

COURT OF APPEAL

McPHERSON JA  
MACKENZIE J  
ATKINSON J

Appeal No 5364 of 2001

MAM MORTGAGES LIMITED (In Liquidation) Non party to appeal  
(First plaintiff)

and

MELBOURNE ASSET MANAGEMENT NOMINEES Non party to appeal  
PTY LTD (Second Plaintiff)

and

DASCAM PTY LTD First Respondent  
(trading as CAMERON BROTHERS) (First Defendant)

and

DAVID ALLAN STUART CAMERON Second Respondent  
(Second Defendant)

and

RICHARD WILLIAM CAMERON Third Respondent  
(Third Defendant)

and

DAVID ALLAN STUART CAMERON AND  
WAVERLEY JOHN CAMERON

Fourth Respondent  
(Fourth Defendant)

and

HIH CASUALTY & GENERAL INSURANCE  
LIMITED

Appellant  
(Third Party)

BRISBANE

..DATE 31/05/2002

JUDGMENT

McPHERSON JA: In action numbered S1562/96 between MAM Mortgages Limited as plaintiff and what I will call the three Cameron defendants, Mr Justice Douglas gave judgment on the 18th of May 2001 dismissing the plaintiff's claim with costs. There is an appeal against that judgment which will be heard in the Court of Appeal beginning on the 17th of June this year. It is a very large appeal, involving, I am told, some 46 or 48 volumes or record, for which three full hearing days have been set aside.

The appellant, who is the applicant before us in this matter, is HIH Insurance Limited. It was the third party in claims by the Cameron defendants for indemnity under an insurance policy or policies issued in their favour. On the 18th of May, or it may be in a separate judgment on the 24th of May, his Honour, Mr Justice Douglas, gave judgment for one of the Cameron defendants, R W Cameron, for a sum of some \$179,000 arising out of what the learned trial Judge found to be a repudiation by HIH of its liability under an insurance policy. He also ordered HIH, as third party, to pay the costs of the third party proceedings in the action.

HIH purported to appeal against that order for costs. That feature of the appeal was the subject of observation and remark when the matter came before the Court of Appeal on the 22nd of February 2000 on an application by the Cameron defendants for security for costs of the appeal. Justice

Davies, with the support of the other two Judges of Appeal, of whom I should note I was one, intimated that the appeal was incompetent by virtue of s.253 of the Supreme Court Act 1995, which precludes any appeal as to costs only, except by leave of the Judge who made the costs order.

No application for leave had been, or has been made, by HIH for leave to be given by the Judge who made the costs order in this case. Instead, HIH has now applied to amend the notice of appeal by inserting in it an appeal against the judgment for \$179,000 in favour of R W Cameron, or, alternatively, to extend the time for appealing against that judgment. No explanation for the delay in mounting that appeal has been given, and it may be remarked that it is now over a year since the judgment sought to be appealed against was delivered.

That is one reason for refusing to allow the amendment or the application to extend time at this late stage. Another is that it has, to my mind, all the hallmarks of a device for avoiding the prohibition in s.253. Yet another is that, until the amendment is allowed and takes effect, and probably even then, it remains an appeal against an order for costs only.

It is, in that sense, an appeal that was commenced without leave and one which is incompetent, and which is beyond the authority of this Court to entertain. Another reason is that the judgment for \$179,000, to which it is sought to annex the

costs appeal, is a judgment against only one of those defendants, namely R W Cameron, so that the other two defendants are not affected by it even if the amendment were to be allowed. As to them, it would remain an appeal as to costs only.

If the appeal against the judgment given in favour of R W Cameron were to be permitted, and if it were successful, it would, of course, carry the costs of those proceedings without the need for a distinct appeal against the costs order without leave.

The real point of the case, however, is that there appears to be a good deal of effort being put into trying to ensure that one side or the other appeals in this matter, without perhaps running the risk of facing orders for costs or orders for security for costs; and we are really being asked to look at something in advance of the appeal that it is not, at this stage, easy to see the need for.

My view is that, having regard to the very long delay that has taken place since the judgment for \$179,000 was given, and because the prospective appellant, HIH, had fair warning from this Court in February that an application should be made soon after that time for any amendments needed to sustain such an appeal, and, since nothing was done from that time onwards until the application was made two days ago, it is the proper

course here to strike out the appeal and to refuse the application to amend the notice of appeal and the application to extend the time within which to appeal against that judgment.

