SUPREME COURT OF QUEENSLAND

CITATION:	*Shadbolt & Anor v Wise & Ors* [2005] QCA 443
PARTIES:	**NORMAN WILLIAM SHADBOLT and NOELE SHADBOLT** (applicants/respondents) v **FRANK WISE** (respondent) **PETER FRANK WISE and DAVID MITCHELL WISE** (respondents/appellants)
FILE NO/S:	Appeal No 5477 of 2005 SC No 2751 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2005
JUDGES:	McPherson, Williams and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. The appellants are to pay the respondents' costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	REAL PROPERTY - FENCING AND BOUNDARIES OF LAND - ENCROACHMENT OF BUILDINGS AND PARTY WALLS - OTHER MATTERS - where the respondents constructed a swimming pool that encroached onto land owned by the appellants - where the respondents applied for relief pursuant to s 184 *Property Law Act* 1974 (Qld) - where an order of the Supreme Court was obtained in 2002 that provided for the transfer of the land that had been encroached upon so long as compensation was paid and all necessary consents were obtained from the relevant local government - where it was necessary to obtain a relaxation of the setback requirements for the encroaching structure before the local government would give its consent to the registration of the transfer of the land - where the appellants refused to co-sign the application for this relaxation - where the respondents applied to the Supreme Court for an order that the Registrar be authorised to sign the

application - where the learned primary judge ordered that the appellants must "do all acts and things necessary on their part to procure such consent" - whether such an order was "with respect to" the conveyance, transfer or lease of the land that had been encroached upon pursuant to s 185 *Property Law Act* 1974 (Qld)

PROCEDURE - COSTS - APPEALS AS TO COSTS - JURISDICTION TO ENTERTAIN - where an order for costs had been made against the appellants by the learned primary judge - where the appellants desired to appeal against this costs order regardless as to whether or not they were successful on any substantive ground of appeal - where the appellants complained that the learned primary judge had made a vesting order that was not sought by the respondents before the learned primary judge suggested it - where the appellants also complained about the characterisation of their conduct by the learned primary judge as "reprehensible" - whether the appeal on the issue of costs alone was incompetent by reason of s 253 *Supreme Court Act* 1995 (Qld)

Commonwealth of Australia Constitution Act (Cth), s 51

Building Act 1975 (Qld)
Land Title Act 1994 (Qld)
Property Law Act 1974 (Qld), s 184, s 185, s 186, s 190, s 194
Supreme Court Act 1995 (Qld), s 253

Cunliffe v The Commonwealth (1994) 182 CLR 272, cited
Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd [2003] QCA 516; [2004] 2 Qd R 11, cited
Fairfax v Federal Commissioner of Taxation (1965) 114 CLR 1, considered
Re Golden Casket Art Union Office [1994] QCA 480; [1995] 2 Qd R 346, cited
Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc [2003] HCA 43; (2003) 214 CLR 397, cited
The Trustees Executors & Agency Co Ltd v Reilly [1941] VLR 110, cited

COUNSEL: S J Keim SC for the appellants
K C Fleming QC, with A F Maher, for the respondents

SOLICITORS: Justin Crosby for the appellants
Murray Lyons for the respondents

[1] **McPHERSON JA:** For the reasons given by Keane JA, this appeal should be dismissed with costs.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA and there is nothing I wish to add thereto. I agree with all that is said therein and with the orders proposed.

[3] **KEANE JA:** In late 1998 Mr and Mrs Shadbolt ("the Shadbolts") constructed a swimming pool which was, unfortunately for them, not entirely on their own land.

The swimming pool and associated structures encroached upon land owned by Mr Wise. The total area of this encroachment was approximately 46 square metres. The balance of the land owned by Mr Wise was 33.9889 hectares. Mr Wise is now deceased and is represented by the appellants.[1] I shall refer to the appellants and Mr Wise compendiously for the purposes of these reasons as "the Wise parties". The issues which arise on the appeal can be understood only after the facts and the decision below have been summarised.

Chronology of events

[4] The Shadbolts applied for relief pursuant to s 184 of the *Property Law Act* 1974 (Qld) ("the *Property Law Act*"). On 31 October 2002, Mullins J ordered that the Shadbolts pay the Wise parties $15,000 by way of compensation for the encroachment, and that "[s]ubject to all necessary consents from Maroochy Shire Council and Greatwood Community Titles Scheme 19855 being obtained within 6 months of the date of this order, the [Wise parties] transfer to the [Shadbolts] the fee simple interest in the land over which the encroachment extends ('subject land')".[2] Under that order, the Shadbolts were also obliged to pay to the Wise parties all costs and expenses reasonably incurred by the Wise parties in order to give effect to the transfer order including "the costs of the preparation of the survey plan required to subdivide the subject land from [the balance of the land of the Wise parties] and all legal costs incurred by the [Wise parties] in respect of the transfer of the subject land to the [Shadbolts]". The Shadbolts were also ordered to pay the costs of the Wise parties of the proceedings to that point on the indemnity basis. Her Honour gave the parties liberty to apply.

