

FAMILY LAW PRACTICE AND PROCEDURE Stay pending appeal granted with conditions. Family Law Act 1975 (Cth) House v The King [1936] HCA 40; (1936) 55 CLR 499 Jackson & Balen (2009) FamCAFC 131 APPLICANT: Ms Rose RESPONDENT: Mr Hodges FILE NUMBER: MLC 1454 of 2013 DATE DELIVERED: 29 August 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: 29 August 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Smallwood SOLICITOR FOR THE APPLICANT: CE Family Lawyers COUNSEL FOR THE RESPONDENT: Mr Dixon QC with Ms Paterson SOLICITOR FOR THE RESPONDENT: JH Legal Pty Ltd ORDERS (1) That subject to the wife paying to the husband \$500,000 by 4.00pm on Friday 12 September 2014, paragraphs 11 to 16 of the orders made on 23 June 2014 are stayed pending determination of the wife's appeal. (2) That the husband's application for costs is stayed until the determination of the wife's appeal. (3) That the applicant in a case filed 6 August 2014 and the response thereto are otherwise dismissed. (4) That the reasons this day be transcribed and be placed on the court file. IT IS NOTED that publication of this judgment by this Court under the pseudonym Rose & Hodges has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER: MLC 1454 of 2013 Ms Rose Applicant And Mr Hodges Respondent REASONS FOR JUDGMENT By her application filed on 6 August 2014, Ms Rose, who, for my convenience only, I shall refer to as the wife, seeks a variety of orders but the over-arching issue is that she seeks a stay of final parenting and property orders that I pronounced on 23 June 2014 after a contested hearing. The wife filed a notice of appeal on 21 July 2014, which is the appeal the subject of the stay dispute. I cannot help but observe that that notice of appeal was drawn by the wife as a litigant in person and that, to some extent, has handicapped her position today. The husband opposes the stay application and has filed a response on 25 August. Counsel for the wife submitted that the stay should be granted on a number of bases. The first was that the wife had to pay the husband money and, having regard to his high earning capacity, there was no prejudice to him, even though he was entitled to the fruits of his judgment. There is some sense in that submission. Secondly, a number of factual issues would be raised on the appeal, which would require the wife to seek to lead further

evidence on the appeal. These related to inaccuracies in the assets and liabilities findings that I made. One, it was submitted, related to having left an entitlement to money in the partnership of the husband's accounting firm, which had clearly been set aside by that firm. Another related to money in an account which, it was said, could be seen from documents presented by the husband only days before the trial began which had not been shown to the wife and which had not been included in the judgment. Those two matters, if accepted and added together, had the effect, according to counsel for the wife, of increasing the pool by about \$300,000. I had some difficulty with that proposition, because the first of those two items that I mentioned is clearly referred to in the transcript and concerns money set aside for tax by the firm, in other words, for every asset there will almost certainly be a liability. There is also the question of whether or not it was the husband's money in any event. The second, as senior counsel for the husband pointed out, was the account that was referred to in the husband's financial statement. In respect of both of those matters, it is not to say that the wife cannot seek to put those as part of an application to lead new evidence, but there are significant impediments set out in the authorities that she will have to face. Even if she was given that permission and error was detected, the dilemma I face today is that I do not know what the right amount is, according to the wife, that she should be paying the husband if, indeed, I was wrong about the \$730,000 in the first place. The third submission was that the refusal to grant the stay would render the appeal nugatory in the sense that the house would have to be sold as a consequence of the existing orders. The wife wishes to keep the home. However, as was submitted by senior counsel for the husband, the share portfolio is the wife's alternative source of capital funding, which could, indeed, satisfy the husband's entitlement. The share portfolio was also the subject of the wife's affidavit that, whilst acknowledging that the share amount in the judgment was an adjusted figure because I added back money that the wife had taken, it was submitted that so doing was not correct. I reject that. Add-backs are permitted but they are not the norm, because the property no longer usually exists. As will be seen from the judgment, I took into account the wife's statement about what had happened to the sold shares but that it was not supported by any evidence. The values in the assets and liabilities list do not have to be the precise value at that time but, rather, what the Court

