SUPREME COURT OF QUEENSLAND

CITATION:	*Toogood & Anor v Cassowary Coast Regional Council* [2019] QSC 60
PARTIES:	**STEVEN PAUL TOOGOOD** (first applicant) **JULIANNE TOOGOOD** (second applicant) **v** **CASSOWARY COAST REGIONAL COUNCIL** (first respondent) **JAMES PATRICK CECIL GOTT** (second respondent)
FILE NO/S:	BS No 2012 of 19
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Ryan J
ORDER:	**1. The application for leave to file an application under rule 667 of the Uniform Civil Procedure Rules 1999 is dismissed.**
CATCHWORDS:	CIVIL PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – GENERALLY – Where undertaking given to the court not to file further proceedings without leave – Application for leave to file application under rule 667 *Uniform Civil Procedure Rules* 1999. *Gerlach v Clifton Bricks Pty Ltd* (2009) 209 CLR 478
COUNSEL:	Mr Toogood prepared the written submissions on behalf of the applicants
SOLICITORS:	(N/A)

[1] On Wednesday 13 March 2019, at 9.15 am, I delivered by reasons in the matter of *Toogood and Anor v Cassowary Coast Regional Council and Anor* (file number 2012/19).

[2] I dismissed the application by the Toogoods to vary the undertaking given by them not to file further proceedings without leave. I also dismissed three applications by the Toogoods for leave to file further proceedings (namely, applications for leave to appeal/leave to appeal out of time). They did not pursue two applications for leave to apply for a stay of proceedings.

[3] On Friday 8 March 2019, at 4.54 pm, the applicants attempted to file, by e-mail, this present application. The registry does not accept documents for filing by e-mail and the Toogoods were so informed. The present application was not received by the court in paper form until 18 March 2019, when it was filed.

[4] Before dealing with the application, I observe that it is reasonable to assume that the applicants are very desirous of obtaining a grant of leave from this court to allow them to pursue an application for leave to appeal from the interlocutory decisions made in the course of the defamation proceedings and that they are making every attempt to persuade this court to grant that leave, including by way of this present application.

[5] I also observe that the applicants may not be aware that a party may challenge the correctness of a *final* judgment on the ground that some interlocutory decision, *which was relevant to the final result*, was wrong, even if there has been no appeal from the interlocutory decision: see *Gerlach v Clifton Bricks Pty Ltd* (2009) 209 CLR 478 [5] – [6] and [49].

[6] The present application is for leave to file proceedings under rule 667 of the *Uniform Civil Procedure Rules* 1999 in relation to the order I made on 13 March 2019.

[7] I treated this application as akin to one brought under section 11 of the *Vexatious Proceedings Act* 2005 (VPA).

[8] I intended to deal with it in a manner similar to that permitted by section 12 of the VPA – that is, without an oral hearing and ex parte in the first instance. I now know, having seen relevant email correspondence, that the respondent became aware of this application when it was emailed to the registry. The respondent has indicated its opposition to the granting of leave. I have taken that opposition into account.

[9] Although this is an application for leave to file an application for the setting aside or variation of my order *made* on 13 March 2019, I note that the application was emailed to the registry *before* I had made any order. Nevertheless, I will treat it as an application relating to my order as made.

[10] Treating the application as akin to one made under the VPA, the question for me is whether the proceeding in respect of which leave is sought is vexatious, in the sense that it would vex the respondent or be an abuse of process. Relevant to those considerations is whether the proposed proceeding has reasonable prospects of success.

[11] The applicants contend that further evidence has come to light which warrants the setting aside or variation of my order. I will proceed as if such a development is sufficient to engage rule 667.

[12] The "evidence" relied upon by the applicants is –

- the reasons of His Honour Judge Coker, dated 27 February 2019;
- a bankruptcy notice;
- an enforcement warrant; and
- an application by the respondent to set aside the decision of Coker DCJ, staying the trial of the civil matter, pending the conclusion of the criminal proceedings.

[13] The applicants argue, in effect, that the reasons of Coker DCJ would persuade me to set aside or vary my order, in particular because of his Honour's concerns about the respondent's application under the VPA.

[14] The applicants argue that proceedings under the VPA are an abuse of process (which is why his Honour is "concerned" about them) and ought not to be continued. For that reason, they argue that I should vary my order to allow the undertaking to be varied in accordance with their originating application.

[15] They also suggest that statements made by his Honour support my granting the applicants leave to apply for leave to appeal the interlocutory decisions which had been the subject matter of the application which I determined.

