SUPREME COURT OF QUEENSLAND

CITATION:	*Atlantic 3-Financial (Aust) Pty Ltd & Anor v. Marler & Anor* [2003] QSC 197
PARTIES:	**ATLANTIC 3-FINANCIAL (AUST) PTY LTD** **ACN 056 262 723** (first applicant) AND **ATLANTIC 3 FUNDS MANAGEMENT LTD** **ACN 092 110 097** (second applicant) **V.** **WARWICK LESLIE MARLER** and **RICHARD LLEWELLYN DARVALL** trading under the firm name or style of **CB DARVALL & DARVALL** (respondents)
FILE NO:	1627 of 2003
DIVISION:	Trial
PROCEEDINGS:	Applications
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	3 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2003
JUDGE:	Helman J.
CATCHWORDS:	PRACTICE AND PROCEDURE – whether slip rule applicable to order – whether material clerical errors in order – whether order for further delivery up required. SOLICITOR'S LIEN – whether order applied to all files of client.
COUNSEL:	P.J. Dunning for the respondents
SOLICITORS:	Lynch & Company for the applicants C.B. Darvall & Darvall

[1] On 21 March 2003 an originating application filed by the first and second applicants on 21 February 2003 came before me for hearing. The first and second applicants sought an order that the respondents deliver up all files and documents that they held in their possession which were the property of the first and second applicants forthwith, and that the respondents pay to the first and second applicants their costs of the application on the standard basis.

[2] At the hearing of the application I heard quite lengthy oral submissions, and, after giving extempore reasons, made an order that the respondents deliver to the

applicants all files and documents that they held in their possession which were the property of the applicants, excluding files in relation to which bills had been rendered, on or before 11 April 2003, and a further order that the respondents pay to the applicants their costs of and incidental to the application to be assessed. The orders as drawn up and filed on 25 March 2003 appear as follows:

> **THE ORDER OF THE COURT IS THAT:**
>
> 1. The Respondent deliver to the Applicant all files and documents that they hold in their possession which are the property of the Applicants, excluding all files in relation to which bills have been rendered on or before 11 April 2003.
>
> 2. The Respondent pay to the Applicant his cost of and incidental to the application to be assessed.

Obviously there were some clerical errors in the way the orders were drawn up. The word 'Respondent' should be 'Respondents' wherever it appears, the word 'Applicant' should be 'Applicants' wherever it appears, the word 'all' should not appear after 'excluding', there should be a comma after the word 'rendered', and the words 'his cost' should be 'their costs'. As will appear later, however, none of those clerical errors is of any moment on the applications at present before me.

[3] The reasons I gave for making the orders I did were these:

> I did express a tentative view earlier in this hearing on the subject whether the respondents' lien had been abandoned at the beginning of the first applicant's retainer of the respondents, and having heard nothing further on that subject I now conclude that that tentative view was correct.
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> This is an application in reliance on rule 84 of the Rules of the Queensland Law Society Incorporated (1987) for an order that the respondents deliver up all files and documents that they hold in their possession which are the property of the first and second applicants forthwith.
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> The first and second applicants retained the respondents as their solicitors up to 9 November 2002, when that retainer was terminated and a request made to the respondents to render bills of costs covering all work done by the respondents for the applicants. Since that request a number of bills have been rendered, but there remain fifty-four outstanding.
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> The question arises then, whether a reasonable time has elapsed since the request for the rendering of the bills. It is relevant to a decision on that issue that since 10 February this year, only six bills have been rendered. On 10 February one was rendered, but as I have said, fifty-four now remain to be rendered. It is also relevant that an extension of the time for delivery of bills was agreed to until 10 January 2003, and that a further extension was offered on 13 January 2003, but none requested.
>
> I have heard argument from Mr Liddy on behalf of the respondents to the effect that a reasonable time has not yet elapsed if one bears in mind the number of bills in question, that the applicants have demonstrated no pressing need for the files, that other bills that have been rendered have not been met with other than extensive challenges. Mr Liddy has also made a

> point of the size of the respondents' firm – consisting of two solicitors and a typist.
>
> Taking all of those matters into account, it would seem to me that the one month referred to in rule 84(2) was too short a time to expect the respondents to render the bills, but that, bearing in mind also that the respondents were no doubt aware of their responsibilities under rule 84 – as all practitioners would no doubt be, the time that has elapsed since the request was made in November is a reasonable time for them to have finalized their accounts to the applicants. I therefore conclude that it is now open to the applicants to rely on rule 84(2) on the basis that a reasonable time has now elapsed and that they are now entitled to the delivery of all of their documents.
>
> …
>
> HIS HONOUR: I order that the respondents deliver to the applicants all files and documents that they hold in their possession which are the property of the applicants, excluding files in relation to which bills have been rendered, on or before 11 April 2003.
>
> I order that the respondents pay to the applicants their costs of and incidental to the application to be assessed.

[4] On 22 April 2003 the respondents instituted an appeal to the Court of Appeal against my decision.

[5] On 23 April 2003 the applicants filed an application seeking orders that the respondents be punished for contempt constituted by their failure to comply with my first order, and, further or alternatively, that the respondents deliver up all of the documents, files, securities, and all other property of the applicants in their possession to the applicants' solicitors within seven days excluding the files concerning a number of named matters in which the respondents had delivered itemized bills of costs pursuant to the request made by the applicants under rule 84.

[6] On 29 May 2003 the respondents applied to the court for an order that the enforcement of the orders I made on 21 March 2003 be stayed pending the determination of their appeal to the Court of Appeal.

[7] On 3 June 2003 the respondents applied for an order that pursuant to rule 388 of the *Uniform Civil Procedure Rules* that the first order I made on 21 March 2003 be corrected to read:

> the respondents deliver to the applicants all of the files and documents that they hold in their possession which are set out in Exhibit WLM 3 to the affidavit of Warwick Leslie Marler of 20 March 2003 by 11 April 2003.