considers is the value attributable to the items at the time that the Court is making the adjustment. The notice of appeal filed by the wife on 21 July simply says that the learned trial judge erred in law in establishing that the wife would have capacity to make the payment ordered to the husband. Her second ground as currently pleaded is that the change in parenting arrangements is not in the best interests of the children, and the third ground is that all assets and income were not considered in calculation of property settlement. The authorities in relation to the stay of a judgment order pending appeal are hardly controversial. They were recently summarised by the Full Court of this Court in *Jackson & Balen* (2009) FamCAFC 131 at paragraph 28 where the Full Court, referring to earlier decisions, made a number of statements of principle. Those include: the onus to establish a proper basis for the stay is on the applicant for the stay. However it is not necessary for the applicant to demonstrate any special or exceptional circumstances; a person who has obtained a judgment is entitled to the benefit of that judgment; a person who has obtained a judgment is entitled to presume the judgment is correct; the mere filing of an appeal is insufficient to grant a stay; the application must be bona fides; a stay may be granted on terms that are fair to all parties - this may involve a court weighing the balance of convenience and the competing rights of the parties; a weighing of the risk that an appeal may be rendered nugatory if a stay is not granted this will be a substantial factor in determining whether it will be appropriate to grant a stay; some preliminary assessment of the strength of the proposed appeal whether the appellant has an arguable case. Looking at the three grounds of appeal to which I referred, it is difficult, because each of them, on their face, appears to be an argument about the exercise of discretion. As I observe, the wife will face the prospect that the Full Court will ask why that does not offend the rule in *House v The King* [1936] HCA 40; (1936) 55 CLR 499. In this case, taking into account all of the matters that the Full Court said were the principles, it is difficult to say that the appeal would be rendered nugatory, but out of an abundance of caution I consider it is possible that that could occur, because the wife has said in her affidavit, which I have now read in some detail and, I have to observe, has little resemblance to the notice of appeal, she may have an argument that the \$730,000 was outside the bounds of reasonableness if such things as capital gains tax and GST were not taken into account. The tax account may, in fact, be

allowed by the Full Court as an unencumbered asset of the husband and, indeed, if the Court of Appeal took a different view about the earning capacity of the husband and the wife. But having said that, the major problem seems to me that the wife does not address what orders should be made if, indeed, the Court of Appeal found that I have made an error. What the wife seeks in her notice of appeal is that the matter be sent back for retrial. Whilst a court might very well do that, it would certainly be wanting to know what it was that the wife was then seeking, because it is conceivable that if the areas are as the wife alleges, the appeal court may very well decide to exercise its own discretion and make an adjustment depending upon the extent to which they found errors had been made. Looking at paragraph 10 of the wife's affidavit, I have concluded that there is at least \$500,000 available immediately that could be paid to the husband without any effect on the structure of the orders if they were to remain intact rather than being implemented at the moment. The wife seems to be saying in her affidavit that that is not correct, because she says that if the shares were sold there would be consequences, but that depends a little bit on whether or not I accept that the \$500,000 loan that underpinned the shares is, in fact, secured against the home. As I pointed out in discussion with counsel for the wife, it seems to me that that would not be affected, providing there were no other orders currently implemented. In my view, there is no logical reason why the wife should not be paying the husband at least \$500,000, and that could be done within 14 days. Those shares are readily available to be sold. The wife also sought a stay of the children's orders. Nothing, other than the children seem to disagree about those orders, seems to underlie what is the ground of the appeal. In my view, there is no basis in this particular case to justify a stay in respect of those orders. The same must be said of the child support orders and, in any event, the most fundamental question in relation to the stay of that sort of order would be that if the stay was not granted, the appeal would be rendered nugatory. Quite obviously, those are matters relating to money that the child support agency and, indeed, the Court could easily and, indeed, the Court could easily adjust later on. On that basis, I could not find that a refusal of the stay would mean that the appeal was rendered nugatory. I have also considered the other matters that the wife has sought, particularly paragraph 5 of her application. This seems to me to be an application against the husband

that he be restrained from altering his financial positions. There is absolutely no evidence that I can see that the husband has done that since the judgment was pronounced, nor is there anything that I can find in my judgment to indicate that I had any concerns about the husband doing that prior to the trial commencing and, indeed, I see no evidence that would satisfy the principles in *Mullen v De Bry*. On that basis, the only orders I am prepared to make today is that there will be a stay of paragraphs 11, 12, 13, 14 and 15 of the orders I made on 23 June 2014, but that order is conditional upon the wife paying to the husband \$500,000 within 14 days. I do not propose to make an order in relation to a default provision but, on the contrary, will give the parties liberty to apply on short notice in the event that the payment is not made. I will have those orders published later this afternoon and the reasons transcribed. RECORDED : NOT TRANSCRIBED There is an application now, arising out of today's proceedings, for costs, that it not be determined. That is opposed on the basis that it should be determined today. The basis upon which the husband does not want it determined today is that we should see what happens in the appeal. I must say, there is some sense in that, notwithstanding it may mean that the parties have to come back again, but much will depend upon what the Full Court says. I propose to grant a stay of the determination of that particular issue until after the appeal is determined. I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 29 August 2014. Associate: Date: 21 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/894.html>