
TRANSCRIPT OF PROCEEDINGS

S ECI 2019 03362, S ECI 2019 03363, S ECI 2019 03365
S ECI 2019 03366, S ECI 2019 03399

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

THURSDAY 8 AUGUST 2019

BEFORE JUDICIAL REGISTRAR CLAYTON

KORNUCOPIA PTY LTD (ACN 615 630 316)
v
HOME SWEET HOME PTY LTD (ACN 617 095 075)

KORNUCOPIA PTY LTD (ACN 615 630 316)
v
FAUSTINA WIRWAN

KORNUCOPIA PTY LTD (ACN 615 630 316)
v
SEBASTIAN HWANG

KORNUCOPIA PTY LTD (ACN 615 630 316)
v
CHANCY ANGGREK and OTHERS

KORNUCOPIA PTY LTD
v
ZHANGZHEN PAN

APPLICATION

MR N. RAGHAVAN appeared on behalf of the Appellants in all proceedings.

DR A. TRICHARDT appeared on behalf of the Respondents in all proceedings.

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3 any means (electronic, mechanical, microcopying, photocopying,
4 recording or otherwise) be reproduced, stored in a retrieval
5 system or transmitted without prior written permission of the
6 Authorised Officer.

7 DR TRICHARDT: Judicial Registrar, I appear for the respondents
8 in all five matters.

9 JUDICIAL REGISTRAR: Yes, thank you, Mr Trichardt.

10 MR RAGHAVAN: Registrar, I appear on behalf of the
11 appellant - - -

12 JUDICIAL REGISTRAR: Yes.

13 MR RAGHAVAN: - - - for all five matters.

14 JUDICIAL REGISTRAR: Thank you. And can you just help me with
15 how to pronounce your name?

16 MR RAGHAVAN: Mr Raghavan.

17 JUDICIAL REGISTRAR: Rag - - -

18 MR RAGHAVAN: Raghavan.

19 JUDICIAL REGISTRAR: Raghavan. Thank you, Mr Raghavan.

20 MR RAGHAVAN: Thank you. Yes, I'll just let my associate, for
21 the transcript, formally call the matters.

22 DR TRICHARDT: Yes.

23 ASSOCIATE: So calling the matters of Kornucopia Pty Ltd v Home
24 Sweet Home Pty Ltd, Kornucopia Pty Ltd v Wirawan,
25 Kornucopia Pty Ltd v Hwang, Kornucopia Pty Ltd v Anggrek
26 & Ors, and Kornucopia Pty Ltd v Pan.

27 JUDICIAL REGISTRAR: Yes. All right. Now, this is the
28 recommencement of the adjourned applications that were
29 before me yesterday for a stay. Mr Trichardt, have you
30 now had an opportunity to peruse the material - - -

31 DR TRICHARDT: Yes.

32 JUDICIAL REGISTRAR: - - - that hadn't been - - -

33 DR TRICHARDT: Yes.

1 JUDICIAL REGISTRAR: - - - served on you - - -

2 DR TRICHARDT: Yes, indeed.

3 JUDICIAL REGISTRAR: - - - after yesterday? Yes.

4 DR TRICHARDT: Registrar, I have prepared an outline of
5 submissions. I beg to hand a copy to you and I've given
6 to my learned friends a copy.

7 JUDICIAL REGISTRAR: Thank you.

8 DR TRICHARDT: I do not intend to read everything there, but I
9 will highlight the various things, and I would submit it
10 will be clear that there is - the court should actually
11 refuse a stay, but in the event of the court finding
12 that, regardless of the submissions that I will make, a
13 stay should be made in each of the matters, that it
14 should be conditional and, amongst other things, the
15 conditions should be that the outstanding arrears be
16 paid, and also that provision be made for the payment or
17 to secure the future payments until the matter has been
18 dealt with either as a result of leave to appeal or the
19 actual appeal or if they're on the same day that day.

20 Now, the first thing I make in paragraph 1 is that
21 this outline is filed in respect of all five matters, and
22 then in paragraphs 2 and 3, I just highlight some of the
23 factual background issues, which I submit, Registrar, is
24 very important in considering this application.

25 The first is there was a notice of appeal and there
26 was - an affidavit, dated 5 August, was filed in support
27 of each of the five notices of appeal, but those
28 affidavits were all out of time because, if we look at
29 the Supreme Court (Miscellaneous Civil Proceedings)
30 Rules, Chapter 2, Rule 4.07, each of the affidavits had
31 to be filed within seven days after the notice of appeal.

1 The notice of appeal in all the matters were filed on
2 24 July. So that would've meant by 31 August, and it was
3 only filed - - -

4 JUDICIAL REGISTRAR: 31 July.

5 DR TRICHARDT: Yes, July. I beg your pardon. And it was only
6 filed on 5 August. Now, apart from that, as I've pointed
7 out in paragraph 2(c), the affidavits do not comply with
8 the requirements set out in Rule 4.07.

9 So I know that is not directly relevant to the
10 application before you today, but it is relevant to the
11 effect that even after all of this time, and after all of
12 the attempts made by the appellant, it does not actually
13 have a proper application for leave to appeal before this
14 court, and there's also not any application seeking an
15 extension of time within which to file the affidavit,
16 which one would've expected the appellants to do.

17 Now, the second point is that the summonses which
18 are all before you today, they are all dated 6 August,
19 yesterday - we did receive unstamped, unfiled copies, but
20 I accept they were filed, so we're not taking that point
21 - in respect of the seeking a stay of the warrant of
22 possession granted by VCAT in respect of all of the
23 judgments it handed down on 16 July.

24 Now, importantly, as I've pointed out in paragraph
25 3, the appellant did not file any affidavit in support of
26 the summonses for the stay of the warrants and, in other
27 words, there is no evidence in any of those matters
28 before the court in support of the application for a
29 stay, and I raised that specifically yesterday, and
30 Mr Preston said, 'No, there's no affidavit and we haven't
31 seen one'.

1 Now, moreover, Rule 4.08 of Chapter 2 of the rules,
2 require an appellant, like the current appellant, to file
3 within seven days a summons seeking directions, an
4 extension of time or for leave to appeal as required by
5 the rules. That has not happened.

6 There's no summons seeking directions. There's no
7 application seeking extension of time or for the leave to
8 appeal as required by the rules, because - that is
9 important because, otherwise, the matter cannot be
10 progressed. So, again, that's a significant failure on
11 the part of the appellant which is relevant to the
12 applications before you today.

13 Now, I then go, on paragraph 4 and following, to
14 just deal with the stay application principles. Now,
15 yesterday, you were also referred to the decision of
16 Justice Beach in Quick v Lam-Ly [2019] VSCA, p.111 and I
17 will refer to that as the 'Quick decision', and,
18 importantly, His Honour deals with it extensively and -
19 first of all, I should make it clear. I'm not saying the
20 facts are identical, but I submit the principles are
21 applicable to this application.

22 And first is in paragraph 11, and I've quoted only
23 the relevant sentence in my outline, but I do not want to
24 stand accused that I didn't refer to the full paragraph.
25 It's just that that's the sentence that's really relevant
26 for today, but, in any event, the full paragraph says:
27 'Other than perhaps to preserve the status quo pending
28 the hearing of the application for leave to appeal in
29 this court, the basis for the making of the order by VCAT
30 on 26 April 2019 is not entirely clear.

31 'Disturbingly, the order was made without notice to

1 Lam-Ly. Further, it was made without Mr Quick' - and
2 that's the important sentence - 'Further, it was made
3 without Mr Quick being required to give any undertaking
4 as to damages or to at least secure the amount of rent
5 then outstanding and rent payable pending the
6 determination of the matter in this court', and then the
7 paragraph continues.

8 Now, yesterday, Mr Preston's submission to you was
9 on the basis that Lam-Ly, or the Quick decision,
10 basically said it deals with an undertaking more or less
11 like when you're seeking an injunction and, therefore, it
12 only operates prospectively, and, therefore, you cannot
13 make a condition of any stay on the basis that the arrear
14 rents must be paid in addition to any rent that may
15 become due and payable in the future until such time as
16 the leave to appeal and appeal is being heard.

17 Now, that is clearly wrong, the submission, and, as
18 a matter of fact, in paragraph 45 of the Quick decision -
19 or 46 if we go back to it, and I will address you on that
20 shortly, but in Quick, His Honour stated succinctly the
21 principles as follows, and, again, I've paraphrased
22 unless I put in quotation marks, so - but the - I have a
23 copy of the decision, in any event - - -

24 JUDICIAL REGISTRAR: Thank you.

25 DR TRICHARDT: - - - that I can - I should have handed it up
26 earlier. In paragraph 25, His Honour said, which is
27 generally accepted, 'The principals governing the grant
28 of the stay is well settled', and there's a number of
29 authorities. I've only referred to one or two more. In
30 paragraph 27, he states three principles, and in my
31 outline, I've broken them up. The first is that, 'The

1 court has a wide discretion [and that's important] and is
2 required to take into account all of the circumstances of
3 the case'.

4 Now, in our matter today, the warrant of possession
5 issue is part of the judgment of VCAT. The other part is
6 the payment of the rent, and the appellants decided they
7 will only seek leave to appeal the one part of the
8 judgment, but that does not make it - or does not result
9 in the fact that you, Registrar, cannot take all of the
10 facts into account of the case, including the fact that
11 there's been arrear rents for about eight months.

12 Now, as I say in the submissions, so you cannot
13 compartmentalise the facts, and to say, 'Well, I am only
14 seeking a stay in respect of this issue, so forget about
15 all the rest', that's not what is required of a court
16 when considering an application for a stay.