A further order was sought pursuant to rule 667(2)(d) that the first order I made on 21 March 2003 be set aside, and in lieu thereof an order made as follows:

> the respondents deliver to the applicants all of the files and documents that they hold in their possession which are set out in Exhibit WLM 3 to the affidavit of Warwick Leslie Marler of 20 March 2003 by 11 April 2003.

[8] I now have before me all three applications made since 21 March 2003.

[9] The reference in the first paragraph of my reasons to a tentative view concerned an argument that had been advanced on behalf of the applicants that the respondents had accepted their retainer from the first applicant in 1996 subject to the condition that they would never seek to rely on a solicitor's lien over any of the first applicant's files. That argument was based on the contents of paragraphs 13 and 14 of an affidavit of Dr Frederic Acker filed on 21 February 2003 and on a letter dated 25 September 1996 from the respondents to the first applicant. I had expressed a view to the effect that that argument should be rejected (p. 30 of the transcript of the hearing on 21 March 2003), and no further issue has been taken on that conclusion as can be seen at p. 70 of the transcript of the hearing on 21 March 2003.

[10] It is convenient to deal first with the respondents' application filed on 3 June 2003. On their behalf it was asserted that they had delivered all files referred to in my first order of 21 March 2003. Their contention is that the only files and documents the subject of that order were those of the fifty-four I referred to in my reasons in respect of which itemized bills of costs had not been delivered.

[11] I should mention here that although I referred to fifty-four files in my reasons – because that was the agreed number referred to in oral submissions, based on an assessment of files itemized in an exhibit (WLM3) given by Mr Marler in paragraph 14 of an affidavit filed on 20 March 2003 – the correct number, it now appears, was fifty: see Mr Marler's revised assessment in paragraph 7 of his affidavit filed on 29 May 2003. Nothing, however, turns on that discrepancy.

[12] The respondents' applications become relevant only if the first order made on 21 March 2003 was not confined to dealing with the fifty files to which I have referred. In other words, the reference to 'all files and documents' was not intended to be a reference to all files and documents but only to those fifty files, notwithstanding that there were other files and documents in relation to which bills had been rendered in short form to the applicants and paid by the applicants, and there were other files in relation to which short-form bills had been rendered but not yet paid.

[13] On its face the first order of 21 March 2003 is not ambiguous, save possibly in one respect to which I shall refer. The reference to 'all files and documents that [the respondents] hold in their possession which are the property of the applicants' is not I think ambiguous, and that order was, after all, made on an originating application that asked for an order that the respondents deliver up 'all files and documents that the respondent holds in its possession which are the property of the first and second applicants forthwith'. The exception of 'files in relation to which bills have been rendered' could possibly be regarded as ambiguous in the following way. It could be thought to refer not only to those files in relation to which itemized bills had been rendered, i.e., some of the fifty, but also to those in relation to which no itemized bills had been rendered but in respect of which short-form bills had been rendered. That the latter category of bills was not intended to be the subject of the exception is made clear by the way in which the exception came to be inserted: it can be seen from the transcript of the hearing on 21 March 2003 at p. 71 that it was introduced at the suggestion of Mr Lynch, the solicitor for the applicants, and was quite clearly intended to apply only to those bills of the fifty in relation to which itemized bills had been rendered.

[14] At the hearing no amendment of the first order was suggested, and no difficulty in interpreting it was raised, on behalf of the respondents, but the difficulty of interpretation has been raised since. It is said on behalf of the respondents that the course of the submissions before me on 21 March 2003 indicates that the order was confined to dealing with the fifty-four files. It appears clear to me that that is not so, and that the question of the fifty-four files arose only in the context of the difficulty that the respondents faced in rendering itemized bills as requested by the applicants. As the issues for my determination were presented to me at the hearing the enforcement of the general lien the respondents might have in respect of files in relation to which short-form bills had been rendered was not included. The respondents resisted the application on only two grounds: the first that was dealt with in the first paragraph of my reasons, and the second that a reasonable time had not elapsed after the applicants' request for the rendering of itemized bills. The focus of the discussion of the fifty-four files was merely on the difficulty faced by the respondents in preparing the called-for itemized bills.

[15] To succeed in their application filed on 3 June 2003 the respondents must show that there was a clerical mistake in an order, or an error in a record of an order, resulting from an accidental slip or omission so that the clear intention of the judgment was not expressed (rule 388(1); *Rose v. Terry Hewat Commercial Diving Pty Ltd*, SC (Qd), Demack J., no. 115 of 1995, 17 August 1999, unreported, at para. 6) or that the orders made should be set aside because they do not reflect the court's intention at the time they were was made (rule 667(2)(d)). I am not persuaded that the respondents are entitled to the relief sought on either ground. If there was a misunderstanding of the extent of the issues before me, and if there was a consequential error in the order, that error can be corrected by the Court of Appeal, but in my view there is no error of the kind contemplated in either rule that permits or calls for my intervention. Neither rule permits or requires a judge to sit on appeal from his or her own decision - nor would such a course be desirable, for obvious reasons.

[16] I turn now to the applicants' application filed on 23 April 2003. The applicants, as I understand it, no longer wish to pursue their claim that the respondents be dealt with for contempt. The further and alternative order sought on behalf of the applicants is unnecessary since in my view the first order made on 21 March 2003 is clear.

[17] It follows that the respondents' application filed on 3 June 2003 and the applicants' application filed on 23 April 2003 must be dismissed. That leaves the respondents' application filed on 29 May 2003, the application for a stay. I shall invite further submissions on that application, and costs.