[16] In his reasons of 27 February 2019, his Coker DCJ –

- informed the parties of the potential involvement of his son, a Crown Prosecutor in Cairns, in the criminal prosecution of the applicants, and his son's determination not to have anything to do with the matter;
- explained that, having considered his son's position, he decided to consider the defamation proceeding "in its entirety" – the hearing of the claim having been listed to commence before his Honour on 4 March 2019;
- noted the applicants inappropriate and unacceptable communications with him and his associate – and described them as "one of the many issues that arise in relation to this matter";
- expressed his concern that, although the trial is listed for three days, it will take much longer than that – based on the way in which the (unrepresented) applicants have conducted their interlocutory applications;
- expressed his concerns that the undertaking given by the applicant to his Honour Justice Applegarth was interfering with the applicants preparation of their defence to the defamation proceedings, insofar as they have been unable to have subpoenas issued;
- noted that, in his view, steps taken in the course of preparing for the defamation hearing would fall within the expression "further proceedings" and indicates the importance of the applicants being able to properly prepare their defence to the defamation claim;
- noted that the criminal proceedings are underway, and considered – even though an application for a stay of the defamation proceedings was not before his Honour – whether the defamation proceedings ought to be stayed pending the finalisation of the criminal proceedings;
- in that context, noted the need to balance justice between the parties and the defendant's "right of silence" in a criminal trial but observed that it would be unlikely for the applicants to remain silent in their criminal trial; also in that context, notes the effect of a stay on the plaintiff needs to be considered;
- considered the possibility that publicity about the civil proceedings might reach and influence the jurors in the criminal proceeding, especially having regard to an article in the Cairns post which mentioned the applicants' arguments about the privacy legislation and incorrectly suggested that the Toogoods had been declared vexatious litigants;
- was troubled by disclosures in the press, such as a suggestion that the applicants had been declared vexatious litigants and expressed his concern "in that regard";
- was concerned that were the defamation proceedings to proceed, that might lead the jurors in the criminal trial to "judgment";

- presumed that members of the media searched court files to uncover information about the Toogoods;
- expressed his concern about the matter proceeding, because of –
  - the applicants being engaged in both civil and criminal proceedings, unrepresented;
  - "the possibility of the removal of the plaintiff's right of hearing in the normal course";
  - "the possibility of determinations in the Supreme Court which remain outstanding, which may, in fact, give alternative positions in relation to the matter";
- referred to the need to recuse himself because of his son's employment as a Crown Prosecutor in Cairns;
- referred to the applicants' previous suggestions of inappropriate relationships between persons involved in the proceedings and the inappropriate actions of others; and
- concluded that he ought to recuse himself in respect of the civil and criminal proceedings.

[17] His Honour appreciated that the defamation hearing could not proceed on 4 March 2019. His Honour "stayed" the further listing of that matter for mention until after this court determined the applicants' application in 2012/19 (that is, after my determination of it) and "considering" when the criminal proceedings might commence.

[18] Nothing in his Honour's reasons provides a basis for my setting aside or varying the order I made.

[19] His Honour's observation that the outcome of the hearing before me "might give rise to alternative positions" was a neutral comment. I respectfully acknowledge that his Honour would have appreciated that it would not be proper to make anything other than a neutral comment in that context.

[20] His Honour's concerns about media reports about the proceedings under the VPA have no bearing on the application which I heard. The applicants seek to rely on those concerns in support of their argument that the VPA proceedings are themselves an abuse of process. But I was not dealing with the VPA proceedings. I was dealing with the variation of an undertaking. The question I had to answer was whether it would be unjust to *hold* the applicants to their undertaking which was given to allow for a pause in the litigation between the parties pending the determination of the VPA proceedings. While I acknowledge that the answer to the question for me depended to a large degree

upon the consequences of a variation of the undertaking and the proceeding that it might encourage or permit, Coker DCJ's concerns about media reporting were irrelevant to the answer to question.

[21] As I understand the argument about the bankruptcy notice emailed to the applicants on 5 March 2019, the complaint is that the applicants cannot "file against" it without leave. The applicants have not indicated what "proceedings" they might wish to file in response to the bankruptcy notice, if indeed there are any relevant proceedings which might be filed.

[22] As I understand the argument about the enforcement warrant which was filed on 6 March 2019, the complaint is similarly that the applicants cannot "file against" it without leave. The applicants have not indicated what "proceedings" they might wish to file in response to the enforcement warrant, if indeed there are any relevant proceedings which might be filed.

[23] Those developments therefore do not provide a reason to set aside or vary my order. The applicants are *respondents* to the bankruptcy notice and the enforcement warrant. As respondents, they may respond appropriately to the notice and the warrant without the leave of this court. An appropriate response is unlikely to require the filing of further proceedings.

[24] As I understand the argument about the respondent's application to have the decision of Coker DCJ about the stay set aside, the complaint is that the applicants withdrew their applications for leave to apply to stay proceedings *because* of the order made by his Honour. Their argument seems to be that, had they know that a rule 667 application was going to be made, they would have pursued the applications in paragraphs 5 and 6 – or perhaps at least the application in paragraph 6.

[25] The applications in paragraph 5 and 6 were not before me and my order did not relate to them. Regardless, the order for the stay made by his Honour Judge Coker remains in place unless and until his Honour varies it. The fact of the rule 667 application does not warrant the setting aside or variation of my order. I note again that the applicants are *respondents* to the rule 667 application before his Honour Judge Coker. It is

reasonable to assume that they would wish to file *submissions* in response to such an application. Filing submissions as respondents would not be contrary to the undertaking and would not require leave.

[26] The applicants suggest some impropriety on the part of the respondent in relation to the bankruptcy notice, the enforcement warrant and an application to his Honour under rule 667 which would warrant my setting aside or staying my order. I do not accept that the respondent has acted improperly in any respect.

[27] In summary – the arguments made by the applicants do not persuade me that my order of 7 March 2019 should be stayed or varied. It follows that an application to vary it would not have reasonable prospects of success and would vex the potential respondent to it were it to be made.

[28] Accordingly, I dismiss the application for leave to bring such an application.