SUPREME COURT OF QUEENSLAND

CITATION:	*Emanuel Management Pty Ltd (in liquidation) & Ors v. Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 484
PARTIES:	**EMANUEL MANAGEMENT PTY LTD (IN LIQUIDATION) AND ORS** (plaintiffs) **v.** **FOSTER'S BREWING GROUP LTD AND ORS** (first group of defendants) AND **COOPERS & LYBRAND AND ORS** (second group of defendants)
FILE NO:	3723 of 1999
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	
DELIVERED AT:	Brisbane
HEARING DATE:	17 December 2003
JUDGE:	Chesterman J
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – where time allowed to appeal cost orders had expired – whether leave to appeal cost orders should be granted
COUNSEL:	J D McKenna SC, with A Pomerenke, for the first group of defendants G A Thompson SC, with L F Kelly, for the second group of defendants T E Lennon QC for the plaintiffs/applicants B D O'Donnell QC for Gordian Runoff Limited/applicant
SOLICITORS:	Clayton Utz for the first group of defendants Mallesons Stephen Jaques for the second group of defendants Hunt & Hunt (Adelaide) for the plaintiffs Dibbs Barker Gosling for Gordian Runoff Limited

[1] I gave judgment in the action on 17 July 2003. A month later, on 25 August, I heard submissions in relation to costs and made orders on 11 September 2003. On the same day I published my reasons for making those orders. On 17 December I heard an application brought by the plaintiffs and Gordian Runoff Ltd ('GRL') for leave to appeal against the orders for costs. Having heard the arguments and having had the benefit of detailed written submissions provided by all the parties prior to the hearing it seemed to me that, with one exception, no case had been made out for a grant of leave. I accordingly gave GRL leave to appeal limited to one ground and otherwise dismissed the applications. I identified my reasons to allow the applicants to appeal within time if either or both wished to challenge the exercise of the discretion to refuse leave to appeal. I indicated that I would provide brief but amplified reasons in writing at a later time, which I now do.

[2] Before dealing with the grounds for refusing leave it will be helpful to set out a chronology of the relevant events.

[3] The orders for costs were made on 11 September 2003. Time for appealing those orders expired on 9 October 2003. On that day the plaintiffs and GRL filed notices of appeal. The notices were invalid and the appeals incompetent because neither party had sought or obtained leave to appeal pursuant to s 253 of the *Supreme Court Act* 1995.

[4] On 14 October the first defendants' solicitors wrote to the plaintiffs' solicitors and to GRL's solicitor to point out that the appeals were incompetent. On 17 October and 22 October respectively the solicitors for GRL and the plaintiffs advised that they would apply for leave to appeal. An approach was made to my Associate and I

indicated that I would hear the applications on 31 October 2003. Directions were given for the exchange of material and submissions. On 24 October 2003 GRL filed an application for leave to appeal which was to be heard on 31 October. The plaintiffs tried to file a similar application, but for some reason were unsuccessful. In any event, having filed its application, the solicitors for GRL advised the defendants that it would not proceed but would instead seek a declaration from the Court of Appeal that leave was unnecessary. The basis for that application was said to be that GRL had not been a party to the original action and so was not caught by the terms of s 253.

[5] The plaintiffs, who could not have advanced that argument, nevertheless also decided not to proceed with their application for leave on 31 October.

[6] On 18 November GRL submitted to the Court of Appeal that it could appeal against the costs orders as of right. On 21 November the Court of Appeal rejected that contention and dismissed GRL's appeal. On 1 December 2003 the plaintiffs filed an application for leave to appeal and the next day GRL filed a second application. No order had been made on the application it had filed in October.

Can Leave be Given?

[7] The question is whether a judge has power to give leave to appeal against an order for costs after the time limited by the *UCPR* for instituting an appeal has expired. There is no authority on the point. Section 253 does not itself prescribe any time limit within which leave must be given. No doubt it is right to approach the construction of a statute on the basis that any power conferred by it should not be circumscribed by anything not expressed or necessarily implicit in the legislation

itself. Yet s 253 operates within a statutory framework which regulates the manner in which and the time in which appeals are to be brought.

