

H. C. OF A. that the applicants are limited to the particular colours shown in
1913. the distinctive coloured label lodged by them as part of the appli-
cation. I concur in the judgment of the Court.

WILLIAM
CHARLICK
LTD.
v.
WILKINSON
& CO. PRO-
PRIETARY
LTD.

*Appeal allowed. Order of Law Officer
reversed, and appeal to him dismissed
with £18 18s. costs. Order of Deputy
Registrar restored, and appellants' ap-
plication for registration granted.
Respondents to pay appellants' costs
of this appeal.*

Solicitor, for the appellants, *F. B. Waters.*
Solicitors, for the respondents, *Braham & Pirani.*

B. L.

Foll
Commissioner
of Taxation v
Packer 90
FLR 153

Cons
Enterprise
Gold Mines
NL v Mineral
Horizons NL
91 FLR 403

Foll
Jennings
Construction
v Burgundy
Royale
Investments
69 ALR 265

Foll
Jennings
Construction
v Burgundy
Royale
Investments
61 ALJR 102

Appl
Asion v DPP
45 SASR 181

Appl
Jennings
Construction
v Burgundy
Royale
Investments
161 CLR 681

Cons
Bunnings
Forest
Products Pty
Ltd v Bullen
(1994) 126
ALR 660

Refd to
Bryant v
Common-
wealth Bank
of Australia
(1996) 90
LGERA 126

[HIGH COURT OF AUSTRALIA.]

THE MARCONT'S WIRELESS TELEGRAPH } PLAINTIFFS ;
COMPANY LIMITED }

AND

THE COMMONWEALTH DEFENDANTS.

[No. 3.]

H. C. OF A. Practice—High Court—Stay of proceedings pending appeal to the Privy Council—
1913. Special terms.

SYDNEY,
April 10.
Barton A.C.J.,
Isaacs and
Rich JJ.

In an action against the Commonwealth for infringement of patent the High
Court had, on the application of the plaintiffs, made an order for inspection
against the Commonwealth. A motion for a stay of proceedings under the
order, pending an application to the Privy Council for special leave to appeal,
was made by the Commonwealth, and the circumstances were such that unless
a stay was granted the appeal would be rendered nugatory, and that if it was
simply granted the whole benefit of the action might be lost to the plaintiffs.

Held, that proceedings should be stayed until the hearing of the application to the Privy Council, on the Commonwealth undertaking to expedite the application and to pay such damages, whether legally claimable or not, as the High Court or a Justice thereof might think just and fair as compensation to the plaintiffs for any damage they might sustain by reason of the stay.

H. C. OF A.
1913.

MARCONI'S
WIRELESS
TELEGRAPH
CO. LTD.

v.

THE COM-
MONWEALTH.
[No. 3.]

MOTION.

In an action brought by the Marconi's Wireless Telegraph Co. Ltd. against the Commonwealth for infringement of patent, on the application of the plaintiffs an order was on 20th March 1913 made by the High Court for inspection of certain wireless telegraphic apparatus: *Marconi's Wireless Telegraph Co. Ltd. v. Commonwealth* [No. 2] (1).

A motion was now made on behalf of the Commonwealth for a stay of proceedings under the order of 20th March 1913 pending an application by the Commonwealth for special leave to appeal to the King in Council.

Starke, for the Commonwealth, in support of the motion.

Mann, for the plaintiff company, to oppose. The plaintiffs will be damnified by the granting of a stay. Their patents run out in 1914. The practical advantage to them of success in the action will be that they can prevent the Commonwealth from using their system of wireless telegraphy, and damages will not be a full compensation to them. There is no right of appeal to the Privy Council, and until the special leave to appeal is granted the order of this Court is effective. The reservation of the right to ask for special leave to appeal to the Privy Council does not impose a duty on this Court to exercise a discretion to say whether an appeal, if successful, should be rendered nugatory.

[ISAACS J. referred to *Wilson v. Church* [No. 2] (2).]