We have been warned that some difficult and possibly unfortunate consequences may arise in the course of the appeal if this application is not allowed; but I think that we must face those consequences at the time of the appeal and, for my part, not, for that reason, abstain from doing our duty of disposing of this application now.

Hence, for the reason I have stated, namely that there really is no explanation for the long delay in making this application, which was not made until very recently, the application should be refused. I would do so with costs.

MACKENZIE J: For the reasons given by Justice McPherson, I agree.

ATKINSON J: The unexplained delay would, in my view, now make it unjust to allow the application to amend the notice of appeal or to extend the time to lodge an appeal made by HIH and I agree with the orders proposed and the reasons of Mr Justice McPherson.

McPHERSON JA: Now, Mr Duffy, that leaves your application for security for costs somewhat hanging in the air. There are, I suppose, two possible ways you could deal with it, one is to

dismiss it, because it is no longer necessary, and I would be inclined to think you would get your costs on that.

MR DUFFY: Yes, your Honour.

McPHERSON JA: The other way might be to adjourn it in case it becomes necessary again, but I think it probably wouldn't be necessary to do that.

MR DUFFY: It could only be necessary if this appeal itself was revived in some way which, following the order of the Court, it seems unlikely. If a new appeal somehow emerges, then we'd be left to ask for security in respect of that.

McPHERSON JA: I suppose you could refer in your application then to all the material you filed on the last occasion, so you're not losing much by it.

MR DUFFY: No, your Honour. So that I'd ask for the costs of each of the three applications involved. There was the application for security, the application to strike out and my learned friend's application for the leave or extension point.

McPHERSON JA: Yes, the striking out application has succeeded, hasn't it?

MR DUFFY: Yes, your Honour.

McPHERSON JA: Well, I suppose the best way of doing it is to say the appeal against the order for costs is struck out with costs, which means that application succeeds with costs. The application for security for costs has become unnecessary now and should be dismissed, I will say with costs, but Mr McMurdo is entitled to address on that, and the application for extension of time within which to institute an appeal against the judgment for \$159,000 is dismissed, again I will say with costs, and allow Mr McMurdo to address on those costs questions if he chooses to do so.

MR DUFFY: Your Honour did say in relation to the security for costs that it would be dismissed with costs. Ordinarily that would mean to the respondents. I take your Honour meant to the applicants.

McPHERSON JA: I did mean that and I should have been more careful about it.

MR DUFFY: I am sorry, your Honour.

McPHERSON JA: That application for security for costs will be dismissed but the respondent to that application must pay the applicant's costs of and incidental to the application for security for costs. Right. Now, you may-----

MR McMURDO: I don't wish to be heard on anything, your Honour.

McPHERSON JA: Thank you, Mr McMurdo. May I make one other point at this time in my potential capacity as presiding Judge of that long appeal. I had a look at the judgment or the form in which it was taken out, that is the one given by Mr Justice Douglas on the 18th of May and I found it difficult to follow because the form of the order in a sense followed what his Honour said too closely. For one thing, there seems to be one order incorporating judgment in two actions.

MR DUFFY: Yes, your Honour.

McPHERSON JA: And I know I will be told that the actions were heard together, but that is not good enough. The actions weren't consolidated and if you want to see a short discussion of the difference between consolidating and hearing them together you might like to look at Young and Young 1954 Queensland Weekly Notes 27. I am not trying to give you a lecture, I am just trying to say that it would be better if, when we came to hear the appeal, we had an order in the MAM Mortgages action and a separate order in the Piesse action because they are all mixed up in the one now.

MR DUFFY: Your Honour, in fact I understand that that has been done, notwithstanding the two orders taken out reflecting what, with respect, appears to be a narrative sense of what was said. I have personally been involved in redrawing orders, so to speak, to separate out the Piesse and the MAM action and in the MAM action, at least, to incorporate all of the orders on whatever date made.

McPHERSON JA: Yes. All right that will help, but at the moment I find it difficult to work out just which order was made in which action without going back each time to have a look at what preceded it and it won't help the elucidation of whatever is in issue on the appeal.

MR DUFFY: I am instructed that the revised orders, so to speak, in each action have now, in fact, been taken out so that hopefully, if I have got it right, that has been attended to.

McPHERSON JA: Well, you can let the Registry have them then and we will get them in due course.

MR DUFFY: And what I mean is that they have been filed I understand, your Honour.

McPHERSON JA: Oh really. So when I asked for one the other day I ought to have got one of those perhaps. All right, thank you very much.

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