

# SUPREME COURT OF QUEENSLAND

CITATION: *Emanuel Management P/L (in liq) & Ors v Foster's Brewing Group Ltd & Ors* [2003] QCA 516

PARTIES: **EMANUEL MANAGEMENT PTY LTD (IN LIQUIDATION)** ACN 007 840 913  
**SEGACIOUS PTY LTD (IN LIQUIDATION)** ACN 010 748 544  
**MEKA SECURITIES PTY LTD (IN LIQUIDATION)** ACN 007 724 629  
**COFORDO 251 PTY LTD (IN LIQUIDATION)** ACN 010 683 584  
**GRANGEVILLE PTY LTD (IN LIQUIDATION)** ACN 008 104 854  
**EMANUEL (NO. 14) PTY LTD (IN LIQUIDATION)** ACN 008 080 206  
**P.B.R.S. PTY LTD (IN LIQUIDATION)** ACN 007 799 546  
**PATERSON & CO PTY LTD (IN LIQUIDATION)** ACN 007 679 763  
**GIUSEPPE NOMINEES PTY LTD (IN LIQUIDATION)** ACN 007 771 486  
**LONSDALE STAGE 2 PTY LTD (IN LIQUIDATION)** ACN 007 812 928  
**EMANUEL PROPERTIES PTY LTD (IN LIQUIDATION)** ACN 007 740 123  
**EMANUEL (NO. 4) PTY LTD (IN LIQUIDATION)** ACN 008 036 995  
**EMANUEL (RUNDLE MALL) PTY LTD (IN LIQUIDATION)** ACN 007 983 851  
**VILLA-CAIRNS PTY LTD (IN LIQUIDATION)** ACN 010 633 459  
**ADDSTONE PTY LTD (IN LIQUIDATION)** ACN 010 764 977  
**ANTLIA PTY LTD (IN LIQUIDATION)** ACN 010 688 776  
**CENTAURUS PTY LTD (IN LIQUIDATION)** ACN 010 688 767  
**CLOUDLAND INVESTMENTS PTY LTD (IN LIQUIDATION)** ACN 010 319 730  
**COFORDO 260 PTY LTD (IN LIQUIDATION)** ACN 010 685 775  
**DERWENT WATER PTY LTD (IN LIQUIDATION)** ACN 010 688 721  
**EMANUEL (NO. 7) PTY LTD (IN LIQUIDATION)** ACN 008 053 352  
**LASCIVIOUS PTY LTD (IN LIQUIDATION)** ACN 010 749 032

**LEOMINOR PTY LTD (IN LIQUIDATION) ACN 010 688 758**  
**LIVILLA PTY LTD (IN LIQUIDATION) ACN 010 748 571**  
**SAROON PTY LTD (IN LIQUIDATION) ACN 010 633 548**  
**WOODVILLE INDUSTRIAL PARK PTY LTD (IN LIQUIDATION) ACN 008 037 018**  
**AIRLIE BEACH PTY LTD (IN LIQUIDATION) ACN 008 203 218**  
**NAVICIO PTY LTD ACN 010 616 690**  
**AIRLIE BAY DEVELOPMENTS PTY LTD (IN LIQUIDATION) ACN 010 177 232**  
**ELIZABETH HOUSE PTY LTD (IN LIQUIDATION) ACN 007 548 487**  
**ADDSTEAD PTY LTD (IN LIQUIDATION) ACN 010 764 931**  
**BRONSTEAD PTY LTD (IN LIQUIDATION) ACN 010 906 475**  
**CARMINA BURANA PTY LTD (IN LIQUIDATION) ACN 010 672 849**  
**CARSIM PTY LTD (IN LIQUIDATION) ACN 007 760 116**  
**CC LOT 1 PTY LTD (IN LIQUIDATION) ACN 008 037 063**  
**CC LOT 4 PTY LTD (IN LIQUIDATION) ACN 008 037 036**  
**DANGIER PTY LTD (IN LIQUIDATION) ACN 010 731 012**  
**EMANUEL (NO. 8) PTY LTD (IN LIQUIDATION) ACN 008 053 343**  
**EMANUEL (NO. 9) PTY LTD (IN LIQUIDATION) ACN 008 053 334**  
**EMANUEL (NO. 13) PTY LTD (IN LIQUIDATION) ACN 008 080 180**  
**EMANUEL (NO. 15) PTY LTD (IN LIQUIDATION) ACN 010 748 606**  
**EMANUEL (MALLTOWN) PTY LTD (IN LIQUIDATION) ACN 007 885 403**  
**EMANUEL (QLD) PTY LTD (IN LIQUIDATION) ACN 008 100 810**  
**EMANUEL (SOUTH AUST) PTY LTD (IN LIQUIDATION) ACN 007 963 466**  
**EMANUEL CONSTRUCTIONS PTY LTD (IN LIQUIDATION) ACN 007 639 438**  
**EMANUEL ENTERPRISES PTY LTD (IN LIQUIDATION) ACN 007 838 691**  
**EMANUEL HOLDINGS PTY LTD (IN LIQUIDATION) ACN 007 653 974**  
**EMANUEL INVESTMENTS PTY LTD (IN LIQUIDATION) ACN 007 743 400**