17 Now, the second principle in paragraph 27 is that,
18 'The party applying for a stay [here the appellant] bears
19 the onus of demonstrating that the stay is justified'.
20 Now, that is very important. It bears the onus. And how
21 do you discharge an onus in an application or in any
22 court matter is by putting evidence before the court.

23 Now, in this matter, despite drawing the appellant's
24 attention to it yesterday, they did not file an affidavit
25 which is the means of putting evidence before the court
26 in an application.

27 MR RAGHAVAN: Registrar, if I may interrupt my colleague just
28 briefly, but in the notice of appeals for all five
29 matters, the issue of rent was definitely part of the
30 appeal - part of the order to the appeal.

31 JUDICIAL REGISTRAR: Thank you.

1 MR RAGHAVAN: Thank you.

2 DR TRICHARDT: I will deal with that - that's, in any event,
3 contrary to what was submitted yesterday, but I'll deal
4 with the notice of appeal, but, in any event, it does not
5 change or have any effect on the submission that I've
6 just made to you, Registrar.

7 And that is it was incumbent upon the appellant to
8 put evidence by way of an affidavit before the court in
9 support of its application for a stay in each of the
10 matters, and they failed to do that. They've made a
11 forensic decision not to put it after it was raised
12 yesterday specifically, and they've had ample time to do
13 so.

14 So if there's no evidence before the court, then
15 there cannot be any position where the appellant can say
16 that a stay is justified, and that links with the next
17 submissions that I will make, and that we'll come to by
18 the demonstration or the establishment of special or
19 exceptional circumstances, but - - -

20 JUDICIAL REGISTRAR: Just on that point, the appellant, I
21 suppose, can make submissions that the (indistinct) is
22 justified. You would say that because there's no
23 evidence before the court, they can't discharge the onus
24 that they bear.

25 DR TRICHARDT: Yes.

26 JUDICIAL REGISTRAR: Yes. Thank you.

27 DR TRICHARDT: Your Honour, then, the other principle
28 highlighted by His Honour in paragraph 27 is that,
29 'Ordinarily, a successful party is entitled to the
30 benefit of the judgment and the presumption that the
31 judgment is correct'.

1 Now, I refer to the recent book of Zuckerman, and I
2 beg leave to hand up a copy of the relevant pages, where
3 it's stated in paragraph 24.7 that, 'The right of the
4 judgment creditor to enforce the judgment cannot be
5 overlooked because, at this stage of the proceedings, it
6 would have already expended significant resources in
7 pursuing its case with the reasonable expectation that
8 the process of adjudication would have resolved finally
9 the issues between the parties'.

10 Now, that's a general statement, and I know one
11 deals with it separately, and I'll get to that, but then
12 we get to paragraph 28, where the principle is stated
13 that, 'The power to order a stay will generally not be
14 exercised unless the parties seeking the stay demonstrate
15 special or exceptional circumstances'.

16 Now, I won't argue and take Your Honour to it, but
17 in Zuckerman, Your Honour will see the next paragraph - I
18 think it's paragraph 247 - he makes the point that it's
19 only in Victoria where it's applicable, but if you look
20 at the cases, the principle is the same in all the other
21 jurisdictions, but, in any event, Justice Beach
22 specifically says it is for the applicant for a stay to
23 demonstrate, to prove, special or exceptional
24 circumstances.

25 Now, again, since the appellant has not put any
26 evidence before the court, it has not and it cannot
27 demonstrate special or exceptional circumstances. Now,
28 in paragraph 29, His Honour then says that, 'Special
29 circumstances may be found to exist where the applicant
30 is able to demonstrate that there is a real risk that it
31 will not be possible to restore the appellant to his or

1 her former position if the judgment against the applicant
2 is executed before the conclusion of the appeal'.

3 Now, no doubt the appellant will say, 'Well,
4 obviously if we are deprived of possession, it follows
5 that we cannot be restored', but Your Honour, my
6 submission is that that would be speculation, because
7 there's no evidence to reach some a finding, because the
8 court - and I should point out the other decision that I
9 refer to in that paragraph, Scott v ANZ Bank, and I can
10 hand up a copy of that decision also - and Zuckerman
11 state that it is substantially in the same position.

12 Now, in this case we say that there's no evidence to
13 say or to point that that would not be possible. And in
14 any event, that is not, as such, determinative of the
15 issue, because in the Quick decision, Mr Quick was an
16 individual, a natural person, who occupied and had
17 possession of the property, and the court said still,
18 'No. I'm not going to stay'. And I'll get to that.

19 The first basis was because Justice Beach found that
20 Mr Quick didn't demonstrate an arguable ground for
21 appeal, but he said, in any event, then the stay would be
22 on the conditions of the payment, but in this case,
23 Your Honour, I would also urge you to look at the
24 decision in Cellante v Kallis Industries, and I beg leave
25 to hand up a copy. I quote the relevant part on p.655,
26 where Chief Justice Young said, 'Where an application is
27 made for a stay of proceedings, it is necessary that the
28 applicant demonstrate an appropriate case'.

29 JUDICIAL REGISTRAR: Sorry, can you just tell me where that is
30 on p.655.

31 DR TRICHARDT: It's at the bottom of the page.

1 JUDICIAL REGISTRAR: Yes. Yes.

2 DR TRICHARDT: Yes.

3 JUDICIAL REGISTRAR: Yes.

4 DR TRICHARDT: He's quoting from another decision, I should
5 have said.

6 JUDICIAL REGISTRAR: The Alexander case.

7 DR TRICHARDT: Yes.

8 JUDICIAL REGISTRAR: Yes.

9 DR TRICHARDT: So the first statement made, it should
10 demonstrate an appropriate case. We know this is not a
11 case yet. Prima facie, a successful party is entitled to
12 the benefit of the judgment obtained by him. He's
13 entitled to commence with the presumption that the
14 judgment is correct.

15 That's also what Justice Beach said, but then these
16 are not matters of rigid principle and a court asked to
17 grant a stay will consider each case upon its merits, but
18 where an applicant for a stay has not demonstrated an
19 appropriate case, but has left the situation in a state
20 of speculation or of mere argument, weight must be given
21 to the fact that the judgment below has been in favour of
22 the other party.

23 Now, Your Honour, that links with the other
24 principle that Justice Beach set out in paragraph 29 of
25 the Quick judgment that the prospect that the appeal may
26 be rendered nugatory must be balanced against the
27 principle that the successful party is entitled to the
28 fruits of its judgment. Now, in light of what I've
29 already said, but it's then clear that we have here an
30 appellant who's not a natural person, but a company,
31 who's not in the physical possession - - -

1 JUDICIAL REGISTRAR: Possession of the property.

2 DR TRICHARDT: - - - and we also know, Registrar, that at the
3 moment, I'm instructed that the appellant is deemed to be
4 insolvent and has to show its solvency in the Supreme
5 Court proceeding S ECI 2019 02781.

6 Now, I have copies of the orders, which ought to be
7 on the relevant court file, and I also have a copy of the
8 notice of appearance, where my instructing solicitors
9 entered an appearance on behalf of the respondent as
10 supporting creditors.

11 So we have a situation here where unless Kornucopia
12 can show Justice Randall on 11 September that the company
13 is solvent, that company is going into liquidation. And
14 then, furthermore, my submission is - and I'll have to
15 check that, because if my learned friend is correct, then
16 I stand to be corrected, but the appeal is, as I have it,
17 not against the payment the sums, and that was also the
18 position put forward by Mr Preston yesterday. You will
19 have your time, please. So I will get the relevant
20 notices of appeal.

21 JUDICIAL REGISTRAR: Yes. Well, I'll have a quick look now,
22 but certainly - - -

23 DR TRICHARDT: Yes.

24 JUDICIAL REGISTRAR: - - - Mr Preston was not seeking a
25 stay - - -

26 DR TRICHARDT: Yes.

27 JUDICIAL REGISTRAR: - - - on the payment, but I'm not sure
28 whether he went so far as to say anything about whether
29 his client was seeking to appeal the - - -

30 DR TRICHARDT: Yes. And it seems as though paragraphs 3 and 4
31 go to the - - -

1 JUDICIAL REGISTRAR: All of the orders of the member.

2 DR TRICHARDT: And I stand to be corrected on that - - -

3 JUDICIAL REGISTRAR: Yes.

4 DR TRICHARDT: - - - but it's not a stay in respect of that.

5 JUDICIAL REGISTRAR: But the stay has not been - - -

6 DR TRICHARDT: Yes.

7 JUDICIAL REGISTRAR: - - - sought in respect of the payment.

8 DR TRICHARDT: That is correct. Now, in paragraph 30 of the

9 Quick decision, Justice Beach pointed out that an
10 applicant must also demonstrate that there is at least an
11 arguable ground of appeal.

12 Now, unless there's an arguable ground of appeal or
13 the appeal is not bona fide, the court - in those two
14 cases, then the court doesn't even look further, but if
15 it can be said that there is an arguable ground of appeal
16 and that the appeal is bona fide, then the court will
17 focus on the enforcement aspect of the judgment, rather
18 on matters that are relevant to the validity or
19 correctness of the judgment.

20 Now, our submission is that there's no arguable
21 ground of appeal, but I won't dwell on it, save to make
22 two observations. The first is that in the affidavit in
23 support of the notices of appeal, the appellant has not
24 exhibited the residential tenancy agreement relevant to
25 the various matters.

26 It goes in the affidavit on setting out when the
27 email was sent on 17 January at 8.30, or it's actually
28 8.26, and then deals with the provisions of the VCAT Act
29 and various other provisions to say, 'Well, it's clear
30 that the notice was not received on the 17th, but on the
31 18th and, therefore, is a day short'.

