COURT OF APPEAL

MORRISON JA

Appeal No 13879 of 2018
DC No 169 of 2017

Morrison JA

JAMES PATRICK CECIL GOTT	**Applicant**
v	
STEPHEN PAUL TOOGOOD **JULIANNE TOOGOOD**	**Respondents**

BRISBANE

FRIDAY, 1 FEBRUARY 2019

JUDGMENT

MORRISON JA: This is an application brought by the respondent, Mr Gott, to strike out or dismiss an application for leave to appeal and for an extension of time, filed by the appellants (Mr and Mrs Toogood)[1] on 17 December 2018.

A short synopsis of the history behind the application for leave to appeal is necessary. Proceedings were instituted by Mr Gott against the Toogoods, in the District Court of Queensland, seeking damages for defamation. Mr Gott is the Chief Executive Officer of the Cassowary Shire Council ("**the Council**") and a dispute between the Toogoods and the Council seems to have been a catalyst for the litigation involving them.

[1] To whom I shall refer as "the Toogoods" unless the context requires me to distinguish between them.

The Toogoods made a complaint to the Council concerning the conduct of the then Deputy Mayor. That complaint was investigated by the Council, but the Toogoods were not satisfied with that investigation. They are alleged to have sent a number of emails to various councillors, council staff and others, relating to their complaint and the investigation conducted by the Council. Mr Gott alleged those communications were defamatory of him.

In the District Court proceedings Mr Gott relied upon the contents of a telephone conversation between the Toogoods and a councillor as containing defamatory imputations.

On 2 November 2017 a number of interlocutory applications were heard by Lynham DCJ. On 26 April 2018 various orders were made in relation to the pleadings, including striking out parts of the defence, ruling that there were deemed admissions, and dismissing an application to strike out the statement of claim.

Subsequently to that it became apparent that there was an audio recording of the telephone conversation which, the Toogoods contend, was made in contravention of the *Invasion of Privacy Act* 1971 (Qld). The Toogoods contended on interlocutory applications that the circumstances in which the telephone call was recorded was "criminal activity" within the meaning of the *Invasion of Privacy Act*, and the use of that audio recording in support of the defamation allegations is prohibited.

The existence of the audio recording was eventually admitted, and a copy of it was provided to the Toogoods on 10 October 2018.

The circumstances in which the audio tape were disclosed, and the contention that it breached the *Invasion of Privacy Act*, are central features in the Toogoods' contentions in respect of the application for leave to appeal. In short, it is contended that there were various errors made by Lynham DCJ because he was lead to believe there was no audio recording when, in fact, there was.

Separately, the Council applied to the Supreme Court under sections 5 and 6 of the *Vexatious Proceedings Act* 2005 (Qld), seeking orders declaring the Toogoods to be vexatious litigants. That matter came before Justice Applegarth on 29 November 2018.

After hearing the matter orders were made based upon undertakings given by the Toogoods. Those orders were to take the application to a final hearing. The relevant orders are in the following terms:

> "UPON THE Respondents Stephen Paul Toogood and Julianne Toogood undertaking not to file any further proceeding in a Court or Tribunal without the prior leave of a Judge of the Supreme Court or the District Court until the hearing and determination of the Amending Originating Application filed by leave on 29 November 2018:
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> 1. The application is adjourned is adjourned to a date to be fixed.
> 2. The Respondents are to file and serve by 9 January 2019:
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> (a) Any further responding affidavit material upon which they intend to rely; and
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> (b) A schedule or similar document which responds to the Applicant's Outline of Submissions and schedules thereto.
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> 3. The hearing of the application under Sections 5 and 6 of the Vexatious Proceedings Act 2005 be set down for a hearing to last less than one day in the Civil List in Brisbane.
> 4. The matter not be listed until after March 2019 and only after Applegarth J has ascertained from the parties their availability and the availability of their Counsel."

The reason for orders 3 and 4 was that on 26 September 2018 the District Court proceedings had been set for trial in March 2019, for three days commencing 4 March 2019.

The application for leave to appeal was filed on 17 December 2018 without having sought "the prior leave of a judge of the Supreme Court". The application to strike out is brought on that basis and because the undertaking was breached.

There can be no doubt, in my respectful view, that the application for leave to appeal in CA 13879 of 2018 is a "further proceeding" as contemplated by the orders by Applegarth J. The *Uniform Civil Procedure Rules* 1999 (Qld) provides in rule 8(1) that "a proceeding starts when the originating process is issued by the court". Rule 8(2) provides that a notice of appeal subject to leave is an originating process issued by the court.

There is no challenge to the fact that the Toogoods did not seek or obtain "the prior leave of a judge of the Supreme Court" before filing the application for leave to appeal.

