is entitled to the fruits of the judgment and that there must be sound reasons to justify the Court from suspending that right.

The test which the Court applies in deciding whether to exercise its discretion is whether in all the circumstances a stay ought to be granted. The applicant seeking the stay has the burden of satisfying the Court that such circumstances exist. Whilst it is not essential that special or exceptional circumstances must be established, it is necessary for the applicant to demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour.

The factors which have been found to be relevant to the exercise of the discretion to grant a stay include:

- the balance of convenience and the competing rights of the successful party and the party appealing including the prejudice that will be suffered

- whether there is a real risk that if the judgment is executed and later the appeal succeeds, it will not be possible to restore the appellant to its former position: that is, there is a real risk that the appeal would prove abortive if the stay were refused
- the concern to ensure that a successful appeal is not rendered nugatory must be weighed up against the expectation of the successful party being deprived of the fruits of the judgment
- whether as a preliminary assessment there are arguable grounds for appeal and real prospects of success rather than commencement of the appeal to avoid immediate execution upon the judgment
- In relation to a stay of execution for costs it may be refused if it is not demonstrated that the respondent to the appeal will have an inability to repay them in the event the appeal is successful

In granting a stay, the Court may impose conditions. For example, it may order that a stay is granted but only on the condition that the appellant give security for the judgment amount which is adequate to protect the respondent - such as a bank guarantee or a payment into Court.

Similarly it may grant an injunction pending appeal in favour of the respondent, restraining the appellant from disposing of assets pending hearing of the appeal.

For more information

For more information, please contact:

- Mary Nemeth, Partner on
03 9321 7810 or 0400 627 048
mnemeth@rigbycooke.com.au

To unsubscribe from this publication

If you do not wish to receive publications of this type from us in the future, please notify us by one of the following methods:

- Send an email to marketing@rigbycooke.com.au
- Send a fax message to "Attention: Rigby Cooke Marketing" on fax number +61 3 9321 7900
- Send a letter to "Attention: Rigby Cooke Marketing", GPO Box 4767UU, Melbourne Vic 3001

Your request to remove you as a subscriber should include the word "unsubscribe" and your full email address to allow us to correctly identify your removal from our lists.

Reprint Permission

Articles in this publication may be reproduced in whole or in part, provided that appropriate recognition is given to the author and the firm, and prior approval is obtained. To obtain approval, please contact Rigby Cooke on +61 3 9321 7852 or email marketing@rigbycooke.com.au.

Disclaimer

This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.