[8] *UCPR* 748 provides that an appeal must be instituted by filing a notice of appeal within 28 days from the date of the decision appealed from. An appeal against costs for which leave had not been obtained is incompetent and will be struck out. *UCPR* 747 provides, in effect, that where leave is necessary for the institution of an appeal, and it is obtained, the notice of appeal must identify the order giving leave and the specific questions for which leave was given to be raised on appeal. These rules suggest that leave must be obtained prior to the expiration of the 28 days. An application brought after the 28 days cannot be one for leave to appeal. Rather, it will be one for leave to apply to have the time allowed for appealing extended, or for leave to appeal conditional upon the Court of Appeal extending time.

[9] There are some authorities concerning appeals from judgments of the District Court which support the view that leave to appeal must be obtained prior to the expiration of any time limited for the appeal. *Johns v Johns* [1988] 1 Qd R 138 was concerned with an appeal which could only be brought from the District Court by leave. O 70 r 34 of the then Supreme Court Rules provided that an appellant, either by leave or by right, from a judgment of the District Court should institute the appeal within the time prescribed by Rule 334 of the District Court Rules. Williams J, who gave the judgment of the court, expressed the opinion that O 70 r 34 required leave to be obtained before the institution of the appeal, 'otherwise it cannot be said that there is an appeal by leave.'

[10] A subsequent case, *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610, expressly endorsed that view of the law. It was, however, held that the Court of Appeal could itself extend time for bringing an appeal (as could the District Court) and, as it was the Court of Appeal which must grant leave to appeal, it could do both at once, and grant leave to appeal and extend time for appealing, if the justice of the case so required.

[11] That solution is not available to the applicants. The applications for leave to appeal, and for an extension of time for bringing an appeal, must be determined separately and by different divisions of the court. It is only the judge who made the costs orders who may allow an appeal from them. It is only the Court of Appeal which can extend time for instituting the appeal. The application for leave to appeal must obviously occur first in time, but if more than 28 days have elapsed since the costs orders were made, any appeal instituted pursuant to the leave will be incompetent. One would think that the appeal contemplated by s 253 is one which is competent, ie., is one that can be brought within time.

[12] For these reasons I doubt whether the power conferred by s 253 can be exercised after the time for appealing has run out.

[13] Despite these doubts I gave GRL leave to appeal limited to the ground that the plaintiffs succeed in their appeal against the substantive orders made on 17 July 2003. The point is that the plaintiffs have appealed against the dismissal of their action. Should they succeed to any extent then it is to be expected that the costs orders will be varied. The effect of the orders for costs made on 11 September 2003 was that the liability to pay costs was imposed co-extensively on the plaintiffs and

GRL. If the substantive appeal alters the basis on which costs were ordered against the plaintiffs it would similarly alter the basis on which costs were ordered against GRL. It, however, was not a party to the action and is not a party to the appeal.

[14] It would be unjust if the plaintiffs succeeded on appeal but the costs orders against GRL could not be disturbed. It was to prevent such an injustice that I thought it appropriate to give limited leave to appeal.

[15] The defendants did not oppose the grant of leave on that basis. This of course would not supply any want of power to make the order. Jurisdiction cannot be conferred by consent, nor by an intimation that an order will not be contested on appeal. I apprehend that a judge should not make an order which is beyond jurisdiction. I am not, however, convinced that the power does not exist. I doubt that it does.

[16] In the circumstance I thought it appropriate to grant limited leave to avoid the possibility of real prejudice to GRL. It must obtain an extension of time within which to appeal and on the hearing of that application the Court of Appeal can, if necessary, consider whether the grant of leave was valid.

Delay

[17] Even if there be power to grant leave to appeal against costs after the expiration of the time for appealing, it is clear that, ordinarily at least, an application for leave should be made within the 28 day period. Not to do so will give rise to additional expense and uncertainty. If an application for leave to appeal is brought after the 28 days have expired there should be some good reason for the delay and the applicant

should have moved as quickly as possible in the circumstances which gave rise to the delay.

[18] It is clear that delay in applying for leave to appeal is itself a relevant factor in the exercise of the discretion. See *Kavanagh v Loch* [1930] St R Qd 317 at 322 and *Johns v Johns* at 142-3.