**EMANUEL PROJECTS PTY LTD (IN LIQUIDATION)**

ACN 007 683 418

**ESTABLISHMENT HOLDINGS PTY LTD (IN LIQUIDATION)** ACN 007 736 218

**ETRUSCAN PTY LTD (IN LIQUIDATION)** ACN 010 731 058

**HAVANA PTY LTD (IN LIQUIDATION)** ACN 008 119 999

**HENDON INDUSTRIAL PARK PTY LTD (IN LIQUIDATION)** ACN 007 890 708

**HERIOT PTY LTD (IN LIQUIDATION)** ACN 010 731 021

**HONDEL PTY LTD (IN LIQUIDATION)** ACN 007 901 144

**JOE EMANUELE PTY LTD (IN LIQUIDATION)** ACN 007 623 690

**LIBRA PTY LTD (IN LIQUIDATION)** ACN 007 588 490

**MARVIEW PTY LTD (IN LIQUIDATION)** ACN 008 272 615

**MOLINARA PASTORAL COMPANY PTY LTD (IN LIQUIDATION)** ACN 007 705 062

**ROCLIN ENTERPRISES PTY LTD (IN LIQUIDATION)** ACN 007 841 161

**SAYER PROPERTIES PTY LTD (IN LIQUIDATION)** ACN 007 714 927

**SOUTH AUSTRALIAN MANUFACTURING PARK PTY LTD (IN LIQUIDATION)** ACN 008 265 058

**SURENT PTY LTD (IN LIQUIDATION)** ACN 008 178 434

**TROMBONE PTY LTD (IN LIQUIDATION)** ACN 010 633 557

**WORANDO TRUST PTY LTD (IN LIQUIDATION)** ACN 007 511 739

**PETER IVAN MACKS**  
(plaintiffs/respondents)

**v**

**FOSTER'S BREWING GROUP LTD** ACN 007 620 886

**GLENMORE PARK ESTATE LTD** ACN 007 533 888

**ELFIC LTD** ACN 007 606 206

**LENSWORTH PROPERTIES PTY LTD (IN LIQUIDATION)** ACN 007 520 649

**KINGLINGTON PTY LTD** ACN 068 499 874

**CALOUNDRA DOWNS PTY LTD** ACN 068 356 525

**CABOOLTURE WATERS PTY LTD** ACN 068 499 810

**MANGO HILL DEVELOPMENT PTY LTD** ACN 068 244 762

**JOHN FRANCIS O'GRADY**

**JOHN DANIEL CROSBY**  
(defendants/first respondents)

**COOPERS & LYBRAND (A Firm)**

**MURRAY GOLDIE ANDERSON**

**TIMOTHY JAMES CUMING**  
 (defendants/second respondents)  
**GORDIAN RUNOFF LTD ACN 052 179 647**  
 (non-party/appellant)

FILE NO/S: Appeal No 8993 of 2003  
 SC No 3723 of 1999

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 18 November 2003

JUDGES: de Jersey CJ, Davies JA and Mullins J  
 Judgment of the Court

ORDER: **Appeal dismissed with costs to be assessed**

CATCHWORDS: PROCEDURE – COSTS – APPEALS AS TO COSTS – JURISDICTION TO ENTERTAIN – where appellant not formally joined to initial proceedings – where learned primary judge ordered appellant to pay first respondent’s costs – where appellant filed notice of appeal against costs order made against it without first seeking or obtaining leave to appeal – whether appellant requires leave to appeal against costs order made against it

