QUEENSLAND COURTS AND TRIBUNALS

TRANSCRIPT OF PROCEEDINGS

DISTRICT COURT OF QUEENSLAND

APPELLATE JURISDICTION

JUDGE KENT KC

Appeal No 3262 of 2023

LISA MARIE HOLMAN	**Appellant**
and	
NICHOLAS ADRIAN CAMPBELL	**Respondent**

BRISBANE

12.25 PM, FRIDAY, 22 MARCH 2024

DAY 1

JUDGMENT

Any rulings in this transcript may be extracted and revised by the presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for leave to appeal to the District Court from orders made by the Magistrates Court at Holland Park on the 12th of October 2023. Pursuant to section 45(1)(a) of the Magistrates Court Act an appeal to this Court from an order of the Magistrates Court may only be pursued without leave of the District Court if the action involves an amount that is more than a minor civil dispute limit.

The respondent argues, and with respect I accept, that firstly the minor civil dispute limit as prescribed in schedule 3 of the QCAT Act is $25,000. Secondly, that the claim, as presently agitated, is for an amount less than that, namely $16,473.17. That being the case, this application does require leave and the respondent argues, and I accept, that there are a number of reasons why leave ought not be granted.

To catalogue the history of the dispute and the nature of the orders briefly. The dispute in the Magistrates Court involves an employment claim. Pursuant to Commonwealth legislation there is a jurisdiction to pursue such claims in the Magistrates Court, which was properly done in this case. The original proceedings were filed, I think, in September of 2022 but the applicant through her legal representative filed two further documents in December of 2022 and September of 2023 seeking to tease out further details of the claim, if I express that in relatively neutral language.

The second of those, that is the September 2023 document, which has been pointed out repetitively runs for some 52 pages, enunciates and articulates claims that are significantly broader and more valuable than previously. This provoked an application by the respondent, the applicant in that application in the Magistrates Court, arguing that what was being done, particularly by the second of the two documents, but really by both of them, was to change the nature of the original claims being agitated and thus those documents are now having effect to an amendment to the originating process, something not permitted by rule 377(1) of the Uniform Civil Procedure Rules without relevant leave of the Court having been given.

This provoked the argument which then unfolded on the 12th of October 2023 in the Magistrates Court at Holland Park before Magistrate Philipson. It is not necessary for me to catalogue or repeat the fine details of those proceedings exhaustively, suffice to say that these propositions advanced by the respondent to this appeal are comfortably made out on a reading of the transcript.

Firstly, that during the course of the argument the question emerged as to whether these later documents that I have referred to really represented something that amounted to a relevant amendment of the initiating process or whether they were more properly categorised as merely particulars, which her Honour repetitively enunciated correctly. If they were such particulars they never were needed to be filed. That was a curious aspect of the claim.

That eventually resulted in the repeated concession by Mr Abaza that they were in fact merely particulars. Of course, that being the case, it took the application into the realm of sub rule (2) of UCPR 377, namely being merely particulars leave was no

longer required. Repetitively that was stated to be the position by Mr Abaza and embraced by her Honour. Indeed when her Honour finally returned the respondent's legal representative at the time, Mr Heath, who appears on this application as well, he accepted, given the concessions made, that that was the correct position.

That generated the orders of the 12th of October, which I pause for the moment but will return to it. I cannot see anything in those orders that is incorrect. However, the genesis of this dispute that has arisen on appeal is that the parties disagree about the quantum that is at stake in the action in the Magistrates Court or indeed the conciliation, which was ordered by her Honour to take place in the context of that action. The reason is that the originating process in effect now only claims $16,000-odd or at most, perhaps, $36,000. The enlargement of the quantum to $138,000 in the second lot of provided particulars is not matched by a required amendment in the originating process.

The way the matter appears to have unfolded to me is that in one way or another Mr Abaza has become aware of this, notwithstanding his concessions at the hearing of the original application, and seeks to avoid the effect of her Honour's orders made consequent on his earlier concessions.

Importantly, this being an appeal about procedural orders, namely orders that only really grapple with the provision of particulars to what is, in effect, an originating process or possibility a pleading, it is caught by the often cited statement of principle from the High Court in *Adam P Brown Male Fashions Pty Limited v Philip Morris Incorporated* [1981] 148 CLR 170, in particular at 177, where the plurality of the High Court quoted and adopted, with approval, the often cited statements of Frederick Jordan from *In re the Will of Gilbert*, namely to quote in a compressed way:

> *... there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case,* (namely the practice or procedure class)*, if a tight rein were not kept on interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice.*

From that statement of principle, which of course is quite old - it goes back to 1946 - is the longstanding principle that leave to appeal from procedural orders will be rarely granted and will not be granted in the absence of some impact on substantive rights.