In my view it is plain that the undertaking recorded in the orders made on 29 November 2018 extends to the filing of the application for leave to appeal. Thus, it was a breach of the undertaking to file the application for leave to appeal and the fact that it was filed without the required prior leave of a judge means that it is susceptible to being struck out as an abuse of process.

The Toogoods submitted that when regard is had to the transcript of the hearing before Applegarth J,[2] it becomes apparent that the order was not intended to extend to a proceeding such as the application for leave to appeal. The order stands to be construed primarily on its face as a self-contained document. Whilst it may be appropriate to refer to a judge's reasons for judgment to construe the orders in context,[3] the same cannot necessarily be said of what passes in the course of submissions. One obvious reason for that is the fact that what is said does not necessarily reflect final conclusions. Except in limited circumstances, such as the slip rule, demonstrated ambiguity or where the order is susceptible to more than one meaning, the proper construction of an order would not normally be affected by what is said in the course of the hearing leading to that order. The proposition that resort should be had to the transcript in order to construe an order was rejected by the Full Court of the Federal Court in *Siminton v Australian Prudential Regulation Authority*.[4]

I do not consider the order to come within the qualifying categories. In any event, reference to the transcript does not support the Toogoods' contentions.

The main thrust of the orders sought by the Council was to stay proceedings in the Queensland Civil and Administrative Tribunal (**QCAT**). In the course of discussing what directions might be made to bring the application on for hearing, and what harm would flow to each side of the proceedings if orders were or were not made, an issue arose as to whether interim relief staying further proceedings in QCAT should be granted pending the hearing.[5] In the course of that discussion Mrs Toogood indicated that they would agree "to not filing

[2] A copy of the transcript was exhibited to material made available on this application.
[3] See: Athens v Randwick City Council (2005) 64 NSWLR 58; [2005] NSWCA 317 at [28]-[36]; Sertari Pty Ltd v Quaker's Hill SPV Pty Ltd [2014] NSWCA 340 at [77]; Ross v Lane Cove Council (2014) 86 NSWLR 34; [2014] NSWCA 50 at [29]-[31].
[4] [2008] FCAFC 90 at [22]-[23].
[5] Transcript T1-28.

any new applications" in QCAT.[6] That indication was confirmed by Mr Toogood shortly thereafter.[7] Applegarth J expressed the view that it would not be just QCAT proceedings, but "any proceedings".[8]

In the course of discussion about whether interim orders would extend beyond the QCAT proceedings, the Council's position was that it would press for no more than that there be an undertaking not to file "any further applications in any proceedings, including interlocutory applications without the consent of the court", which in context was a reference to the District Court.[9]

The submissions then turned to the defamation proceedings in the District Court, with it being made clear that the Council did not wish to interfere if the plaintiff in that proceeding (Mr Gott) wanted to proceed to a trial in March.[10] In that context Applegarth J framed the required undertaking as being "not to file any further proceedings … in a Court or Tribunal, without the prior leave of a judge of the Supreme Court".[11]

That undertaking was then read out and the Toogoods were asked if they understood it.[12] Then, after dealing with procedural matters concerning the steps to bring the application on for hearing, the undertaking was read again and the Toogoods indicated that they understood it.[13]

Shortly thereafter Applegarth J referred to the fact that the defamation proceeding was coming on for hearing in March. At that point Mr Toogood mentioned that "there's an appeal about to be filed in that matter".[14] Upon ascertaining that Mr Toogood meant an appeal to be filed by them in the defamation proceedings, Applegarth J responded "No, you just gave an undertaking not to file any further proceedings".[15] Then followed this exchange:[16]

> "RESPONDENT S. TOOGOOD: Not in the defamation proceeding, your Honour. We spoke to that because … there's been breach of disclosure orders which has only just now been put up by the court.

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[6] T1-30 line 16.
[7] T1-31 line 30.
[8] T1-31 lines 34-38.
[9] T1-32 lines 27-31.
[10] T1-34 lines 6-25.
[11] T1-34 lines 31-37.
[12] T1-35 lines 29-33.
[13] T1-42 lines 20-40.
[14] T1-43 line 11.
[15] T1-43 line 29.
[16] T1-43 line 32 to T1-44 line 26.