1 And I will beg leave to hand up a copy of one of the
2 residential tenancies, merely to point out the clause
3 4(a), and the reason for doing so is that it is stated
4 there that the appellant consented to the service of
5 notices and documents in accordance with the requirements
6 of the Electronic Transactions (Victoria) Act (2000).

7 And that is then relevant to if we look at s.13 and
8 s.13A of that Act, because s.13 provides and says when an
9 electronic email has been dispatched, and that is when an
10 electronic communication leaves an information system
11 under control of the originator.

12 So in our case, we can see on the email exhibited to
13 the affidavit that that went on 8.26 pm on the 17th, but
14 we then get to s.13A, which has not been referred to in
15 the affidavit in support, which is basically submissions.

16 And that is important, because it says, in sub-A,
17 'For purposes of the law, (indistinct), unless otherwise
18 agreed between the originator and the addresses of an
19 electronic communication, the time of receipt of the
20 electronic communication is the time when the electronic
21 becomes capable of being received by the addressee at an
22 electronic address designated by the addressee'.

23 So in our case, even if we look at the affidavit
24 filed in support, they've indicated that it has be sent
25 to director of Kornucopia, that this Act is applicable.
26 They say it was received at 8.30, but they make the case
27 without reference to these sections that, 'Oh, no. There
28 was no solicitor that could be - it's after hours and you
29 could only the next day', but the Act makes specific
30 provisions for when an email has been sent and when it's
31 received absent an agreement.

1 There's no agreement alleged. So we don't have to
2 go into the Acts Interpretation Act, because this Act
3 covers the field in the regular. So on that basis, I
4 submit that there's no arguable ground.

5 JUDICIAL REGISTRAR: So do you say that there's a difference
6 between when the electronic communication was capable of
7 being retrieved and when it actually in fact was
8 retrieved? Is that the argument that you're making?

9 DR TRICHARDT: Well, the - - -

10 JUDICIAL REGISTRAR: Because you're saying there's no evidence
11 before the court about (indistinct).

12 DR TRICHARDT: There's no evidence, but all we know is that
13 even if we have regard to the affidavit filed in support
14 of the notice of appeal, there's no issue that the
15 appellant said it received the email at 8.30 on the 17th,
16 but they then have this convoluted argument to say,
17 'Well, you know, if you look at the Acts Interpretation
18 Act and so on, it said' - - -

19 JUDICIAL REGISTRAR: It had to be before 4 pm.

20 DR TRICHARDT: That's the VCAT Act says - - -

21 JUDICIAL REGISTRAR: It is the VCAT Act. Yes.

22 DR TRICHARDT: But the Acts Interpretation said if it's after
23 business hour, then you look at the next business day,
24 and the submission is clearly this Act regulates it.
25 There's no need to look at the VCAT Act, or - - -

26 JUDICIAL REGISTRAR: Yes.

27 DR TRICHARDT: - - - the others, because that's why it's said.
28 And it's a different thing - it's totally different - if
29 there was evidence before you, Registrar, that the
30 appellant said that it was not the director to whom it
31 was (indistinct) was not capable of retrieving it, but

1 that's not the case.

2 JUDICIAL REGISTRAR: Yes.

3 DR TRICHARDT: The submissions that were made and what was said
4 in that affidavit for the court of the notice of appeal
5 was that, 'Well, you know, at 8.30 at night, how can you
6 get a lawyer, or - - - '

7 JUDICIAL REGISTRAR: Well, there's no requirement to get a
8 lawyer - - -

9 DR TRICHARDT: No. No.

10 JUDICIAL REGISTRAR: - - - for a company or anyone else.

11 That's not a requirement of the Residential Tenancies
12 Act.

13 DR TRICHARDT: That's right. And, therefore, we submit that
14 there's really no arguable case. However, Registrar, I
15 do accept that at the moment, the reasons for the VCAT
16 decision of 16 July is not before the court and we don't
17 know what the reasons were.

18 So that's another problem with the notice of appeal
19 and the affidavit filed in support, because the Rule says
20 you have to put those reasons before the court, because
21 otherwise, how is the court going to determine and decide
22 the matter if the reasons are not there.

23 But what is important is that for the purposes of
24 this summons for the stay, there's no evidence, but even
25 the affidavit in support of the notice of appeal is
26 incomplete, not only because the reasons are not there,
27 but they don't put the very basic document, the retail
28 tenancy agreement, before the court, and one can
29 speculate why: oversight, or is it because clause 4(a)
30 is there, and clause 4(a) makes a mockery of this
31 convoluted argument about the application of the VCAT Act

1 and the application of the Acts Interpretation Act.

2 It is quite clear, and I would be surprised - and I
3 don't want to speculate, but I would be surprised if we
4 don't see something to that effect in the reasons of the
5 VCAT member.

6 Be it as it may, in any event, even if the court
7 were to find that there's an arguable ground of appeal,
8 it is clear from what Justice Beach has said and the
9 other authority that that, as such, does not constitute
10 special circumstances, because the fact that there's an
11 arguable ground of appeal does not go to the issues
12 pertaining to the enforcement of the judgment or part of
13 the judgment, in this case, the execution of the warrant
14 of possession.

15 Now, then in paragraph 6, Registrar, I have already
16 referred you to it earlier. Justice Beach found that
17 Mr Quick had no arguable ground of appeal, but then
18 continues in paragraph 45 that even if so, Mr Quick has
19 not established the special or exceptional circumstances
20 required in order to justify a stay, and my submission is
21 that is exactly what we have here.

22 And then at paragraph 46: 'Moreover, even if I were
23 persuaded that Mr Quick has a ground of appeal that was
24 at least arguable, there is no basis in this case for
25 staying the orders that have been made against him so
26 that he may continue to adversely possess the premises
27 pending the hearing of this application for leave without
28 paying or securing the outstanding rent that has accrued
29 and continues to accrue'.

30 Now, that brings me back to the submission that I
31 made right at the start when I submitted to you,

1 Registrar, that there shouldn't be a stay of these
2 orders, but if - on the basis that there's no arguable
3 case - and, in any event, if there's no establishment of
4 special or exceptional circumstances - but if you were
5 against me on that basis, then the submission is that if
6 there's a stay in each of these matters - that it must be
7 conditional upon the appellant paying the arrears and
8 making provision - securing the outstanding rent that
9 still continues to accrue.

10 Now, in paragraph 7 of the outline, I've just set
11 out the first schedule or block there. It shows that the
12 monthly rent is 2,825, or 2,608 - whatever the case for
13 the properties - amounting to the total sum of \$13,538.32
14 per month, which has not been paid, and then the next
15 column is the - maybe I should refer to the last column,
16 because that's the VCAT order on 16 July which sets out
17 the amount owing - the 19,000, et cetera, plus the 2,000
18 bond.

19 But obviously my clients, the respondents, have the
20 bond, so you can deduct \$2,600. So it's the last column
21 that we then look at as - for the outstanding amount
22 according to the VCAT order.

23 Now, I must point out that these do not include the
24 Pan numbers, because for Pan the order said - the
25 arrears, as for the VCAT order, was \$10,000, and then it
26 says the monthly rental is \$2,672.32, so if we take that
27 into account on this, in the third column the Pan would
28 be \$10,000, and that's the - I think it's already there
29 in 17(10)(s). And then the outstanding is 2,672. That
30 must be the last one in the first column as well. Sorry,
31 it's included there, but - - -

1 JUDICIAL REGISTRAR: It is, yes.

2 DR TRICHARDT: - - - that's the explanation for it, and then
3 the middle column, or the second column - that sets out
4 the rent owing to 14 August, and the reason for 14 August
5 is that these rents become due and payable on the 15th of
6 every month, according to the agreement. So the middle
7 column would be a combination of what VCAT has ordered -
8 was in arrears, plus the rent from 16 July to 14 August.

9 JUDICIAL REGISTRAR: Yes, I see.

10 DR TRICHARDT: So that would be the arrears that we say should
11 be paid as a condition if you, Registrar, are mindful to
12 order a stay. The further aspect that I wish to point
13 out, then, is in paragraph 8 of the outline - - -

14 JUDICIAL REGISTRAR: Sorry, just for clarification, is the rent
15 paid in advance or in arrears, or partly in advance -
16 partly in arrears?

17 DR TRICHARDT: Your Honour, the - Registrar, I would submit
18 that if an order were to be - - -

19 JUDICIAL REGISTRAR: No, no, no. I understand that. I'm just
20 wondering, in the terms of the residential tenancy
21 agreement - - -

22 DR TRICHARDT: Yes.

23 JUDICIAL REGISTRAR: - - - is the rent to be paid in advance or
24 in arrears, or partly in advance - partly in arrears.

25 DR TRICHARDT: I will have to check on that. I was just
26 working on the basis that Mr Preston yesterday indicated
27 they would have no problem to pay any fines.

