SUPREME COURT OF QUEENSLAND

CITATION:	*Hogan v Almavale Bloodstock P/L* [2003] QCA 462
PARTIES:	**PAUL DAMIAN HOGAN trading as HOGAN BLOODSTOCK** (plaintiff/applicant) v **ALMAVALE BLOODSTOCK PTY LTD** ACN 083 973 719 (defendant/respondent)
FILE NO/S:	Appeal No 6208 of 2003 DC No 375 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	23 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2003
JUDGES:	McMurdo P, McPherson JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time to apply for leave to appeal refused** **2. Notice of appeal filed in this matter struck out** **3. Applicant pay the respondent's costs of and incidental to the application for leave and the incompetent appeal to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – PRACTIE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – INTERLOCUTORY ORDERS AND JUDGMENTS – where appeal incompetent APPEAL AND NEW TRIAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where applicant seeks leave to appeal, to extend time and to grant leave to appeal so that appeal may be heard - where application refused *Westpac v Kleff Pty Ltd* [1998] QCA 311; CA No 8204 of 1998, 16 October 1998, followed
COUNSEL:	H Zillman for the appellant J Curran for the respondent

SOLICITORS: Bennet Carrol & Gibbons for the appellant
Pennisi & Associates for the respondent

THE PRESIDENT: This matter purports to be an appeal from an interlocutory decision made by a Judge of the District Court. No such appeal as of right lies and the appeal is therefore incompetent. The applicant has subsequently filed out of time an application for leave to appeal and asks us to extend time and grant leave to appeal so that the appeal may be heard.

The order appealed from is one ordering this applicant to amend his statement of claim within 14 days and that he pay this respondent's costs of and incidental to the application at first instance and of any consequential amendment to the amended defence and counter claim.

The order was made in circumstances where the applicant unsatisfactorily amended his statement of claim shortly before the trial was listed. The burden on the applicant in these circumstances is heavy. See Westpac v Klef Pty Ltd [1998] QCA 311; CA No 8204 of 1998, 16 October 1998, 8, para 11:

> "An application for leave to appeal for an interlocutory judgment will commonly be refused unless it appears that the decision from which it is sought to appeal is attended with sufficient doubt to warrant its being reconsidered and also that, supposing the decision below to be wrong, substantial injustice would result if leave were refused."

In essence this applicant's argument is that he was not given proper notice of the primary application under the UCPR and he also contends the costs order was unfair.

The primary Judge does not seem to have given separate oral reasons although he appeared to deal with the merits of this applicant's argument during the course of submissions. Whilst his Honour did not make a formal order abridging time, it seems that was in fact the effect of the order made. It seems his Honour was satisfied that any lack of compliance with the timeframes required by the UCPR in this case was a technical matter rather than a matter of justice in that this applicant effectively had ample notice of the respondent's concerns so that the order made by his Honour complied with the true spirit of the UCPR, namely the just and expeditious disposal of matters by the courts.

In the circumstances, this applicant has failed to demonstrate grounds warranting the granting of leave from the interlocutory order here. I would refuse the application for an extension of time to apply for leave to appeal, and strike out the notice of appeal filed in this matter. I would also order that this applicant pay the respondent's costs of and incidental to the application for leave and the incompetent appeal to be assessed.

McPHERSON JA: I agree.

WILSON J: I agree and would only add a few comments. In my view it was entirely proper for the primary Judge to make the orders he did in the circumstances. In December 2002 the plaintiff tendered a request for trial date, which was returned in February by the defendant. However, the

plaintiff did not file it and the defendant followed it up on at least three occasions. Finally in May the plaintiff indicated that it would not be filed because the matter should not be set down for trial until the statement of claim had been amended.

Still the statement of claim was not amended. An application to force the delivery of a properly particularised amended statement of claim was filed and properly served.

The plaintiff delivered an amended statement of claim shortly before the return date of that application, but the amended statement of claim was still not adequately particularised. On the matter coming before the primary Judge, counsel for the plaintiff conceded that the particulars ought to be supplied.

There is a complaint that rule 444 was not complied with in so far as the application was turned into one for the delivery of particulars. That rule is clearly designed to facilitate the resolution of interlocutory disputes without the need for an application. It provides for the ventilation of issues in correspondence before an application is filed.

Nevertheless the Court can proceed to hear an application where the procedure has not been followed, if it so directs under rule 448 or in the exercise of its wide powers (both under the rules and inherently) to excuse non compliance with

procedural requirements. I, too, would dismiss the application for leave.

THE PRESIDENT: The orders are as I set out earlier.