*Judicature Act 1873 (UK), s 49*  
*Judicature Act 1876 (Qld), s 1, s 9*  
*Supreme Court Act 1995 (Qld), s 241, s 253*  
*Supreme Court of Judicature (Consolidation) Act 1925 (UK), s 31*  
*Uniform Civil Procedure Rules 1999 (Qld), r 689*

*Etna v Arif* [1999] 2 VR 353, distinguished  
*Re Golden Casket Art Union Office* [1995] 2 Qd R 346, approved  
*Knight v FP Special Assets Ltd* (1992) 174 CLR 178, considered  
*Re Land and Property Trust Co Plc* [1991] 1 WLR 601, distinguished

COUNSEL: A J H Morris QC for the appellant  
 No appearance for the plaintiffs/respondents  
 J D McKenna SC, with R C Schulte, for the first respondents  
 T D Sullivan for the second respondents

SOLICITORS: Dibbs Barker Gosling for the appellant  
 No appearance for the plaintiffs/respondents

Clayton Utz for the first respondents  
Mallesons Stephen Jaques for the second respondents

- [1] **THE COURT:** On 17 July 2003, the learned primary Judge gave judgment in the principal proceeding. The appellant was not a party formally joined in that proceeding, but by force of a funding agreement with the plaintiffs, was entitled to a 35 per cent share of any fruits of the litigation, and enjoyed some measure of control over its conduct. (The validity of that funding agreement had been upheld prior to the commencement of the litigation: *Elfic Ltd v Macks* [2003] 2 Qd R 125.) His Honour dismissed the plaintiffs' claims, leading to the institution of an appeal by the plaintiffs on 14 August 2003.
- [2] The learned Judge heard argument on the issue of costs on 25 August 2003. The first group of defendants sought costs against both the plaintiffs and the appellant. To facilitate the claim against the appellant, they sought an order joining the appellant as a party. The appellant did not oppose such joinder. However the Judge raised the question whether it was necessary, and whether making it would not simply increase costs, at which the defendants did not press for the joinder and the appellant conceded jurisdiction to order costs against it notwithstanding it was not a party.
- [3] On 11 September 2003, his Honour ordered the appellant to pay the first group of defendants' costs of the proceeding on an indemnity basis. On 9 October 2003, without having first sought and obtained leave to appeal, the appellant filed a notice of purported appeal against, only, the costs orders made against it (and against the plaintiffs). On 24 October 2003, the appellant filed an application for leave to appeal against costs, but the hearing, intended for 31 October, was adjourned, apparently in the expectation the competency of the appeal instituted on 9 October – without a prior grant of leave to appeal, could be determined by the Court of Appeal. The more regular course would have been to ventilate the issue, whether leave was necessary, before the learned primary Judge. But the respondents raised no objection to this court's now dealing with the matter, and the argument having been presented comprehensively, we should do so.
- [4] The question is whether s 253 of the *Supreme Court Act* 1995 obliges a non-party appellant to seek leave to appeal against a costs order made against it. The section provides:

“No order made by any judge of the said court by the consent of parties or as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order.”

The disposition of this issue of costs plainly was “by law ... left to the discretion of the judge”: r 689 Uniform Civil Procedure Rules, *Knight v F P Special Assets Ltd* (1992) 174 CLR 178.

- [5] A provision in those terms has been part of Queensland law since 1876, originating in s 9 of the *Judicature Act* of that year, which derived from s 49 of the *Judicature Act* 1873 (England) – in identical terms. Mr Morris QC, who appeared for the appellant at the hearing, submitted it is unlikely the respective legislatures would have had the position of a non-party in mind. But there was then jurisdiction to

make such orders, and the comparative rarity of the exercise of the jurisdiction in that era does not make good his proposition.

