SUPREME COURT OF QUEENSLAND

CITATION:	*Stubberfield v. Lippiatt & Co.* [2002] QCA 447
PARTIES:	**JOHN RICHARD STUBBERFIELD** (defendant/applicant) **v** **LIPPIATT & CO (A FIRM)** (plaintiff/respondent)
FILE NO/S:	Appeal No 6653 of 2002 DC No 2263 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2002
JUDGES:	McMurdo P, McPherson JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave dismissed with costs**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – where court found retainer between respondent and applicant wrongfully terminated by the applicant – where refusal by learned District Court Judge to grant extension of time for applicant to appeal decision of the Magistrates Court – where long delay between judgment and making of sequestration order and annulment of bankruptcy before notice filed in District Court – whether learned judge proceeded on erroneous principle or miscarried use of discretion – where applicant seeks relief under *Uniform Civil Procedure Rules* r 667 (2)(b) – where applicant alleges order of court obtained by fraud – where alleged fraudulent conduct of respondent by way of two affidavits containing alleged differences in content *Uniform Civil Procedure Rules* 1999 (Qld), r 667(2)(b)
COUNSEL:	The applicant appeared on his own behalf A H Musgrave for the respondent

SOLICITORS: The applicant appeared on his own behalf
Lippiatt & Co for the respondent

[1] **McMURDO P**: I agree with the reasons for judgment of Cullinane J and with his proposed orders.

[2] **McPHERSON JA:** I agree with the reasons of Cullinane J for dismissing the applications for leave to appeal and doing so with costs.

[3] **CULLINANE J:** In this matter the applicants seeks leave to appeal against an order of the District Court refusing an extension of time in which to seek leave to appeal to that court against a judgment of the Magistrates Court given in favour of the respondent on 9 October 1998.

[4] The total amount of the judgment is $21,699.37 including costs and interest.

[5] The respondent firm of solicitors had instituted proceedings against the applicant for professional fees incurred in resisting a bankruptcy petition. The person who, on behalf of the respondent, had the relevant dealings with the applicant was one Lippiatt and I will for convenience refer to him as the respondent.

[6] Although the judgment was given on 9 October 1998 the applicant did not apply for leave to appeal in the District Court until June 2002.

[7] In July 1997 a sequestration order had been made against the applicant's estate. The bankruptcy was annulled in November 2001 after the applicant's debts had been paid in full.

[8] The primary issue between the parties before the Magistrates Court concerned the circumstances in which the respondent's retainer had been terminated.

[9] The learned Magistrate found for the respondent on this issue concluding that the retainer had been wrongfully terminated by the applicant. This decision was based in part upon an affidavit prepared by the applicant over the weekend before the hearing of the bankruptcy petition and which was subsequently filed by him when representing himself before the Federal Court. In the alternative the learned Magistrate was of the view that if the respondent had terminated the retainer it was because he was justified in doing so in view of the applicant's conduct. He rejected other matters raised by the applicant by way of both defence and counter-claim.

[10] When the applicant applied to the District Court for an extension of time the learned District Court judge was prepared to find that on a consideration of the applicant's prospects of success he had a reasonably arguable case. It is to be noted that in doing so the learned judge said that he could not be certain whether the arguable basis which he assumed existed had in fact arisen on the evidence before the Magistrates Court. It might be thought that this approach is somewhat generous to the applicant.

[11] However the learned District Court judge refused to grant the extension of time sought. He held that no acceptable explanation for the long delay had been advanced by the applicant and considered that overall the justice of the case did not warrant an extension of time.

[12] For a considerable part of the time which elapsed (almost four years) the applicant was bankrupt. However some eight months passed between judgment and the making of the sequestration order and more than another six months passed after the bankruptcy was annulled before the notice was filed in the District Court.