28 JUDICIAL REGISTRAR: Pay any amount. I'm just wondering - the
29 figure that you've arrived at up to 14 August - that
30 would be for the - - -

31 DR TRICHARDT: Arrears, yes, going back.

1 JUDICIAL REGISTRAR: Only for the arrears? It wouldn't be for
2 the subsequent month?
3 DR TRICHARDT: No. No. So - - -
4 JUDICIAL REGISTRAR: Very well.
5 DR TRICHARDT: So - - -
6 JUDICIAL REGISTRAR: (Indistinct) understand.
7 DR TRICHARDT: - - - for the - - -
8 JUDICIAL REGISTRAR: So then you would also seek the
9 forthcoming payment in advance - - -
10 DR TRICHARDT: On 15 August - - -
11 JUDICIAL REGISTRAR: - - - on the 15th - - -
12 DR TRICHARDT: - - - and 15th of every month - - -
13 JUDICIAL REGISTRAR: In accordance with the tenancy agreement?
14 DR TRICHARDT: Yes.
15 JUDICIAL REGISTRAR: Yes.
16 DR TRICHARDT: That's on the basis that the period from 16 July
17 to 14 August is included in - added to the VCAT figure as
18 we say in the second column.
19 JUDICIAL REGISTRAR: Yes, I understand.
20 DR TRICHARDT: So in paragraph 8, as I have submitted, there
21 shouldn't be stay orders, but if the court were to grant,
22 it must be conditional upon the arrear rentals paid by 4
23 pm on Friday tomorrow, 9 August. Now, Your Honour may
24 say, 'Why then?' Because at the moment arrangements have
25 been made to execute the warrant at 11.30 or 12 o'clock
26 on Monday - 12 o'clock - 12.30 on Monday.
27 So we don't want to, again, tell the police not to
28 go, so if the condition is paid the arrears and that
29 would be the amount set out in the second column - so
30 including up to the 14 August one - that must be paid by
31 4 pm on Friday, and that's basically what I've said in

1 sub-paragraphs (a) and (b), and then sub-paragraph (c) -
2 to say that the stay will not come into effect unless the
3 payments in Paragraph 8(a) and (b) are made.

4 And then if the appellant were to have made the
5 payments by 4 o'clock tomorrow - and then the stay would
6 be in effect, and then the rent for all the subsequent
7 months be paid in advanced on the 15th of each month
8 until the determination of the application for leave to
9 appeal.

10 Now, I am not sure whether you would in a position
11 today to give an indication when the leave to appeal and
12 appeal will be heard, because that could make the order
13 easier to say - specify the month; otherwise, it will
14 just continue on the 15 - until whatever time - - -

15 JUDICIAL REGISTRAR: It will probably have to be until the
16 determination, because even if it was heard on a
17 particular - - -

18 DR TRICHARDT: Yes.

19 JUDICIAL REGISTRAR: - - - day, the determination may not
20 be - - -

21 DR TRICHARDT: That is - - -

22 JUDICIAL REGISTRAR: - - - (indistinct) that day.

23 DR TRICHARDT: That's correct. And then we then say that if a
24 payment is not made on the 15th, the respondent -
25 whoever's payment has not been made can approach the
26 court without notice to the appellant for an order
27 lifting the stay to allow the respondents - all of them
28 then to engage the police to execute the warrants of
29 possession, so that is to avoid having to have an
30 argument again, and all sorts of applications.

31 This must be self-executing, and we can just notify

1 the court that we have not - by affidavit - that the
2 payment was not received, and then the court can say,
3 'The stay is lifted. You can go ahead'. And then,
4 further, the appellant waive it's right to challenge an
5 order made pursuant to paragraph 9(d).

6 And that, you will recall, Registrar, was yesterday,
7 when Mr Preston was also (indistinct) discuss what if the
8 court then lifts the stay, and there's an appeal, and
9 then we find ourselves in this whole - - -

10 JUDICIAL REGISTRAR: Back to the same position.

11 DR TRICHARDT: And, therefore, they can't. That's the self-
12 executing - they can't then challenge it. We don't have
13 to give them notice, because they've had their
14 opportunity, and then lastly that the appellant pay the
15 costs of the application for stay, either tax or as
16 agreed.

17 That's for yesterday and today, and insofar as that
18 is concerned, my instructing solicitor just printed out a
19 copy of Horsebreeze, where it was stated that, in these
20 sort of cases, 'The order in relation to costs of an
21 application for a stay [it's in the middle paragraph] of
22 execution pending an appeal should be that the costs be
23 paid by the applicant, not that they be reserved'.

24 Now, we would seek such an order as well. I can
25 also inform you, Registrar, and foreshadow that there
26 will be an application for security for costs in respect
27 of the appeal, having regard to the fact that the
28 appellant is, as at today, still deemed to be insolvent.

29 We don't know what's going to happen before
30 Associate Justice Randall, and we know there's a lot of
31 money outstanding. Nothing is coming forward. So there

1 will be such an application, but that does not affect the
2 orders that we are seeking from you today.

3 The - what else did I need to - I may just mention
4 that insofar as whether there's an arguable ground for
5 appeal, there's a snapshot attached to the affidavit of
6 appeal, and it appears as though it comes from a document
7 Residential Tenancies Practice Note 2017 No.1 Electronic
8 Services of Notice.

9 And in that document, as my learned friends
10 indicated, there was a statement made that maybe this is
11 a case that the court should consider, but it does make
12 reference to s.13A of the Electronic Transfer Act, and my
13 submission is that that section will be the section that
14 the court will find regulating it.

15 So, in summary, there's an application, but no
16 evidence in support, so, therefore, the appellant has
17 failed to make out any claim that a stay is justified,
18 that there are special or exceptional circumstances, and
19 that should, as such, bring this whole application to an
20 end, that no order be made in their favour.

21 It's arguable that there's no arguable ground. We
22 say not, but I do accept that in light of the fact that
23 the reasons of VCAT is not before you and that they are
24 arguments, whether they are good, but that doesn't make a
25 change to the whole application for a stay.

26 It's not special circumstances. They have not
27 demonstrated and discharged their burden of proof that if
28 they were to be successful with the leave to appeal and
29 appeal, that the appellant cannot be restored to the
30 position before, and in light of what I've said, it's a
31 company not in possession - not actually living in the

1 premises. It's a deemed insolvent company.

2 And then, lastly, that despite all of what I've
3 submitted, you are still mindful to grant a stay, then it
4 must be on the conditions that the arrears be paid and
5 provision made. My instructing solicitor points out to
6 me that the tenancy agreement shows rent payable in
7 advance from the 4th or the 6th of the month, not - yes.

8 So it may mean, then, that an adjustment - because
9 we've assumed it was the 15th, but even if we work on the
10 15th, there can't be any prejudice if those orders were
11 made, and that we also seek the costs, because this is -
12 and, Registrar, you pointed out yesterday when Mr Preston
13 was also there, if one just looks at the whole history of
14 this matter, having regard to Deputy President Proctor's
15 reasons and so on, there's delays and it's been taking a
16 long time. They're not paying.

17 There are submissions that, yes, they've got claims
18 in excess and such, but none was ever progressed or
19 advanced or pursued, and everything happens on the last
20 moment and out of time without seeking any indulgence
21 from the court for an extension of time within in which
22 to do things or comply with the rules.

23 And surely an applicant - appellant, like we have
24 here, cannot come to court and say, 'I seek your
25 indulgence, but I'm just not following the rules. I'm
26 delaying matters. I'm not interested in paying, and I
27 just make up all of these things. I'm not even putting
28 everything before the court so that the court is fully
29 informed on the appeal'.

30 And the other - if we can just look at why we're
31 here today, because yesterday, we were not provided with

1 the affidavits. We were not provided with sealed copies
2 of the summons and so on, which necessitated us to come
3 back to you today, wasting the court's time and causing
4 my clients to incur further costs. Unless there's
5 anything in particular that - - -

6 JUDICIAL REGISTRAR: I just want to - - -

7 DR TRICHARDT: - - - you would like to hear me on, those are my
8 submissions.

9 JUDICIAL REGISTRAR: I just want to ask you something about the
10 submission you made about the fact that the tenant in
11 these cases is a corporate entity and that in terms of
12 the lack of evidence before the court about - then the
13 appeal being rendered nugatory because they couldn't be
14 put back into the situation that they may be in currently
15 if they were - - -

16 DR TRICHARDT: Yes.

17 JUDICIAL REGISTRAR: - - - successful on appeal. The appellant
18 is not the occupier of the properties. The appellant
19 runs a business, as I understand it, where the properties
20 are rented out.

21 DR TRICHARDT: Yes.

22 JUDICIAL REGISTRAR: So what they are seeking to do,
23 presumably, is avoid a loss of profits. It's a monetary
24 matter - - -

25 DR TRICHARDT: Yes.

26 JUDICIAL REGISTRAR: - - - and, on that basis, it seems to me
27 that in the event that they were successful and they
28 could establish in some way that they had suffered a
29 loss, that could be a legal claim open to them. It's not
30 the same as an individual being removed from their home.

31 DR TRICHARDT: Yes.

1 JUDICIAL REGISTRAR: Do you have anything you want to say about
2 that?

3 DR TRICHARDT: Yes, and that is the situation. I must say, I
4 don't know where that evidence - I know it was discussed
5 yesterday - - -

6 JUDICIAL REGISTRAR: It's not evidence. It's - - -

7 DR TRICHARDT: - - - but if - - -

8 JUDICIAL REGISTRAR: I mean, I suppose Mr Preston was asking me
9 to take judicial notice of the fact that not having
10 possession of a property would render an appeal nugatory,
11 and in the ordinary circumstances where the applicant for
12 the stay is the occupant of the property - - -

13 DR TRICHARDT: Yes.

14 JUDICIAL REGISTRAR: - - - that is, perhaps, something that I
15 could take on judicial notice without formal evidence
16 before me, but I think, on reflection, I'm not persuaded
17 that those - - -

18 DR TRICHARDT: Yes.

19 JUDICIAL REGISTRAR: That it's a lay down misere, if you
20 like - - -

21 DR TRICHARDT: Yes.

22 JUDICIAL REGISTRAR: - - - in terms of the appeal being
23 rendered nugatory, and you've alluded to that as well.

24 DR TRICHARDT: Absolutely, but I would also go further to
25 submit that even if we were to deal with a natural person
26 individual like Mr Quick or Mr Scott in the Scott v ANZ
27 Bank, it was still incumbent upon them to put evidence
28 before - - -

29 JUDICIAL REGISTRAR: Yes.

30 DR TRICHARDT: - - - the court to say, 'Listen, this is my
31 home. I live in this home, and if you kick me out, then

1 I won't be able to live in this house', or whatever,
2 'And, as a result, you will not be able to restore me to
3 my previous position for whatever the situation may be'.