There there was a right of appeal. This Court will not stay proceedings under its order merely because one of the parties wishes to apply for special leave to appeal to the Privy Council. There is no precedent for an application of this kind.

Starke, in reply. The application for a stay must be made to

(1) 16 C.L.R., 178.

(2) 12 Ch. D., 454, at p. 458.

H. C. OF A.
1913.

MARCONI'S
WIRELESS
TELEGRAPH
CO. LTD.
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THE COMMONWEALTH.
[No. 3.]

this Court, for the Privy Council will make no order for a stay until an appeal is pending before them: *Quinlan v. Child* (1). This Court has an inherent power to stay proceedings under its order, and will do so if a refusal of a stay will render the proposed appeal nugatory, if it is allowed: *Emmerson v. Ind, Coope & Co.* (2).

[ISAACS J. referred to *Siemens v. Heirs of Buße* (3); *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (4).]

It is necessary to show special circumstances: *The Annot Lyle* (5); *The Ratata* (6). The fact that unless a stay is granted the Commonwealth will be deprived of any benefit to be derived from the appeal is a special circumstance. A stay cannot injure the plaintiffs pecuniarily, and will not interfere with their right to an injunction. The Commonwealth is willing to undertake to pay such damages or loss, whether legally claimable or not, as this Court may hereafter think just or reasonable to compensate the plaintiffs in respect of the order for a stay.

BARTON A.C.J., in delivering the judgment of the Court, said:—The Court will not ordinarily grant an application of this kind unless very strong and special grounds are shown. This is a very peculiar case. The conditions are such that, on the one hand, if the stay is granted without more, the whole benefit of the action may be lost to the plaintiffs, while, on the other hand, unless the stay is granted on some fair terms, the defendants' appeal will be nugatory. It really is a question of the preservation of the rights of the parties without disregard of the balance of convenience. Under those circumstances we think that the order we propose to make is a fair one.

Order that the operation of the order of this Court of 20th March 1913 be suspended until the hearing of the defendants' application to the Privy Council for special leave to appeal, on the defendants undertaking to prosecute their appli-

(1) (1900) A.C., 496, at p. 498.
(2) 55 L.J., Ch., 903, at p. 905.
(3) 11 Moo. P.C.C., 62.

(4) L.R. 1 P.C., 8.
(5) 11 P.D., 114.
(6) (1897) P., 118.

cation with all reasonable expedition, and also undertaking to pay the plaintiffs such damages or loss, whether legally claimable or not, as this Court or a Justice thereof may think just and fair as compensation to the plaintiffs for any disadvantage they may sustain by reason of this order. The defendants to pay the costs of this application.

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WIRELESS
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MONWEALTH.
[No. 3.]

Solicitors, for the plaintiffs, *Blake & Riggall*.
Solicitor, for the defendants, *Gordon H. Castle*, Crown Solicitor
for the Commonwealth.

B. L.

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| Cons Burnie Port Authority v General Jones Pty Ltd (1994) 120 ALR 42 | Disced <i>Whin- field v Lands Purchase & Management Board</i> (1914) 18 CLR 606 | Cons Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520 |
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[PRIVY COUNCIL.]

RICKARDS (SINCE DECEASED, NOW REPRESENTED BY LEETE AND OTHERS) . . . } APPELLANT;
DEFENDANT,

AND

LOTHIAN RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Negligence—Water supply maintained on premises—Damage caused by escape of water—Malicious act of third person—Liability of owner.

A person who maintains on his premises a reasonable system for the supply of water for domestic purposes, is only using them in an ordinary and proper manner, and, although he is bound to exercise all reasonable care, he is not responsible for damage caused by the escape of the water due, not to his own default, but to the malicious act of a third person.

PRIVY
COUNCIL.*
1913.
Feb. 11.

* Present—The Lord Chancellor, Lord Macnaghten, Lord Atkinson, and Lord Moulton.