[19] The applications were not brought before 9 October because the solicitors for both the plaintiffs and GRL were ignorant of the provisions of s 253. Ignorance of such a high order is surprising, but the solicitors in question have deposed to their unfamiliarity with that notorious provision, and I suppose I must accept their confession. Their want of knowledge was supplied by the correspondence from the first defendants of 14 October. Within a week both the plaintiffs and GRL intimated that they would apply for leave to appeal in accordance with the requirements of s 253. Neither did so until 1 December despite having obtained a hearing date from the court for 31 October. The explanations proffered for not proceeding promptly once they knew of the need for leave are unsatisfactory. The position of the two applicants has to be considered separately.

[20] GRL puts forward by way of explanation for the delay that, 'having considered (its) position overnight' after arranging for the application to be heard on 31 October, it 'formed the view that s 253 … did not apply to (GRL)'. As related earlier GRL then sought a declaration from the Court of Appeal as to the construction of the section. This has all the indications of a tactic designed to circumvent the application of s 253. The section in its terms restricts appeals against an 'order made by any judge … as to costs only …' and it was against such an order that

GRL wished to appeal. Its submission to the Court of Appeal was peremptorily rejected. That court, perhaps with more diffidence than was necessary, distinguished the English cases on which GRL based its submission. Moreover the English authorities are inconsistent with the reasoning in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 which made it clear that an order of costs against a non-party is but an instance of the general jurisdiction to make orders for the costs of a proceeding.

[21] The position in summary is that GRL chose not to apply promptly once it was aware of the requirements of the section. Rather it sought to avoid the operation of provision by an ill-considered tactic. Having failed it belatedly reapplied to the trial judge.

[22] In my opinion its delay and the reason for it should not be overlooked. I consider this ground alone sufficient to refuse a grant of leave to appeal.

[23] The plaintiffs offer this explanation:

(a) They did not wish to proceed with an appeal against the orders for costs unless they had GRL's approval and promise to fund the appeal.

(b) On 3 October GRL advised the plaintiffs that they should appeal. GRL and the plaintiffs thereafter collaborated in the preparation of notices of appeal.

(c) The plaintiffs' solicitor did not know that leave was needed for such an appeal.

(d) After receipt of the first defendant's letter of 14 October the solicitors for the plaintiffs and GRL conferred and eventually decided to apply for leave. The application was to be heard on 31 October.

(e) On 24 October GRL's solicitor intimated GRL's decision to apply instead to the Court of Appeal. Thereupon the plaintiffs

> ‘reconsidered their position’ because if they proceeded with their application in the absence of GRL ‘they would do so without the benefit of the work anticipated to be done by (GRL) …’
>
> (f) Between 24 October and 7 November the plaintiffs’ solicitors communicated with GRL’s solicitor to determine whether GRL would fund the plaintiffs’ application for leave. Confirmation that it would fund the application was given on 7 November.

[24] It is no justification for the plaintiffs’ inaction that GRL was pursuing an alternative course. The point which GRL thought it had was never available to the plaintiffs. On no view could they avoid the operation of s 253. Moreover the plaintiffs do not explain why they delayed until 1 December when they knew on 7 November that GRL would fund their application. Additionally it is difficult to accept that some uncertainty about the availability of funding is the reason for the delay. On 3 October GRL indicated that the plaintiffs should appeal against the costs order and they thereafter prepared to do so. Indeed they filed a notice of appeal. They also indicated that they would apply for leave to appeal once the necessity for this step was pointed out to them – and this was before they had received confirmation that GRL would pay for it. Nor do the plaintiffs explain why, given the obvious urgency of the situation, it took until 7 November to obtain confirmation from GRL.

[25] In my opinion the plaintiffs’ failure to apply promptly after 14 October is a sufficient ground for refusing them leave to appeal.

[26] So far I have dealt with the question of delay only after the applicants were notified of the requirement for leave to appeal. That ignorance is, in my opinion, inexcusable. The applicants should have approached the court immediately to overcome the deficiency in their appeals. Beyond that, in my opinion, the failure to

apply within time is itself a sufficient ground for refusing to give leave. It is almost inconceivable that none of the practitioners involved in the preparation of the notices of appeal was aware of s 253. Such a provision has been in force since 1876. Ignorance of the provision is not a sufficient reason for entertaining an application of leave to appeal brought after the expiration of the time allowed for an appeal.