[5] The Wise parties appealed against the judgment of Mullins J. That appeal was dismissed on 6 June 2003.[3]

[6] The Shadbolts obtained two extensions of time within which the consent from the Council necessary for the transfer might be obtained.

[7] On 3 September 2003, pursuant to a further order of Mullins J, the Registrar of the Supreme Court signed an application to the Council in order to facilitate the subdivision of the land of the Wise parties to enable the subject land to be transferred to the Shadbolts. The Council notified its consent to the application on 28 October 2003.

[8] Thereafter, the Council sealed the necessary plans of survey and, on 5 November 2003, the solicitors for the Shadbolts sent copies of the survey plans sealed by the Council to the solicitors for the Wise parties so that they might attend to the registration of the transfer of the land. Registration was required by law to occur within six months of the date of the Council's approval.[4] The Wise parties did not attend to registration within that time frame. This necessitated a further application to the Council.

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1 This position was formalised by a previous order of this Court: see *Shadbolt v Wise* [2003] QCA 186; Appeal No 10829 of 2002, 6 May 2003.

2 *Shadbolt v Wise* [2002] QSC 348; SC No 2751 of 2001, 31 October 2002.

3 *Shadbolt v Wise* [2003] QCA 241; (2003) 126 LGERA 59.

4 A plan of subdivision will only be capable of registration, subject to a small number of exceptions which are not relevant to the present case, if an approval has been obtained from the relevant local government: *Land Title Act* 1994 (Qld), s 50(g). If such an approval is necessary then the approved plan must be lodged for registration within six months of the approval being given: *Integrated Planning Act* 1997 (Qld), s 3.7.6.

[9] On 21 July 2004, the Maroochy Shire Council advised the Shadbolts that the signature of the Wise parties was required on the further application to the Council.

[10] The application which had been signed by the Registrar on 3 September 2003 did not include a request to the Council to relax the requirements of the *Building Act* 1975 (Qld) ("the *Building Act*") in relation to building setbacks[5] from the boundaries of a parcel of land.[6] This meant that, upon completion of the transfer, the superstructure built around the pool would be within the area of setback required by the *Building Act* along the new boundary between the Shadbolts' land and the land of the Wise parties. The Council's previous approval of the application signed by the Registrar was expressed to be subject to a requirement that the development comply with all the setback requirements of the *Building Act*.[7] It would appear that, by oversight, the Council had previously sealed the plan of subdivision without appreciating that the subdivision did not comply with the setback requirements of the *Building Act*. Having become aware of this additional requirement, the Council refused to reseal the plan of subdivision unless a further application, signed by the Wise parties, was made for relaxation of the setback requirements.

[11] The Wise parties declined to sign the further application; and the Shadbolts applied to the court again for an order that the Registrar be authorised to sign the development application required by the Council.

The decision below

[12] On 10 June 2005, the learned primary judge varied the order of Mullins J made on 31 October 2002 by altering the time for obtaining the consents necessary for the transfer to "on or before 10 December 2005", and by ordering that the Wise parties "do all acts and things necessary on their part to procure such consent".[8] That order clearly obliged the Wise parties to sign the development application required by the Council.

[13] His Honour also made a further order, viz that "the title to the [subject land] be vested in the [Shadbolts]". This order was made pursuant to s 190 of the *Property*

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5 A "setback" means the shortest distance measured horizontally from the outermost projection of the building or structure to the vertical projection of the boundary of the lot: See "Design and Siting Standard for Single Detached Housing on Lots under 450m^2", *Queensland Development Code*, Pt 11 at 4. The same definition is used in Part 12 of the Code, which deals with single detached housing on lots 450m^2 and over.

6 Building work carried out in Queensland must comply with the *Standard Building Regulation* 1993 (Qld): *Building Act* 1975 (Qld), s 4. This regulation provides that, unless there is something in the local planning scheme to the contrary, it is the provisions of Pt 11 and Pt 12 of the *Queensland Development Code* that apply to housing and associated structures: *Standard Building Regulation* 1993 (Qld), s 34, s 35. The proper size of setbacks is one matter that is dealt with by these parts of the Code. This arrangement has pertained since the requirements for side and rear boundary clearances were removed from the *Standard Building Regulation* 1993 (Qld) in 2003: see *Building Legislation Amendment Regulation (No. 1)* 2003 (Qld), s 36. The planning scheme of the Maroochy Shire Council was not placed before the Court but it was suggested by counsel that the planning scheme did contain specific setback requirements. However that may be, the precise content of the setback requirement in the present case is irrelevant to the disposition of the appeal.