4 There were arguments in Scott, 'You've got a
5 mortgage over it', and all sorts of things, but what
6 you'd then need to, I would submit - and it's speculation
7 because we don't have evidence, but you would then have
8 to say, 'Well, here's the agreement. This is what I am
9 using the business for. There are long-term tenants that
10 I'm subletting to', or whatever the case may be - - -

11 JUDICIAL REGISTRAR: Whatever the case is.

12 DR TRICHARDT: - - - and then, 'I would be in breach of that
13 contract', and so on. And, in any event, you know, we
14 need to know that if they were successful with this
15 appeal, that there was a one-day notice, sure, it is
16 always, depending on the agreements and so on, for the
17 landlords to say, 'We terminate. You're in arrears with
18 the rent. You haven't paid. That's the end of it. You
19 don't have any further' - so - - -

20 JUDICIAL REGISTRAR: What, simply by - - -

21 DR TRICHARDT: So - - -

22 JUDICIAL REGISTRAR: - - - the notice to vacate?

23 DR TRICHARDT: So what - at most, one would then most probably
24 have - re-issue a notice for possession. There's 14 days
25 or whatever, but that's all speculation, but that's the
26 sort of thing that the applicant for a stay application
27 must put before the court to say, 'Because of the
28 following facts, it would not be possible to
29 substantially restore my position', and there's nothing.

30 It would be speculation, and it cannot be expected
31 of the court to engage in such speculation after they've

1 had ample opportunity, and the rules require them to do
2 so, and they made a decision not to put any affidavit -
3 they've put an affidavit in support of the notice of
4 appeal. They could've done it in respect of the summons.

5 And, Your Honour, even if we continue with the
6 speculation, and I'm not saying we should, but just, for
7 example, say, if they are successful and Kornucopia has
8 paid the arrears and so on and they want to go and have
9 possession of - continue with the lease of these premises
10 to continue the business, on what basis would there be a
11 reason not to do so? My clients are in the business of
12 renting out their premises. So there's certainly no
13 evidence to counter and assumption - - -

14 JUDICIAL REGISTRAR: Yes.

15 DR TRICHARDT: - - - that - - -

16 JUDICIAL REGISTRAR: Exactly.

17 DR TRICHARDT: - - - Kornucopia could be restored to
18 possession.

19 JUDICIAL REGISTRAR: Yes.

20 DR TRICHARDT: And, as you've pointed out, they may - I don't
21 submit that they will have, but they may try to pursue
22 the claim. They've threatened they've got so many other
23 claims and if they get out, they can show solvency, then,
24 who knows, they can pursue it if they want, if they think
25 (indistinct) if they're not, then the liquidator must
26 decide whether there's a claim.

27 JUDICIAL REGISTRAR: Yes. All right. Thank you. Yes,
28 Mr Raghavan.

29 DR TRICHARDT: Sorry, Your Honour, if I may - - -

30 JUDICIAL REGISTRAR: Yes.

31 DR TRICHARDT: - - - I just want to re-confirm that I stand to

1 be corrected on the appeal only being in - - -
2 JUDICIAL REGISTRAR: Yes.
3 DR TRICHARDT: - - - respect of a stay.
4 JUDICIAL REGISTRAR: Yes. No, I understand. Thank you. Yes,
5 Mr Raghavan.
6 MR RAGHAVAN: Registrar, I'd just like to start by saying my
7 colleague's submissions were drafted with the presumption
8 that the rent arrears are not being challenged. This is
9 very clear in the notice to appeal for all five matters.
10 It's stated very clearly.
11 JUDICIAL REGISTRAR: Sorry, when you talk about your colleague,
12 are you talking about Mr Trichardt or Mr Preston.
13 MR RAGHAVAN: No, Mr Trichardt.
14 JUDICIAL REGISTRAR: Well, he's said that he accepts that. I
15 don't think that his submissions were dependent
16 (indistinct)
17 MR RAGHAVAN: Okay. Registrar, I'd just like to start off by
18 handing up a copy of the affidavit that I'm relying on,
19 as well - - -
20 JUDICIAL REGISTRAR: I'm sorry, what affidavit?
21 MR RAGHAVAN: No, this is not a new affidavit, just the
22 affidavit in support of the notice of appeal, just for
23 your reference.
24 JUDICIAL REGISTRAR: I have that already.
25 MR RAGHAVAN: Okay.
26 JUDICIAL REGISTRAR: Yes. In which matter?
27 MR RAGHAVAN: They're all the same.
28 DR TRICHARDT: Yes, they are.
29 JUDICIAL REGISTRAR: Yes. All right. Well, I've got the
30 matter of Wirawan, so if - - -
31 MR RAGHAVAN: That's fine - - -

1 JUDICIAL REGISTRAR: - - - that's acceptable.

2 MR RAGHAVAN: - - - Registrar. Now, in terms of the affidavits
3 in support of the notice to appeals being late by a
4 couple of days, I submit that the director, or the
5 director who provided the details that provided a basis
6 of all the information contained within the affidavit was
7 ill and inaccessible.

8 JUDICIAL REGISTRAR: Is there any evidence of that before the
9 court?

10 DR TRICHARDT: No.

11 MR RAGHAVAN: Not in a certificate or not in a legal sense.

12 JUDICIAL REGISTRAR: Well, that's just a submission from the
13 Bar table.

14 MR RAGHAVAN: Yes, Registrar. The other party did not write to
15 us to say we were late.

16 JUDICIAL REGISTRAR: They weren't served. They weren't served
17 until yesterday with the affidavit material.

18 MR RAGHAVAN: We - - -

19 JUDICIAL REGISTRAR: In any event, it's not on the other party
20 to tell you to comply with the rules.

21 MR RAGHAVAN: Yes, Registrar.

22 JUDICIAL REGISTRAR: Ordinarily, what they would be served with
23 is the notice of appeal, the affidavit and the summons
24 for directions within the right time.

25 MR RAGHAVAN: In terms of the notice of appeal and the
26 affidavits in support, we have now complied with all the
27 requirements.

28 JUDICIAL REGISTRAR: In terms of the notice of appeal?

29 MR RAGHAVAN: In terms of the notice of appeal.

30 JUDICIAL REGISTRAR: But there's no affidavit in support of
31 this summons for a stay?

1 MR RAGHAVAN: Yes.

2 JUDICIAL REGISTRAR: Is that correct?

3 MR RAGHAVAN: And, Registrar, I'd just like to point out at
4 this time that the beneficial owner of the appellant is
5 seated next to me, and he can testify and give evidence
6 about matters that are personal to the appeal.

7 JUDICIAL REGISTRAR: Well, in what way would that be
8 appropriate?

9 MR RAGHAVAN: Any evidence that you require - - -

10 JUDICIAL REGISTRAR: It's your case to make - - -

11 MR RAGHAVAN: I understand, Registrar.

12 JUDICIAL REGISTRAR: - - - and the appropriate way to make a
13 case is on affidavit material so that the court is aware
14 of what the case is before it and the other party is
15 aware of what is said.

16 MR RAGHAVAN: I understand, Registrar.

17 JUDICIAL REGISTRAR: It's a corporation. Now, the court might
18 provide some indulgence to individuals who have no legal
19 representation. That is not the situation that we find
20 ourselves in.

21 MR RAGHAVAN: We would like to request permission, Registrar,
22 that Mr Kuksal be allowed to speak just briefly and make
23 some submissions - testimony.

24 JUDICIAL REGISTRAR: No. That permission is denied. You're a
25 corporation. You're legally represented. Your role is
26 to make the submissions on behalf of the company.

27 MR RAGHAVAN: Registrar, this matter today is about three
28 things only. Did we have a reasonable case to argue?
29 Second, if the tenant is kicked out, is the damage done
30 irredeemable, the prejudice irredeemable and
31 irreversible, and I would like to point out there is a

1 distinction that the Registrar was trying to make.

2 We are tenants under a residential tenancy lease.
3 It's not the point that being a business, makes - you
4 know, makes it different in any sense, as for example,
5 employees are staying at the residences in question,
6 as - - -

7 JUDICIAL REGISTRAR: What's the evidence of that?

8 MR RAGHAVAN: Mr Kuksal can testify to that.

9 JUDICIAL REGISTRAR: No. I've already refused him permission.

10 This should all be on affidavit if this is the case you
11 want to make. This was raised yesterday that there was
12 no affidavit material and there's been no affidavit
13 material filed.

14 Mr Trichardt specifically said there's no affidavit
15 in support of the summons, and Mr Preston said, 'I'll get
16 some instructions. It's a matter for my clients as to
17 whether there will be an affidavit filed'.

18 MR RAGHAVAN: I understand, Registrar, but the issue was the
19 warrants, you know, for the execution of the possession
20 orders, or the stay, rather, was due to expire today,
21 Thursday.