[27] The applicants submitted that they should not be visited with the consequence of their solicitor's negligence but I do not see why that should be so. The solicitors were the applicants' agents for the purpose of conducting their litigation. They should be bound by the acts and omissions of their agents. They have their remedies in the event of negligence or breach of contract in the discharge of the agency.

[28] One can find cases involving claims arising out of personal injuries in which, where time limits have not been adhered to and a claimant has lost a right to pursue his remedy, the courts have drawn a distinction between the conduct of the claimant and that of his solicitors for the purposes of determining whether time should be extended. These cases are, it seems to me, an exception to the general rule that a litigant is bound by the conduct of his agent/solicitor. No doubt the exception recognises the vulnerable position of claimants in personal injury cases, many of whom will lack the resources, financial or psychological, to pursue their solicitors and will go unrecompensed, perhaps for very serious injuries, if their actions cannot proceed.

[29] There are no such considerations in the present case. The applicants are commercial entities well able to pursue their rights. The plaintiffs are impecunious but enjoy the financial support of GRL.

Sufficient Ground to Attack the Orders as to Costs

[30] The evident purpose of s 253 is to limit appeals 'as to costs only.' This is because decisions on costs afford a prime example of a discretionary judgment which parliament has recognised should be left to the trial judge. Ryan J pointed out in *McCasker v Darling Downs Co-operative Bacon Association Ltd* (unreported 27 July 1988):

> '… the object of s 9 of the *Judicature Act* is to leave the matter of costs to the discretion of the judge and … I should not grant … leave unless … convinced it is appropriate … It has not been shown that any important general principle is involved such as to justify the granting of leave … and I refuse the application …'

In *Grundmann v Georgeson* (1996) Aust Torts Reports 81-396 at 518 Dowsett J (with whom McPherson JA agreed) said:

> 'Leave should not be given unless the applicant demonstrates that there is a cogent argument against the order. It will not usually be enough to asset dissatisfaction or that the judge may not have correctly applied a well established principle.'

In a later case, *Christiansen v Christiansen* (unreported 2 July 1999) McPherson JA noted that in order to obtain leave to appeal pursuant to s 253 the applicant must identify an error in principle made by the trial judge.

The Court of Appeal in *Gray v Hopcroft* [2000] QCA 144 refused to give leave to appeal against an order for costs made by a District Court judge on the ground that the order was not 'clearly unsupportable'. To the same effect is the judgment in

Van Riet v ACP Publishing Pty Ltd [2003] QCA 37, also an application for leave to appeal from an order as to costs made by a District Court judge, in which it was said that the applicant had 'not established that the exercise of discretion was so extraordinary as to warrant the granting of leave …'

[31] The applicants seek to identify some questions of principle arising from the costs orders made against them. The first is that the 'special position of the liquidator' is such that he should not be made liable for the costs of litigation brought at his instigation by insolvent companies. To derive their point of principle the applicants distort part of the reasons given for making an order against Mr Macks personally, and ignore other parts of the reasons. The decision to make the order against Mr Macks in part was based upon legal orthodoxy sanctioned by the High Court in *Knight*. The first defendant's submissions (paragraphs 20 to 32) are a correct analysis of the approach I took and which I thought I made clear.

[32] There is nothing 'extraordinary', or 'unsupportable', or even unusual in requiring a liquidator who instigates an impecunious company to commence unsuccessful litigation to pay the costs. It is certainly not contrary to principle.

[33] The second point is a reiteration of the submission that the plaintiffs should recover the costs of 'the insolvency issue'. It is submitted that the reasons misunderstand the requirement of *UCPR* 682(2) and that leave should be given to allow the Court of Appeal to give a definite exegesis of the rule.

