SUPREME COURT OF QUEENSLAND

CITATION:	*Molony & Anor v ACN 009 697 367 P/L* [2002] QCA 420
PARTIES:	**RAY MOLONY AND INTERNATIONAL JOCKEY SCHOOL PTY LTD** ACN 085 035 383 (plaintiff/appellant/applicant) **v** **ACN 009 697 367 PTY LTD (FORMERLY FRED MARSH PTY LTD) (IN LIQUIDATION)** ACN 009 697 367 (defendant/respondent)
FILE NO/S:	Appeal No 6356 of 2002 SC No 85 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave to Appeal Application for Extension of Time
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EXTEMPORE ON:	10 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2002
JUDGES:	McMurdo P, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Dismiss application for leave to appeal with costs. Extend to 25 October 2002 the time within which the appellant or the second plaintiff may appeal against the order made on 20 June 2002.**
CATCHWORDS:	APPEAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – Application for leave to appeal not required – Extension of time in which to appeal where no prejudice to defendant
COUNSEL:	The appellant appeared on his own behalf A W Duffy for the respondent
SOLICITORS:	Ebsworth & Ebsworth for the respondent

McPHERSON JA: The first plaintiff in proceeding number 85 of 2001 in the Supreme Court Registry in Cairns is an individual named Ray Moloney. The second plaintiff in the

action is International Jockey School Pty Ltd which is a company controlled by the first plaintiff.

The proceedings were instituted on 27th June 2001 claiming damages for breach of contract and contravention of the Trade Practices Act against the defendant which is a company formally named Fred Marsh Pty Ltd that went into voluntary liquidation on 2nd October 2001 after Mr Marsh, who was the sole shareholder, died. Leave to proceed against the defendant company does not seem to have been obtained, but it is solvent and one would not expect that there would be much difficulty in obtaining leave in those circumstances if indeed it is needed.

The claim for damages is based on what is alleged to have been a written agreement for a lease of land for a period of slightly more than three years. It cannot therefore have taken effect as a lease, but only, at best, as an equitable lease on the principle in Walsh v. Lonsdale, but the plaintiffs - or at least the first plaintiff - are entitled to sue on it as a contract and that is what they or he have done.

The major problem in the way of a trial of the action seems to have been that there is a dispute about the existence of the lease or perhaps the validity of its execution by Mr Marsh on behalf of the defendant. That, however, is a matter for determination at trial and does not directly concern us here.

The subject of this application to the Court of Appeal is an order made by Justice Jones on 20th June 2002 that the second plaintiff, the company, give security for the defendant's costs of the proceedings and do so within 28 days of that order. That was the order numbered 2 that was made by his Honour on that date.

Order number 3 was that in the event of the second plaintiff failing to provide "such security" within 28 days, "the proceedings" be stayed until the order for security for costs

is complied with. An obvious difficulty with an order of that kind is that it is not quantified. How can one tell if the costs of the proceedings have not been secured in accordance with the order within 28 days or at all unless one knows how much they are?

It has been pointed out that there is a reference to an amount of some $35,000 as the quantum of the security to be provided, but it is in the Judge's reasons and not in the order itself as it should have been. In the end, however, the question of whether or not there was default and compliance with the order is not the matter being debated here.

There is no doubt that his Honour was justified in making an order for security for costs in some amount against the second plaintiff as to which there is evidence that it is or was then an impecunious company. His Honour was not authorised or indeed asked by the defendant to make an order for security for costs against the first plaintiff who, being an individual, is not susceptible to such an order except in special circumstances such as foreign residence which do not exist here.

That is so unless the law has recently been changed by the Uniform Civil Practice Rules, which Mr Duffy is prepared to contend it has. Putting that aside, however, the real problem is that order number 3 provides that if not complied with within 28 days, the proceedings "are to be stayed". On the face of it, an order in that form means that the whole of the proceedings in number 85 of 2001 are stayed; that is to say, both the proceeding by the first plaintiff as well as the proceeding by the second plaintiff.

That is something to which I think the defendant was not entitled. The result of the orders 2 and 3, however, is that upon a default within 28 days no further step can be taken in the action, as I will call it, by the first plaintiff (against whom no order for security was made or sought), or by the second plaintiff even though it was the only plaintiff against which the order for security for costs was sought or could be made.

Order number 3 made on 20th June 2002 ought, in my opinion, to have been confined to staying the proceedings by the second plaintiff alone, leaving the proceedings by the first plaintiff to go to trial in the ordinary way.

But the order, even if it is wrong in law, is an order of a superior court of record and is therefore valid and binding until set aside on appeal. Instead of appealing against it, however, and having it set aside on appeal, the first plaintiff has applied to this Court for an order for leave to appeal against it.

Mr Duffy, for the defendant, or respondent on this application for leave, contends that the application for leave is unnecessary and ought therefore to be struck out or dismissed. In my opinion his submission is correct. We cannot give leave to take a step for which no leave is needed or authorised. We do not make orders that have absolutely no effect or significance at law.

What the plaintiff needs now is an extension of time within which to appeal against the order made by Justice Jones on 20th June 2002. I cannot see that the defendant would be prejudiced by such an extension at this stage because it has always been known that the first plaintiff was seeking to challenge the order even if, as it turns out, by using the wrong form of procedure, and any delay that has elapsed since the time for appealing ran out can only have operated to the defendant's advantage.

I would therefore, first, dismiss the application for leave to appeal with costs, but, secondly, extend to 25th October 2002 the time within which the appellant or the second plaintiff may appeal against the order made on 20th June 2002. We were asked in the written outlines by Mr Duffy to order payment of costs by his opponent on an indemnity basis, but I would not do so. The defendant did not ask for an order that the proceedings by the first plaintiff be stayed, or if it did it was not entitled to it, and it ought, in my view,

to have been prepared to agree to its being corrected or at least it ought not to have insisted on the order being enforced.

In the circumstances, therefore, although I think the unsuccessful applicant should pay the costs of this application for leave to appeal, those costs should not be assessed on an indemnity basis or anything else but a standard basis. Those are my reasons and the orders I propose.

THE PRESIDENT: I agree.

HOLMES J: I agree.

THE PRESIDENT: Those are the orders of the Court.