22 JUDICIAL REGISTRAR: That's right.

23 MR RAGHAVAN: And - - -

24 JUDICIAL REGISTRAR: That's why this court, despite the very
25 late notice of this application, made time available
26 yesterday and has made time available today. We made
27 time available yesterday in circumstances where you were
28 advised that the matter wouldn't proceed if the summons
29 wasn't filed by 1 o'clock. It wasn't filed by 1 o'clock,
30 and yet we're still making that indulgence and listed it
31 for 3 o'clock. It wasn't filed until 1.31. It wasn't

1 served on Mr Trichardt at all - - -
2 MR RAGHAVAN: I understand - - -
3 JUDICIAL REGISTRAR: - - - and yet he managed to get here. His
4 client has managed to brief and he's managed overnight to
5 put together submissions and a comprehensive outline of
6 the case that he puts. It's your client's case to make.
7 MR RAGHAVAN: I understand, Registrar.
8 JUDICIAL REGISTRAR: You've sought and obtained an indulgence
9 and the court is at the end of the indulgences that it
10 will grant. So make your case.
11 MR RAGHAVAN: And I would like to point out regarding Quick,
12 Quick himself a natural person, but he was licensing. He
13 was licensing - - -
14 JUDICIAL REGISTRAR: Yes.
15 MR RAGHAVAN: - - - a property without permission.
16 JUDICIAL REGISTRAR: Yes. That's right. And he didn't get a
17 stay.
18 MR RAGHAVAN: Just to clarify, he was refused a stay because no
19 undertaking was given.
20 JUDICIAL REGISTRAR: Have you read the decision?
21 MR RAGHAVAN: I've just briefly gone over it.
22 JUDICIAL REGISTRAR: Well, that's not a correct submission.
23 MR RAGHAVAN: Now, in terms of rental areas, my colleague here
24 made a wrong assumption that we were not actively
25 defending this.
26 JUDICIAL REGISTRAR: No. I think that's been cleared up.
27 MR RAGHAVAN: I understand.
28 JUDICIAL REGISTRAR: I understand.
29 MR RAGHAVAN: But just to reiterate, we are appealing that to
30 the Supreme Court and there'll be separate grounds for
31 the basis of that appeal of the rent. Now, in terms of

1 enforcing - you know, wanting to obtain payment of the
2 rent, I've already mentioned it's been appealed.

3 However, enforcement of a judgment debt is very
4 clear, well laid out and straightforward. It is done in
5 the Magistrates' Court and, like I said, the procedures
6 are very clear and, therefore, the respondent, if they
7 wish to enforce the orders made at VCAT, they should
8 follow those procedures and not undertake, you know,
9 other sorts of proceedings, including insolvency
10 proceedings.

11 And just on that, the debt in question in the
12 insolvency proceedings is only for \$12,000. What we are
13 proposing to do is to pay \$13,000 by whatever date is
14 agreed on. Now, that in itself renders any issue of
15 insolvency, I would submit respectfully, out of the
16 question, and it would show that insolvency proceeding is
17 just a way to - - -

18 JUDICIAL REGISTRAR: But, again, I've got no evidence about
19 that. I've got a submission from the Bar table. At the
20 moment, as I understand, there's a deemed insolvency; is
21 that correct, Dr Trichardt, and - - -

22 DR TRICHARDT: That's correct. And it's not my client who have
23 made that - - -

24 JUDICIAL REGISTRAR: And it's not these clients. And so to the
25 extent that that's of any relevant to this proceeding,
26 that's just a fact and I understand your client is
27 challenging that or you are challenging that - - -

28 DR TRICHARDT: That's correct.

29 JUDICIAL REGISTRAR: - - - and that will go before Associate
30 Justice Randall on 11 September. What you propose to do
31 about that or the strength or weakness of that case is

1 not relevant to this court, other than the mere fact that
2 at the moment your client is deemed insolvent, to the
3 extent that that has any bearing on the overall
4 discretion that this court is required to exercise.

5 MR RAGHAVAN: I understand, Registrar, and just to clarify that
6 my colleague is a solicitor for supporting creditors in
7 that hearing. So - - -

8 JUDICIAL REGISTRAR: He's counsel.

9 MR RAGHAVAN: Counsel. Okay. As you say, those are separate
10 proceeding. I just wanted to highlight the amount in
11 question quickly. That is fact that the amount due, or
12 owing, rather, is \$12,000.

13 MR KUKSAL: Just roughly.

14 MR RAGHAVAN: And it is a disputed amount. So - yes. The stay
15 will be conditional on advance payment of rent. So that
16 would clear that matter up regarding insolvency. Payment
17 will be made one month in advance. If a stay is granted,
18 that would be the condition and, therefore, if we were
19 not allowed - if my client was not given the right to,
20 you know, let the appeal process run, what would happen
21 would be for - the warrant would be executed.

22 JUDICIAL REGISTRAR: You can let the appeal process run. The
23 appeal can go ahead regardless of the stay. There's no
24 suggestion that the appeal is being dealt with.

25 MR RAGHAVAN: But we are appealing the possession order, but
26 yet - - -

27 JUDICIAL REGISTRAR: Well, that's not before the court. You're
28 appealing the decision of - well, yes. All right.
29 You're appealing the order for possession of the member.
30 That's before the court. That's right. Yes.

31 MR RAGHAVAN: And so the issue is, you know, having a stay put

1 in place up until the matter is heard fully at appeal -
2 yes. So just to make it very clear, if a stay isn't
3 granted, I believe the warrant is due to be executed this
4 Monday at 12.30, and in that situation, then, my client
5 would be kicked out of all the properties in question,
6 and that would, you know, render the appeal quite
7 useless, because what would happen then if my client
8 wanted an appeal? There is that issue, I would submit.

9 JUDICIAL REGISTRAR: So what Dr Trichardt has submitted to the
10 court is that there is no evidence before the court that
11 the appeal would be rendered nugatory; that it's mere
12 speculation.

13 MR RAGHAVAN: It's a residential tenancy agreement.

14 JUDICIAL REGISTRAR: I understand.

15 MR RAGHAVAN: That's right. So - - -

16 JUDICIAL REGISTRAR: Yes. Well, you heard from Dr Trichardt
17 had to say. Do you want to respond to that in any way?
18 I'm just giving you the opportunity, in terms of that.

19 MR RAGHAVAN: Registrar, if you could just give me a
20 minute - - -

21 JUDICIAL REGISTRAR: Certainly.

22 MR RAGHAVAN: - - - to seek instructions. Thank you. I've
23 just been instructed by my client to provide more
24 clarification about the issue of, you know, a business
25 occupying the property. It's not just a matter of cash
26 flow. There are certain attributes, certain unique
27 points, about a business and its business location that
28 go beyond merely just, you know, financial implications.

29 MR KUKSAL: Okay. Registrar - - -

30 JUDICIAL REGISTRAR: I'm sorry? Why are you speaking? I don't
31 know who you are or in what capacity you're here, but

1 you've got a lawyer. The lawyer should be representing
2 you.

3 MR RAGHAVAN: Sorry, Registrar - - -

4 JUDICIAL REGISTRAR: No. That's all right.

5 MR RAGHAVAN: - - - for that delay. The issue is I have not
6 been well briefed for this matter. Daniel was the
7 barrister, counsel, at yesterday's hearing - was fully
8 briefed in this matter. Registrar, I request just a five
9 minute adjournment just to seek proper instructions.

10 JUDICIAL REGISTRAR: I will grant you five minutes to seek some
11 further instruction and make any additional submissions.
12 Mr Preston made full submissions yesterday and I have
13 taken everything that he said into account.

14 MR RAGHAVAN: Okay.

15 JUDICIAL REGISTRAR: But what he largely turned his submissions
16 to were the arguable grounds of appeal. So that was the
17 weight of his submissions, and what is being attacked
18 today by Dr Trichardt is whether exceptional
19 circumstances exist. There is no material before the
20 court about that.

21 And so you can certainly make submissions, but you
22 can't make submissions that purport to be evidence. That
23 needs to be done by way of affidavit. It hasn't been
24 done. An opportunity was provided. So any submissions
25 that you make should address me on the law and the
26 principles, but I'll stand the matter down for five
27 minutes.

28 MR RAGHAVAN: Thank you, Registrar.

29 (Short adjournment)

30 DR TRICHARDT: Registrar, should I - - -

31 JUDICIAL REGISTRAR: Yes, would you mind? Just let them know.

1 MR RAGHAVAN: Registrar, my apologies for that - for being
2 late. I apologise for that. I also would like to
3 apologise for the lack of an affidavit pursuant to the
4 stay application for yesterday and, obviously, continuing
5 today. I do apologise. The matter was heard up until 5
6 last night, and we didn't have time to prepare an
7 affidavit that would have done justice to that
8 submissions that we wished to make today.

9 With regards to the lease agreement, it was signed
10 by a company, and there is no evidence given that the
11 company is running a business there. It would be
12 unreasonable in the circumstances to presume - to make
13 any sort of presumptions without evidence that a company
14 is running a business at premises under a retail lease -
15 a residential lease, to clarify, not a retail lease.

16 JUDICIAL REGISTRAR: I'm not sure I understand what you mean.

17 MR RAGHAVAN: What I'm saying is, just to provide clarification
18 on the issue of - - -

19 JUDICIAL REGISTRAR: Well, the company isn't a person - - -

20 MR RAGHAVAN: This - - -

21 JUDICIAL REGISTRAR: - - - an individual. So the company is
22 not living.

23 MR RAGHAVAN: Well - - -

24 JUDICIAL REGISTRAR: - - - in the properties.

25 MR RAGHAVAN: I understand that, Registrar. But I have just
26 spoken with the director and have been instructed
27 that - - -

28 JUDICIAL REGISTRAR: And who's the director?

29 MR RAGHAVAN: - - - the premises accommodate employees.

30 JUDICIAL REGISTRAR: Who's the director?

31 MR RAGHAVAN: Lulu Xu. She is the director of the company and

1 she can testify - make an affidavit stating that there
2 are several employees.

3 JUDICIAL REGISTRAR: She could have done, but she hasn't.

4 MR RAGHAVAN: But just to clarify, there's no evidence that -
5 either that we're, you know, operating a business at any
6 of these leases under the Residential - under the RTA.