> They've been ordered to provide. They have disclosed. They haven't actually said … where they got the document from. There's critical evidence that's crucial to our defence that is going to require an application from us between then and now, and we have an appeal that's almost finished. It's out of time, but it's in time because it's based on fraud – based on breach of disclosure orders.
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> HIS HONOUR: Okay.
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> RESPONDENT S. TOOGOOD: It'll be an interlocutory application ---
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> HIS HONOUR: No, no, no, that's exactly what I'm guarding against, that you [sic] vexing whether it's the council, council officers, someone else you need leave of a judge to bring those types of ---
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> RESPONDENT S. TOOGOOD: Against the applicant.
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> HIS HONOUR: --- proceeding.
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> RESPONDENT S. TOOGOOD: Yes, and we ---
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> HIS HONOUR: No, no, no, this is any further proceeding.
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> RESPONDENT S. TOOGOOD: We have no proceeding against Mr [Gott]. It's his proceeding against us. We have a right to [indistinct] it's a civil trial. We have a right to actually – well, you've taken our right away to actually put an appeal in there.
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> HIS HONOUR: Well, you need leave – you told me you need leave of the Court of Appeal to file any appeal ---
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> RESPONDENT S. TOOGOOD: Actually, that's correct.
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> HIS HONOUR: --- Because it's out of time.
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> RESPONDENT S. TOOGOOD: Yes, your Honour. So that would qualify under what you're saying here.
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> HIS HONOUR: So you can ask a judge of appeal to grant you leave as well.
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> RESPONDENT J. TOOGOOD: Thank you."

What then followed was a reference to the fact that another District Court judge had foreshadowed that there might be further interlocutory applications in the District Court defamation proceedings, which prompted Applegarth J to amend the required undertaking to refer to "the prior leave of a judge of the Supreme or District Courts".[17] As discussion continued Applegarth J then made it clear that in respect of the District Court "you'd need the leave of either a Supreme Court judge or a District Court judge to bring an interlocutory

[17] T1-45 line 3.

application … in that proceeding".[18] That the Toogoods understood the extent of the undertaking is clear by the passage immediately following:[19]

> "HIS HONOUR: You need the … the prior leave of a judge of the Supreme or District Court to bring any further proceedings in a Court or Tribunal.
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> RESPONDENT S. TOOGOOD: **It's like a vexatious proceeding order. I need leave before I do it.** So ---
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> HIS HONOUR: Yes.
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> RESPONDENT S. TOOGOOD: --- **It's a quasi – but I agree to it.** It's an undertaking. I agree to that.
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> HIS HONOUR: Okay. And Mrs Toogood, you understand the undertaking?
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> RESPONDENT J. TOOGOOD: Yes I do."

Before me it was accepted by Senior Counsel for the applicant, Mr Fraser QC, that if the application for leave to appeal was struck out, it would be without prejudice to the right of the Toogoods to seek the leave required under the order of Applegarth J, and if that leave were granted, to file another application for leave to appeal.

I pause to note that in the course of the hearing of this application I mentioned a second proposed application for leave to appeal, which the Toogood's attempted to file on 16 January 2019. That related to orders made in the defamation proceedings on 19 December 2018 by Coker DCJ. As prior leave had not been sought to file that application the Registry correctly refused to accept it. The Toogoods made it plain that they intend to pursue the grant of leave in order to file that application for leave to appeal.

The application for leave to appeal in the present case was filed in breach of the order of Applegarth J, which was predicated upon the prior leave of a judge of the Supreme Court being obtained before filing any further proceedings in the Supreme Court. It should therefore be struck out, without prejudice to the right of the Toogoods to file again if that leave is obtained.

The applicant sought that the Toogoods pay the applicant's costs on the indemnity basis. That order was resisted on two essential grounds. The first was that the Toogoods had

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[18] T1-46 lines 5-10.
[19] T1-46 lines 18-31; emphasis added.

misunderstood the terms of the undertaking, believing as a consequence of the exchange between them and Applegarth J that it did not extend to an appeal from the orders of Lynham DCJ. Secondly, it was contended that the application had been brought without any attempt to communicate with them, or to bring to their attention the fact that it was contended that the application for leave to appeal had been filed in breach of the order and undertaking.

I reject the contention that the Toogoods were under a misunderstanding. The passages to which I have referred make it plain, in my respectful view, that they fully understood that an appeal of this kind would require prior leave. Mr Toogood's response at the end of the passages referred to above show he understood it operated in the same way as the leave required to be obtained by a vexatious litigant. Therefore, the conclusion I draw is that the proceedings were not filed under some misapprehension.

It is true that there was no communication between the applicant and the Toogoods prior to the filing of the application. However, had such communication been attempted it would, in my respectful view, have almost certainly drawn the same response as was made by the Toogoods in argument before me. In such a circumstance the application would have been necessary in any event.

Given that the application for leave to appeal was filed in breach of the undertaking and order of Applegarth J, and an application was necessary to strike it out, the Toogoods should pay the applicant's costs on the indemnity basis.

The orders are as follows:

1. Application for leave to appeal, CA No 13879 of 2018, is struck out, without prejudice to the right of Mr and Mrs Toogood, the named appellants, to file an application for leave to appeal should leave be granted within the terms of the order of Applegarth J made on 29 November 2018.

2. The respondents are to pay the applicant's costs on the indemnity basis.