7 It may be noted in passing that the authorities are clear that a provision in the terms of s 185(1)(b) of the *Property Law Act* does not empower a court to transfer land surrounding an encroachment so that setback requirements can be automatically complied with. This is because the section only authorises the transfer of the "subject land" upon which the encroachment is located: *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No 5157* [1997] 1 Qd R 102 at 107. See also *Carlin v Mladenovic* [2002] SASC 206 at [26] - [31]; (2002) 84 SASR 155 at 160 - 162.

8 *Shadbolt v Wise* [2005] QSC 163; SC No 2751 of 2001, 10 June 2005.

Law Act. This order is not the subject of an appeal by the Wise parties. They complain, however, that this order had not been sought by the Shadbolts before it was suggested by his Honour. The Wise parties rely upon this circumstance insofar as their appeal relates to the order as to costs made by the learned primary judge.

[14] His Honour made no order as to the costs of the application before him. Section 194 of the *Property Law Act* empowered his Honour to "make such order as to payment of costs … as [the court] may deem just in the circumstances".[9] Where the assistance of the court is necessary to overcome problems which arise because of an encroachment, the encroaching party will usually be required to pay the costs of the party whose land has been encroached upon because it will usually be the case that it is the conduct of the encroaching party that has necessitated the resort to litigation. His Honour chose not to adopt that course in this case, apparently because of his disapproval of the conduct of the Wise parties.

[15] In this regard, in the course of the learned primary judge's reasons, he described the conduct of the Wise parties as "reprehensible" because they were "doing nothing to cooperate with [the Shadbolts] in carrying the order of the Court into effect". The Wise parties contend that his Honour's view was erroneous and that this error is material to the appeal in relation to the order as to costs.

The scope of s 185 of the Act

[16] The Wise parties' principal contention is that the order made by the learned primary judge was not authorised by s 185 of the *Property Law Act*.

[17] The power conferred on the Court by s 185 of the *Property Law Act* is relevantly in the following terms:

> " **(1)** On an application under section 184 the court may make such order as it may deem just with respect to -
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> …
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> (b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and
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> (c) the removal of the encroachment."

[18] The Wise parties observe that the original order of Mullins J did not expressly cast any obligation upon the Wise parties in relation to the obtaining of any consent from the Council. Her Honour's order for a transfer was expressed to be subject to that consent being obtained. It is then submitted on behalf of the Wise parties that the order made by the learned primary judge is not an order with respect to the "conveyance [or] transfer" of the subject land within the meaning of s 185(1)(b) of the *Property Law Act*, in that it requires the Wise parties to consent to the relaxation of the setback requirements so as to facilitate the giving of the Council's approval to the plan of subdivision. In this regard, the Wise parties submit that this requirement is remote from the subject matter of s 185(1)(b) of the *Property Law Act*, ie the conveyance or transfer of the subject land. Further, they submit that this requirement is unnecessary having regard to the vesting order made by the learned primary judge.

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[9] Cf the general rule in civil litigation that costs follow the event unless the court considers another order is more appropriate: *Uniform Civil Procedure Rules* 1999 (Qld), r 689(1).

[19] In developing these contentions on behalf of the Wise parties, it was argued by their counsel that assistance may be obtained in determining whether the order was "with respect to" the conveyance or transfer of the subject land from authorities which have discussed the scope of that expression in the context of s 51 of the *Commonwealth Constitution.*

[20] In that context, it is well established that the character of a law is to be determined by reference to "the nature of the rights, duties and privileges which it creates, changes, abolishes or regulates".[10] In *Fairfax v Federal Commissioner of Taxation*[11] Kitto J, speaking of s 51 of the *Constitution*, said:

> "Under that section the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?"

[21] On the assumption that it is correct to approach the validity of an order under s 185 of the Act by the same process of characterisation adopted by Kitto J in relation to s 51 of the *Constitution*, the issue whether an order requiring the Wise parties to execute an application for relaxation of the setback requirements is an order with respect to the conveyance or transfer of the subject land is to be resolved by a consideration of the legal rights and duties affected by the order.