7 It's not - there's simply no evidence of that. So - - -

8 JUDICIAL REGISTRAR: I accept that.

9 MR RAGHAVAN: Okay. Thank you. Finally, even if it based on
10 no evidence it was concluded that the premises were
11 exclusively used for business purposes, there is a well-
12 established principle in law that the dislodgment of
13 business is about more than monetary concerns. There are
14 intangible losses associated with the dislodgment.

15 JUDICIAL REGISTRAR: Well, what's it to be? Is it that you're
16 not running a business there? Or that you are running a
17 business there and there are intangible losses that the
18 court should take judicial notice of?

19 MR RAGHAVAN: I'm just - - -

20 JUDICIAL REGISTRAR: Can you walk both sides of this street?

21 MR RAGHAVAN: I'm just arguing as an alternative.

22 JUDICIAL REGISTRAR: Well, I'm not required to make a finding
23 as to whether there's a business operating there, am I?

24 MR RAGHAVAN: No.

25 JUDICIAL REGISTRAR: The submission that is made against you is
26 there is no evidence before the court that the appeal
27 would be rendered nugatory. That's the submission.
28 Whether it's because you do run a business there or you
29 don't run a business there, it's all speculation, isn't
30 it?

31 There is no evidence. There's no evidence that

1 you're running a business there. There's no evidence
2 that you're not. There's no evidence of who's in these
3 properties. There's no evidence at all. It's all
4 speculation. That's the point that is being made against
5 you.

6 MR RAGHAVAN: But even if we - I do not have an affidavit from
7 relevant parties, I am saying from the bar table that
8 there are employees living in those properties. It is a
9 lease under the Residential Tenancy Lease. There are
10 people living there - natural people living there. It's
11 not as if - - -

12 JUDICIAL REGISTRAR: But how does that render the appeal
13 nugatory for the company? There's other properties
14 available for you. I mean, it's all speculation, isn't
15 it? I just don't know. I don't know if - - -

16 MR RAGHAVAN: What - - -

17 JUDICIAL REGISTRAR: - - - there's any particular reason why it
18 would be impossible for employees of the company to be
19 relocated to other residential properties. There's
20 nothing before me.

21 MR RAGHAVAN: Well, from the bar table I submit, Registrar,
22 that the warrant of possession is due to be executed on -
23 by 12.30 on Monday. That is what I am saying. There is
24 simply - it's a very short - - -

25 JUDICIAL REGISTRAR: Yes. That's - - -

26 MR RAGHAVAN: - - - amount of time. And it's the urgency - - -

27 JUDICIAL REGISTRAR: Well, it was since 16 July, so it's nearly
28 a month.

29 MR KUKSAL: No. Sorry.

30 JUDICIAL REGISTRAR: The orders were made on 16 July.

31 MR KUKSAL: Yes. And they were stayed. The stay order - - -

1 JUDICIAL REGISTRAR: Sorry. You've got a lawyer. I don't know
2 who you are or what - - -
3 MR KUKSAL: The orders were stayed. I'm the beneficial owner
4 of the business.
5 JUDICIAL REGISTRAR: What's the beneficial owner?
6 MR KUKSAL: I own the company.
7 DR TRICHARDT: That doesn't matter.
8 JUDICIAL REGISTRAR: Well, that doesn't give you standing in
9 this court.
10 MR KUKSAL: I also have the - - -
11 JUDICIAL REGISTRAR: Yes. All right. So - - -
12 MR KUKSAL: I have authorisation from the director.
13 JUDICIAL REGISTRAR: Mr Raghavan.
14 MR RAGHAVAN: Yes. So the order is - the orders is
15 (indistinct) from the 16th. There was another hearing on
16 the 31st, I believe, staying the - - -
17 JUDICIAL REGISTRAR: The stay hearing.
18 MR RAGHAVAN: The stay order.
19 JUDICIAL REGISTRAR: But there were orders - - -
20 MR RAGHAVAN: At VCAT.
21 JUDICIAL REGISTRAR: - - - since (indistinct) in any event, the
22 tenants - the tenant, which is the business, has been on
23 notice since the 16th of the possession order.
24 MR RAGHAVAN: Yes.
25 MR KUKSAL: And we stayed the orders at VCAT (indistinct) the
26 possession order.
27 MR RAGHAVAN: Registrar, if I may ask leave for Mr Kuksal, he
28 is - - -
29 JUDICIAL REGISTRAR: That leave is not granted. He has no
30 standing in this court. The owner is not a director.
31 And there's no evidence about who he is at all, other

1 than he's own submission that he's the beneficial owner
2 (indistinct)

3 MR RAGHAVAN: We're able to get the director of the company
4 over the phone to you.

5 JUDICIAL REGISTRAR: Well, it's - - -

6 MR RAGHAVAN: Yes. It's already - - -

7 JUDICIAL REGISTRAR: It's after 1 o'clock. It's five past 1.

8 MR RAGHAVAN: Yes. Already - - -

9 JUDICIAL REGISTRAR: This has already been adjourned. You've
10 had your opportunity. I don't accept that you have had
11 no opportunity to put on affidavit material. And, in any
12 event, affidavit material should have been put on at the
13 time of the summons.

14 MR RAGHAVAN: I understand.

15 JUDICIAL REGISTRAR: These proceedings have been on foot since
16 24 July.

17 MR KUKSAL: That's not accurate.

18 MR RAGHAVAN: I - - -

19 JUDICIAL REGISTRAR: Well, in this court, the proceedings were
20 filed on 24 July.

21 MR KUKSAL: Yes. But the stay order was not necessary - - -

22 JUDICIAL REGISTRAR: (Indistinct) you've got legal
23 representation - - -

24 MR KUKSAL: - - - because there was a stay - - -

25 JUDICIAL REGISTRAR: - - - so you should speak through your
26 lawyer.

27 MR KUKSAL: I can provide evidence of - - -

28 JUDICIAL REGISTRAR: So, Mr - but you're not in the position to
29 provide evidence, because I'm refusing you that
30 permission. Mr Raghavan, these proceedings have been on
31 foot since 24 July. Now, the case that your client makes

1 in this court is that you have grounds of appeal based on
2 some very specific dates and times and appearance for
3 particular provisions of Acts and legislation.

4 But it's - it appears that when it comes time for
5 your client to comply with the specifics of the Rules of
6 the court, that you request an indulgence time and again.
7 There won't be any further indulgence. When you rose to
8 stand, you said that you had three things that you - that
9 the case was about.

10 You said: whether there was a reasonable case to
11 answer, whether if your tenant was kicked out the damage
12 was irreversible, and then you moved on to the fact that
13 rental arrears were being appealed.

14 MR RAGHAVAN: Yes.

15 JUDICIAL REGISTRAR: Was that the third point that you wanted
16 to make? Or was there another point?

17 MR RAGHAVAN: Registrar, just if I could continue just briefly
18 with the second point, because I didn't have an
19 opportunity to - because we got caught up with the issue
20 of being a natural person and so on.

21 But just to put it on the other side, to put it on
22 my colleague's side, they're in a position, you know,
23 representing the landlords, and we're offering to pay
24 monthly in advance. That makes - that mitigates whatever
25 risk they have going forward. It mitigates almost
26 completely the risk.

27 JUDICIAL REGISTRAR: That was the submission that was pressed
28 at length yesterday.

29 MR RAGHAVAN: Okay.

30 JUDICIAL REGISTRAR: And (indistinct) very well. Is there
31 anything else that you want to say?

1 MR RAGHAVAN: Yes. Unfortunately, my client has told me that I
2 no longer have instructions to - to run this matter -
3 this hearing today.

4 JUDICIAL REGISTRAR: What does that mean?

5 MR RAGHAVAN: So I will have to withdraw as solicitor.

6 MR KUKSAL: So Naveen has not been prepared properly. Daniel
7 was briefed to appear for this matter. He could not be
8 here today. He had advised the court of that yesterday.
9 We're being put in a very difficult position where you're
10 asking Naveen very specific questions that he obviously
11 does not have the answer to. I am here - - -

12 JUDICIAL REGISTRAR: Right. As I said - - -

13 MR KUKSAL: I am here, available to answer those questions, but
14 you're not permitting me to answer those questions.

15 JUDICIAL REGISTRAR: It's not - it is not the way that it
16 works. I'm sorry. I don't know who you are.

17 MR KUKSAL: I'm Shivesh. Naveen can introduce me. I am the
18 beneficial owner of - - -

19 JUDICIAL REGISTRAR: You're Mr?

20 MR KUKSAL: Shivesh Kuksal.

21 JUDICIAL REGISTRAR: Mr Kuksal.

22 MR KUKSAL: That's right. I'm the beneficial owner of the
23 entity. I have the authorisation of the director to
24 represent the company.

25 JUDICIAL REGISTRAR: It's - - -

26 MR KUKSAL: Daniel had also foreshadowed - - -

27 JUDICIAL REGISTRAR: Mr Kuksal, can you please sit down and be
28 quiet. Okay. Mr Raghavan, if you are no longer
29 instructed, I will proceed to hand down my orders.

30 MR RAGHAVAN: Just - - -

31 JUDICIAL REGISTRAR: Do you hold instructions or not?

1 MR RAGHAVAN: Just to clarify, Registrar, again, I do not have
2 instructions, just because I do not know enough about
3 this matter. I was called at the last minute, and Daniel
4 was fully briefed in this matter. I understand he did
5 the entire hearing yesterday. And I will have to stand
6 down. And I ask in lieu, just for the sake of procedural
7 fairness, that Mr Kuksal, who is - who - he represents to
8 be the beneficial owner of the appellant, and has the
9 director's authorisation and has a direct interest
10 in - - -

11 JUDICIAL REGISTRAR: Your client well knows that in matters of
12 this nature that are before the court, where it's a
13 corporation, no step can be taken except by a solicitor.
14 A previous application made by your client to represent
15 the company was refused. There are no grounds before me
16 as to why that should be altered now. You're the lawyer
17 on the record.