Here, there is in my conclusion no such impact. That is because whatever the status of the arguments about the statutory limit on the appellant's claim they were the same as at October last year as they are now and had not been impacted adversely in any way by the orders made by the Magistrate.

It may well be that the appellant can return to the Magistrates Court and argue for a perceived required increase in the amount of the claim but whatever the fate of those arguments, her prospects on such an application have not been diminished by the

orders made by the Magistrate in this case. The result is that there has been no impact, in my conclusion, on any substantive rights. That being the case and leave being required under the current state of the pleadings, my conclusion is, on that ground alone, that leave ought not be granted to appeal. However, I should say something about the overall merits of the appeal in any case.

In my view the appeal was really stillborn and that is because in the context of the remarks that I have already made, particularly having regard to the content of the transcript, it cannot sensibly be argued that the Magistrate made an identifiable error, which is of course the starting point for an appeal of any nature. Whether it be the kind of one which was being referred by Judge Porter in *James v Calus* [2021] QDC 306 or more broadly, for example see *McDonald v Queensland Police Service* where the Court of Appeal observed that the starting point is an identifiable error as a precursor to any right of appeal.

For the reasons that leave is required and ought not be granted, and in any case the appeal is without merit, in my conclusion leave to appeal will not be granted. So the application is refused.

I should further clarify, though, one aspect of the matter. As I have said, it does lie in the power of the applicant to return to the Magistrates Court and seek to amend her originating process to include the quantum of the claim later agitated in the particulars. The observations that I have made, namely that this falls within the small claims proviso legislation, should not be seen as my determining any application by the applicant to enlarge her claim as being stillborn. It has been said by the parties that – well, it is said in particular by the respondent that the quantum is limited to $20,000 because of the provisions in force at the time in the Fair Work Act.

My conclusion that it is under the small claim limit are not premised on the interpretation of the Fair Work Act, rather they focus on the existing state of the pleadings. That is, the originating process claims an amount, as the respondent says, which is under the small claim limit and it is on that basis rather than any particular exercise in statutory interpretation of the Fair Work Act that I reach the relevant conclusions.

The result will be that the application for leave to appeal is refused.

On the issue of costs, correspondence which was without prejudice save as to the issue of costs made an offer as early as January of this year to resolve the appeal on a basis that each party would bear their own costs. The respondent has been wholly successful on this application on a basis identified in this outline of argument, which perhaps importantly – I am not sure when it was served but it bears a date three days before the correspondence in January making that offer.

The offer was left open until the 25th of January 2024 so there was sufficient time for the applicant to be apprised of all of the arguments agitated in the respondent's outline - which have been wholly successful today - before reaching a concluded position about the offer.

Costs pursuant to the UCPR are discretionary. The default position is what is often known as standard costs follow the event, however there are circumstances that sometimes give rise to what is also known as indemnity costs. In my view, the applicant's arguments, which I have identified in the primary reasons for judgment, were without merit. The respondent's arguments, on the other hand, were forceful and in the context of that and the correspondence at least of January 2024. In my view this is an appropriate case for the award of indemnity costs.

Thus the orders so far as costs are concerned are that the applicant will pay the respondent's costs of the application for leave to appeal on an indemnity basis.

Mr Heath, I often ask for parties who are successful to send me a written version of the orders so that I can just make them a typewritten document that is on the Court file and everyone can see clearly what was ordered. As indeed happened in the Magistrates Court in this case. Can you arrange to do that?

MR HEATH: Happy to do that and send it to your associate, your Honour.

HIS HONOUR: Yes, and copy Mr Abaza in, of course – – –

MR HEATH: Yes, of course.

HIS HONOUR: – – – so there is no dispute about it.

MR HEATH: Yes, I will get that prepared today.

HIS HONOUR: That being the case, I have made the orders but I make the orders in a written form and that will be on the Court file.

MR HEATH: The application for leave to appeal is dismissed and the applicant pay the respondent's costs of the application for leave to appeal.

HIS HONOUR: Of the application on the indemnity basis.

MR HEATH: On the indemnity basis, yes, I understand.

HIS HONOUR: Okay. Thanks for your help, everyone.