- [6] Attempts to circumvent the apparently intended straightforward limitation of s 253 have in this State generally been discouraged. The provision applies according to its terms: cf. *Re Golden Casket Art Union Office* [1995] 2 Qd R 346.
- [7] But the present issue has not to this point been authoritatively determined in this jurisdiction. In primary support of the view that the provision applies only to parties formally joined in a proceeding, Mr O'Donnell QC, who prepared the written submission for the appellant, relied in his written submissions on the position which obtains in the United Kingdom. In *In re Land and Property Trust Co Plc* [1991] 1 WLR 601, 605 it was observed “[c]osts orders against persons who were not parties ... are not orders which relate “only to costs” ... Such orders necessarily relate to matters other than merely the outcome of the proceedings. There has to be something more, some conduct by the non-party which makes it just that he should bear the costs of the litigation to which he was not a party” (per Nicholls LJ). See also *Wilkinson v Kenny* [1993] 1 WLR 963, 972.
- [8] That much may of course be accepted. But the application of that analysis to s 253 of the Queensland Act is not necessarily justified, because of difference between the language of that provision and the terms of s 31(1)(h) of the *Supreme Court of Judicature (Consolidation) Act 1925* which was before the English Court of Appeal. The difference rests in the inclusion in the English provision, by an amendment made in 1981, of the following underlined words: “appeal ... from any order ... relating only to costs”. The Queensland provision speaks of an “order ... as to costs only”. The words “relating to” have conventionally been regarded as of wide ambit, and in our view the Queensland prescription, “as to”, contemplates a somewhat narrower focus. Accordingly, the English approach is not necessarily susceptible of ready application to the Queensland provision.
- [9] A feature which positively suggests that s 253 should not be read as subject to the limitation that it not apply in respect of a costs order against a non-party, is the circumstance that the section uses the term “parties”, a term defined to extend to non-parties. Section 1 of the *Judicature Act 1876* defined “party” as including “every person served with notice of or attending any proceeding although not named on the Record”, a definition preserved by s 241 of the *Supreme Court Act 1995*. This appellant in fact attended the proceedings at the hearing in relation to costs. That the legislature saw fit, for the purposes of s 253, to define “party” in such a way as would embrace an entity not a party in the full or conventional sense, would ordinarily counter the addition to the provision of a limitation, not expressed, excluding its application to entities which would conventionally be regarded as non-parties. See *Knight v F P Special Assets Ltd*, pp 186, 190.
- [10] Mr O'Donnell QC submitted in his written outline that applying the requirement of s 253 to a non-party could produce an unjust outcome in that were the Trial Judge to refuse leave, the costs order would stand, even were the judgment upon which it was based overturned on appeal by the unsuccessful party. There are two matters which might be said in response. First, in that event, the circumstances having changed, the application for leave could be renewed before the primary Judge, and one would expect leave to be given. Second, there is the ultimate protection that, as has long been acknowledged in this State (*Lauchlan v Hartley* [1979] Qd R 305,

309), an order refusing leave is vulnerable “if it can be shown that the discretion has never really been exercised”, as where there has been “a failure to act judicially”, as by purporting to exercise the discretion “without any materials on which a judge could exercise it” (*Hong v A & R Brown Ltd* [1948] 1 KB 515, 519). But that aside, as confirmed in *Re Golden Casket Art Union Office*, p 348, an order refusing leave to appeal may be disturbed on appeal if leave has been “erroneously refused”, potentially raising the approach discussed in *House v The King* (1936) 55 CLR 499.

- [11] Mr O’Donnell QC additionally submitted in writing, as significant to the determination of the ambit of the provision, that it does not apply to a costs order made against a solicitor, and Mr Morris QC pursued this point in his oral submissions: cf. *In re Bradford, Thursby and Farish* (1883) 15 QBD 635, 636; *Thompson v Fraser* [1986] 1 WLR 17; *Michael v Freehill Hollingdale and Page* (1990) 3 WAR 223, 228, 234; *Etna v Arif* [1999] 2 VR 353, 379. To warrant such an order, the court must necessarily be satisfied there has been some dereliction on the part of the solicitor, and that may be regarded as the feature to which the order primarily relates. That approach is therefore distinguishable because historically considered as uniquely referable to the disciplinary jurisdiction of the court, and not to the court’s general discretionary jurisdiction as to costs. It is accepted that there must be an appeal without leave in respect of a finding of professional misconduct or negligence (*Etna v Arif*, p 379).
- [12] The provision should operate in accordance with its literal terms, that is, not subject to an implied exclusion of costs orders against non-parties. In all the circumstances expressed above, that approach should be seen as reflecting the apparent legislative intent.
- [13] The appeal brought without leave being incompetent, it should be dismissed. That would not of itself formally preclude the appellant’s making application for leave to appeal, to the learned primary Judge. Mr Morris QC sought an order of adjournment in this situation, lest there be a subsequent grant of leave. But no doubt in that case, much, though not all, of the material presently before the court, could be re-used.
- [14] The appeal is dismissed, with costs to be assessed.