18 There was an opportunity to brief and you briefed
19 yesterday. You've come along today. There was an
20 opportunity to put in further affidavit material, which
21 was not taken, or actually affidavit material at all.
22 There was no affidavit material that was filed with this
23 summons in support of this stay, and consequently there's
24 no evidence before the court.

25 Now, I'm not sure if it is your client or exactly
26 what Mr Kuksal's role is. He holds authorisation, he
27 says, on behalf of the director and that may well be the
28 case, but you're the lawyer on the record.

29 MR RAGHAVAN: Yes, Registrar. I - - -

30 JUDICIAL REGISTRAR: It's an extraordinary situation - - -

31 MR RAGHAVAN: I understand that - - -

1 JUDICIAL REGISTRAR: - - - that in the midst of a hearing, your
2 instructions are suddenly withdrawn, but what that means
3 is that no step can now be taken by your client, because
4 they are not represented. So if that is the situation,
5 I'm not going to hear from Mr Kuksal and there is going
6 to be no solicitor on the record, which means no step can
7 be taken by the company.

8 MR RAGHAVAN: I have instructed my client of the possible
9 consequences, but I reiterate I only received
10 instructions after five, quite late.

11 JUDICIAL REGISTRAR: I understand that. Mr Raghavan, you may
12 well have been placed in an invidious position, but the
13 fact of the matter is that your client has been
14 litigating in this court for some time and litigating in
15 matters of this type before this court and is, or should
16 be, well apprised of the Rules of the Supreme Court - - -

17 MR KUKSAL: We did not know that you had scheduled a date for
18 today.

19 JUDICIAL REGISTRAR: - - - and those rules require a summons to
20 be supported by an affidavit. The defect in this
21 application is that there is no affidavit in support.
22 The difficulty that you face is not one that I'm
23 unsympathetic to, but the reality is that the summons was
24 not filed in time to be served on the respondents. The
25 respondents - - -

26 MR KUKSAL: We were only given the summons - - -

27 JUDICIAL REGISTRAR: - - - were required to be given procedural
28 fairness - - -

29 MR KUKSAL: We were only given the summons - - -

30 JUDICIAL REGISTRAR: - - - and that required - can you please
31 be quiet, Mr Kuksal.

1 MR KUKSAL: I'm sorry. He does not have instructions to

2 proceed. I don't know in what - - -

3 JUDICIAL REGISTRAR: I'm speaking to - - -

4 MR KUKSAL: - - - authority you're speaking with.

5 JUDICIAL REGISTRAR: I'm sorry?

6 MR KUKSAL: He does not have instructions.

7 JUDICIAL REGISTRAR: I'm speaking to the court. On that basis,
8 the respondent sought time to consider material. They
9 have not been served with the affidavits in support of
10 this entire matter. There are no affidavits in support
11 of the appeal, entirely appropriate and it was not
12 opposed by your client yesterday that the matter be
13 adjourned to today, and in fact it was agreed that that
14 would be an appropriate course, given the late filing of
15 the summons and they fact that they hadn't been served
16 with the affidavit material.

17 Dr Trichardt gave an indication yesterday of the
18 matters that he sought to obtain instructions about,
19 which included whether the discretion of this court ought
20 to be exercised in the granting of the stay in the
21 absence of an affidavit, and specifically raised the fact
22 that there was no affidavit material.

23 MR KUKSAL: Well - - -

24 JUDICIAL REGISTRAR: He further indicated that it was his view
25 that there ought not be an exercise of the discretion in
26 your client's favour in these circumstances, and that all
27 of the circumstances ought to be considered, and those
28 are the very matters that he's brought before the court
29 today. So it just cannot be said that you lacked
30 opportunity.

31 Dr Trichardt managed to, being very late served with

1 the affidavit material, come up with responses, and in
2 any event, it's your application. You bear all the
3 burden of making out the case. The problem that the
4 court is presented with is that complete lack of evidence
5 that would establish exceptional circumstances.

6 MR KUKSAL: I'm sorry. You gave them the argument today
7 that - - -

8 JUDICIAL REGISTRAR: Because of that - - -

9 MR KUKSAL: - - - because there was no natural person - - -

10 JUDICIAL REGISTRAR: Sir, can you please (indistinct) - - -

11 MR KUKSAL: I'm sorry. You can ask me to leave and I will
12 leave, but you - - -

13 JUDICIAL REGISTRAR: Mr - - -

14 MR KUKSAL: - - - gave the other side their argument today.

15 JUDICIAL REGISTRAR: Mr Kuksal, you're very welcome to stay if
16 you can be quiet, but (indistinct) - - -

17 MR KUKSAL: The other side have written submissions. It was
18 not in their written submissions - - -

19 JUDICIAL REGISTRAR: Mr Kuksal, can you please be quiet.

20 MR KUKSAL: - - - that the entity was not a natural person.

21 JUDICIAL REGISTRAR: Can you - - -

22 MR KUKSAL: You gave them that argument today.

23 JUDICIAL REGISTRAR: Can you please be quiet.

24 MR KUKSAL: When Daniel left - - -

25 JUDICIAL REGISTRAR: Mr Kuksal - - -

26 MR KUKSAL: I would like to get this for the record, and then I
27 can be quiet. When Daniel left - - -

28 JUDICIAL REGISTRAR: Mr Kuksal, can you please be quiet.

29 MR KUKSAL: - - - it was agreed that there were exceptional
30 circumstances - - -

31 JUDICIAL REGISTRAR: Nothing was agreed at all.

1 MR KUKSAL: You had clearly indicated that those - - -
2 JUDICIAL REGISTRAR: Nothing. No.
3 MR KUKSAL: You gave the argument today that were not part of
4 their written submissions.
5 JUDICIAL REGISTRAR: Mr Kuksal, you were not in court
6 yesterday.
7 MR KUKSAL: Today I have been in court.
8 JUDICIAL REGISTRAR: You were not in court yesterday, and
9 Mr - - -
10 MR KUKSAL: You gave them the argument. It's not part of their
11 written submissions and I think this is clearly - - -
12 JUDICIAL REGISTRAR: Can I make it clear to you, Mr Kuksal, two
13 things: one is you were not in court and you have
14 misrepresented what occurred. I did not accept that
15 there were exceptional circumstances. I
16 (indistinct) - - -
17 MR KUKSAL: You indicated that you were very inclined to grant
18 a stay, and the wording of it was to be agreed. Only on
19 that basis was the adjournment accepted, because we - - -
20 JUDICIAL REGISTRAR: That is not a correct characterisation.
21 MR KUKSAL: That is the summary that I received from
22 Daniel - - -
23 JUDICIAL REGISTRAR: The second thing - - -
24 MR KUKSAL: - - - and the transcript will show that.
25 JUDICIAL REGISTRAR: - - - that I want to make clear is that
26 the argument about whether you're an individual person or
27 whether - - -
28 MR KUKSAL: The entity is a natural person.
29 JUDICIAL REGISTRAR: - - - the entity is a natural person - - -
30 MR KUKSAL: You gave them that argument today.
31 JUDICIAL REGISTRAR: - - - is not the basis upon which I'm

1 forming any decision at all. The basis upon - - -
2 MR KUKSAL: How can an entity dislodged from its form - - -
3 JUDICIAL REGISTRAR: Mr Kuksal - - -
4 MR KUKSAL: - - - not incur - - -
5 JUDICIAL REGISTRAR: Mr Kuksal - - -
6 MR KUKSAL: - - - substantial losses?
7 JUDICIAL REGISTRAR: All right. I'm going to ask you one more
8 time to be quiet, and if you cannot be quiet, I am going
9 to have to ask you to leave the court; okay?
10 MR KUKSAL: There is no point in me staying here.
11 JUDICIAL REGISTRAR: Can you be quiet?
12 MR KUKSAL: Would you allow me to address - - -
13 JUDICIAL REGISTRAR: No. I have already said no. Can you be
14 quiet?
15 MR KUKSAL: There is no point in my staying here.
16 JUDICIAL REGISTRAR: All right. Then I'm going to have to ask
17 you to leave.
18 MR KUKSAL: That's fine. Thank you.
19 JUDICIAL REGISTRAR: Now, the basis upon which I am not
20 granting a stay is that there is no evidence before the
21 court to establish that there are exceptional
22 circumstances. You don't get over the first threshold,
23 which is that there are special or exceptional
24 circumstances. So in that case, I am refusing the
25 application. I'll order that the appellant pay the costs
26 of the respondents. Are there any other orders that
27 should be made today?
28 DR TRICHARDT: Your Honour, I would just submit that the costs
29 be paid immediately, because we don't want to stand over
30 with the costs paid forthwith, and in light of the events
31 of today, I would seek that the costs order be made on an

1 indemnity basis payable immediately.

2 JUDICIAL REGISTRAR: Well, I'll order that the costs of the
3 application are paid immediately, but I'll just order
4 them on a standard basis - - -

5 DR TRICHARDT: As the court please.

6 JUDICIAL REGISTRAR: - - - to be taxed in default of agreement.
7 Anything else?

8 DR TRICHARDT: No. I think that takes care of - - -

9 JUDICIAL REGISTRAR: Yes. Thank you very much, Dr Trichardt.

10 All right. I think that that concludes the hearing. We
11 can close the court.

12 ---