[13] The applicant went to live in New South Wales. He was involved in other proceedings. In material that was placed before the District Court he said that he had gone to New South Wales to seek relief from the harassment and stress of legal proceedings, having concerns that he could not get a fair hearing in the Queensland Courts. He also said that there was a need to obtain medical attention for his wife who was suffering from depression and perhaps dementia. Before us the applicant placed somewhat greater emphasis upon the last mentioned fact.

[14] The learned District Court judge found that the applicant had in effect chosen to ignore the proceedings that he was involved in Queensland. This view was open on the material before the court and it is not surprising that the learned judge, after making full allowance for the period that the applicant had been bankrupt, refused to extend the time.

[15] There is nothing in the material before this Court to suggest that in exercising his discretion in such a way the learned District Court judge proceeded upon any erroneous principle or that the discretion in any way miscarried. I would refuse the application for leave to appeal.

[16] The applicant in the form of a written outline bearing the date 27 September 2002 (in fact there are two which bear this date) has advanced a claim under *UCPR* Rule 667(2)(b). This empowers the court to set aside an order if it was obtained by fraud.

[17] In support of this claim he made a number of allegations. One of these concerned what was asserted by him to be fraudulent conduct on the part of the respondent in seeking to enforce the judgment. Such conduct cannot constitute a basis to seek relief under Rule 667(2)(b).

[18] The applicant contended that the respondent had been guilty of fraudulent conduct in swearing two affidavits, one sworn on or about 4 May 1994 for the purposes of defending the bankruptcy proceedings against the respondent in the Federal Court and a subsequent affidavit sworn in the proceedings in the Magistrates Court.

[19] The applicant in his written outline and in his oral submissions placed considerable emphasis on differences in the contents of these affidavits which he asserted can only be explained by fraud.

[20] The passages relied upon are to be found in paragraphs 4 & 5 in the written argument of the applicant dated 27 September and in para 16. The former paragraphs are concerned with the affidavits filed in the Federal Court and two letters (one to the applicant and one to counsel) and the latter refers to the contents of an affidavit before the Magistrates Court.

[21] In the main the matters referred to concern what is said to represent different views of the applicant's prospects of resisting the bankruptcy petition. The position expounded in the first affidavit and the two letters differs from that set out in the

later affidavit. The view set out in the later affidavit is supported by an opinion from counsel (not the counsel to whom the letter referred to was addressed).

[22] In the later affidavit the respondent speaks of the applicant's changed circumstances. The applicant is emphatic in his claim that the legal position set out in the earlier affidavit and the letters is correct and claims that the subsequent differing view found in the latter affidavit can only be explained by fraud.

[23] The change referred to by the respondent seems to be the failure of the applicant to take steps to object to a certificate of taxation pursuant to leave to do so granted by a judge.

[24] What is at issue here is not of course whether too optimistic a view might have been taken of the applicant's legal position at the time of the first affidavit or whether too pessimistic a view of this was taken at the time of the later affidavit or whether the changed circumstances to which I have referred did or did not alter the applicant's legal position. What is at issue is whether the different views taken of the applicant's position in the two affidavits is capable of providing evidence of fraudulent conduct on the part of the respondent as asserted by the applicant. This is the totality of the evidence he relies upon in support of this alleged fraudulent conduct. In my view it is plainly incapable of supporting such a claim.

[25] Other matters raised by the applicant in support of his claim that the respondent acted fraudulently concern the filing of two affidavits (one referred to as a long affidavit and the other as the short affidavit) and the manner in which the retainer came to be terminated. Apart from the bare assertion that the respondent acted fraudulently there is nothing to support the serious claims he makes in relation to these matters.

[26] Whilst no formal application to set aside the judgment under Rule 667(2)(b) was made it was, as I have said, raised by the applicant in a written outline of argument and the respondent filed an affidavit in response to the matters raised by the applicant.

[27] Both the application for leave to appeal against the judgment of the District Court and (insofar as the material can be regarded as raising such an application) the application under Rule 667(2)(b) should be dismissed with costs.