

# Stay Applications

*Jago v District Court of NSW & Ors [1989] HCA 46*

*Grassby v The Queen [1989] HCA 45*

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It sometimes arises that a criminal proceeding will lead to a miscarriage of justice if it is allowed to continue. In these circumstances, the proper response is for the Defendant to apply for an order that the proceeds be stayed. Every defence lawyer should understand the test and how to make the application. This paper is designed to assist legal practitioners in the state of NSW.

## Grounds for a Stay

A stay is a discretionary remedy and a fairness test is applied which involves balancing the interests of the accused against the community's right to expect that persons charged with criminal offences are brought to trial.<sup>1</sup> The court will necessarily look to the harm suffered or likely to be suffered if appropriate orders are not made.<sup>2</sup>

Common grounds include unreasonable delay in bringing the charge, unreasonable failure to investigate, unreasonable failure to disclose evidence and any misconduct by police or prosecutors that would make the trial oppressive or unfair. Where delay is the sole ground of complaint, an accused seeking a permanent stay must be able to show that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.<sup>3</sup>

Whether you can satisfy this test turns on the facts of your particular case. In every case you will need to file a Notice of Motion and an affidavit detailing the circumstances that make the proceedings unfair and likely to bring the administration of justice into disrepute.

## Officious Registrars

I recently applied for stays in two sex cases that were both in the Local Court. The registry at Burwood LC allowed my instructing solicitor to file the Notice of Motion without fuss. On the very same day, the solicitor in the other matter was knocked back at the Downing Centre. I had to attend Level 4 and interact with an extremely officious registrar.

The registrar asserted that the Local Court did not have power to grant a stay and demanded to know what statute I was applying under. I explained that every court has inherent jurisdiction to control its own procedure to prevent an abuse of process or a miscarriage of justice.

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<sup>1</sup> *Jago v The District Court of NSW & Ors [1989] HCA 46; 168 C.L.R. 23 at [20]*

<sup>2</sup> *Jago v The District Court of NSW & Ors [1989] HCA 46; 168 C.L.R. 23 at [19]*

<sup>3</sup> *Jago v The District Court of NSW & Ors [1989] HCA 46; 168 C.L.R. 23 at [21]*

He responded, 'This is not a Court of Common Law. It is created by statute and only has powers that are conferred by statute. It doesn't have inherent jurisdiction.'

I explained that I had already made the application orally and the magistrate had directed me to file a Notice of Motion, affidavit and written submissions. He still refused to take the Notice. In the end he allowed me to file my submissions and affidavit but wouldn't take the Notice. It made no difference as the stay application had already been listed by the Magistrate and the DPP were on notice. I simply filed the Notice at the hearing.

## Implied Powers

It turns out I had used the incorrect term. Instead of 'inherent jurisdiction,' I should have said 'implied power.' The Courts of Common Law had inherent jurisdiction to prevent abuse of their process and to punish for contempt.<sup>4</sup> The Supreme Court and the High Court are superior courts of record and enjoy the same well of undefined powers.<sup>5</sup>

The District and Local Courts, on the other hand, are created by statute and, theoretically, have only the powers granted to them by statute. However, the High Court has held that they also possess '*jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise.*'<sup>6</sup>

In Grassby,<sup>7</sup> the High Court held that one of those implied powers is the power to grant a stay. Dawson J said at [23]:

*'It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be "derived by implication from statutory provisions conferring particular jurisdiction". There is in my view no reason why, where appropriate, they may not extend to ordering a stay of proceedings.'*<sup>8</sup>

I am available every day if you have any interesting issues.

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<sup>4</sup> Reg. v. Forbes; Ex parte Bevan (1972) 127 CLR 1, at p7

<sup>5</sup> Grassby v The Queen [1989] HCA 45; 168 CLR 1 at [21]

<sup>6</sup> Grassby v The Queen [1989] HCA 45; 168 CLR 1 at [21]

<sup>7</sup> Grassby v The Queen [1989] HCA 45; 168 CLR 1

<sup>8</sup> cf. R. v. Hush; Ex parte Devanny (1932) 48 CLR 487, at p 515