[34] The 'insolvency issue' was a question of fact – by what date had the corporate plaintiffs become insolvent? The question was resolved in favour of the date advanced by the plaintiffs. The question was relevant to a number of causes of

action, particularly against the second defendants, but it was not a question the resolution of which determined any cause of action. It cannot be right that, as a matter of principle, a plaintiff who succeeds in proving a contentious fact but whose action is unsuccessful is entitled to the costs incurred in proving that fact. The trial judge has a discretion which, no doubt, must be exercised having regard to the conduct of the litigants, but it is an entirely orthodox order to require a wholly unsuccessful plaintiff to pay the defendant's costs even where the defendant does not win every point of fact or law it advanced.

[35] GRL's submission was that:

> 'The correct principle is that laid down in r 689. The prescription in that rule that costs "follow the event" should be read as meaning that costs are to be distributed according to the results of the several issues, while the party who was successful on the whole gets the general costs … A division of costs according to several issues should apply where the plaintiff succeeds on some issues, even if in the result its action is dismissed.'

[36] It is important to recall the exact wording of the rule. It says:

> '(1) Costs of a proceeding … are in the discretion of the court but follow the event, unless the court considers another order is more appropriate.'

I doubt that the question of fact concerning the date on which the corporate plaintiffs became insolvent is an 'event' for the purposes of the rule. Assuming it is an 'event', it is clearly a factor relevant to the exercise of the discretion to make 'another order' that the plaintiffs were wholly unsuccessful in their action. GRL's submissions do not consider this point.

[37] The applicants also advanced an argument that the Court of Appeal should be given the opportunity to 'consider and possibly alter one or more of the costs orders if, having heard and determined the appeal wholly adversely to the applicants, it is

nevertheless minded so to do.' What the applicants had in mind was my characterisation of the plaintiffs' claims as "hopeless", which was a ground for ordering indemnity costs. Counsel for the applicants pressed the view that the Court of Appeal might take a different, less censorious, view of the circumstances.

[38] There are two answers to this submission. The first is that it ignores the test which the Court of Appeal will apply on an appeal brought, pursuant to leave, against a discretionary order as to costs. Even where leave is given an appeal against costs remains an appeal against the exercise of discretion and the principles found in *House v The King* (1936) 55 CLR 499 are applicable. The appeal would not succeed unless the Court of Appeal were convinced that the exercise of discretion was plainly wrong. It is not enough that the judges on appeal might have formed a different view. See *Nabour v Harris & Churruca* [1963] Qd R 321 at 325.

[39] The second answer is that the applicants did not attempt to identify any evidence or fact which might cast doubt on the conclusions I expressed in the principal judgment given in July 2003. Their task was not, of course, to persuade me that I was wrong but an application for leave to appeal on the basis that the Court of Appeal will be invited to so conclude should contain some reference to the circumstances which will be relied upon for that purpose. No basis was advanced to support the hope that the Court of Appeal might, if it dismisses the appeals against the substantive judgment, form a different opinion about the reasonableness of the plaintiffs' conduct in bringing the action.

[40] Two further points should be noted. The first is that GRL objected to specific orders made which it was said conflicted with the provisions of *UCPR* 704(3). The

point is misconceived and overlooks the power of the court to control the assessment of costs found, *inter alia*, in *UCPR* 684(1). The second point is that GRL complains about the order for interest on costs. This is no more than a dissatisfaction with the particular exercise of discretion.

[41] In the reasons I gave orally for refusing leave to appeal I noted that the orders for costs were made in accordance with a discretion exercised 'on quite conventional grounds and with reference to well established principle. … The fact that the amounts involved are very large indeed, and that the parties ordered to pay them are dissatisfied with the outcome are no grounds for giving leave to appeal …' The authorities are clear that leave to appeal against costs should not be granted where the discretion has been exercised in that manner. A trial judge who is asked for leave to appeal should not be defensive about the orders made or overly reluctant to give leave. Nevertheless the cases make it clear that leave should not be given unless there is an arguable case that, applying the principles of *House v The King* the discretion will be overturned on appeal. That means there must be an arguable case that the judge committed an error of law, or misapprehended the facts or that the result is inexplicably inconsistent with the facts.

[42] The applicants did not identify any mistake of fact nor did they submit that the orders made were, in the circumstances, bizarre. Their arguments that the orders were affected by errors of law are without substance and are, on analysis, no more than complaints that the discretion should have been exercised differently.

[43] It was for these reasons that I dismissed the applications, with the exception earlier identified.