[22] Insofar as the order requires the execution of the application it requires from the Wise parties, a step which is apt to enable the Shadbolts to obtain legal title to the subject land, it is clearly an order with respect to the conveyance of the subject land. To say the least, it is, in the language of Mason CJ in *Cunliffe v The Commonwealth*,[12] an order "which exhibits in its practical operation a substantial or sufficient connexion with the relevant head of power". Moreover, it is to be emphasised that the land is held under the *Land Title Act* 1994 (Qld). In order to obtain registration of the transfer of the subject land, and thus the legal title to that land, a plan of subdivision capable of registration under the *Land Title Act* was required.[13] In that regard, the approval of the relevant local government is necessary.[14] There can, in my view, be no doubt that when s 185(1)(b) of the *Property Law Act* refers to the "conveyance [or] transfer … of the land", it must be taken to encompass the legal title to the land.[15] The vesting order made by the

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10 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 294.

11 (1965) 114 CLR 1 at 7. This statement of principle was recently cited with approval by Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ in *Paliflex Pty Ltd v Chief Commissioner of State Revenue* [2003] HCA 65 at [36]; (2003) 219 CLR 325 at 346.

12 (1994) 182 CLR 272 at 294.

13 An instrument does not transfer or create an interest in a lot at law until it is registered: *Land Title Act* 1994 (Qld), s 181. An instrument may only be registered if it complies with the *Land Title Act*: *Land Title Act* 1994 (Qld), s 153. The requirements of a registrable plan of subdivision are set out in s 50 of the *Land Title Act.*

14 *Land Title Act* 1994 (Qld), s 50(g).

15 The dictionary contained in the *Property Law Act* provides that a "conveyance" includes a transfer of an interest in land and any assignment, appointment, lease, settlement, or other assurance in writing of any property: *Property Law Act* 1974 (Qld), s 3, Sch 6.

learned primary judge may have sufficed to create equitable rights in respect of the land in the Shadbolts and to cast equitable obligations in their favour upon the Wise parties but, without the title to the subject land being registered in the name of the Shadbolts, legal title to the subject land could not be transferred to them.[16]

[23] The question which must then be addressed is whether other legal rights and duties are affected by the order in a way which is not so incidental to the transfer of the subject land as to deny the character of the order as one with respect to the conveyance or transfer of the subject land. In this regard, the Wise parties assert that the order under challenge is correctly characterised as an order with respect to some subject other than the conveyance or transfer of the subject land because it obliges them to forego their "rights" to object to the swimming pool and associated structures on the basis that the relevant setback requirements have not been fulfilled.

[24] In this regard, it may be noted that the order that the Wise parties' consent to the relaxation of the setback requirements of the *Building Act* has not been shown adversely to affect in any material way the use and enjoyment by the Wise parties of the land to be retained by them. There has not been, for example, a suggestion that the relaxation of the setback requirements will actually impede the use and enjoyment of the land which they are to retain because of the proximity of the structure on the subject land, or that the relaxation is likely to reduce the value of the retained land to any extent not already compensated for by the $15,000 compensation ordered to be paid by the Shadbolts by Mullins J. At the hearing before the learned primary judge, no attempt was made on behalf of the Wise parties to suggest that an infringement of the "rights" involved in requiring them to consent to the relaxation of the setback requirements to facilitate the conveyance of the subject land would cause material loss to the Wise parties. That is hardly surprising given the relatively tiny area of the subject land and the structures thereon in comparison with the large balance area retained by the Wise parties. If any such loss had been identified, an order for compensation under s 186(2)(b) of the *Property Law Act* could have included compensation for such loss.

[25] The principal significance of s 186(2)(b) in relation to the argument of the Wise parties, however, is that its very terms suggest that interference with the "rights" of a party, beyond that party's rights as owner of the subject land required to be transferred, may result from an order made under s 185(1)(b).

[26] Section 186 provides relevantly as follows:

> " **(1)** The minimum compensation to be paid to the adjacent owner in respect of any conveyance [or] transfer … under section 185 to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence, be the unimproved capital value of the subject land, and in any other case 3 times such unimproved capital value.
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> **(2)** In determining whether the compensation shall exceed the minimum and if so by what amount, the court shall have regard to—
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> (a) the value, whether improved or unimproved, of the subject land to the adjacent owner; and

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16 *Breskvar v Wall* (1971) 126 CLR 376 at 385 - 386.

> (b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and **through the orders proposed to be made in favour of the encroaching owner**; and
> (c) the circumstances in which the encroachment was made." (emphasis added)

[27] That part of s 186(2)(b) which has been highlighted above indicates that loss or damage may result to the adjacent owner through the making of orders in favour of an encroaching owner under s 185. That is to say, the rights or interests of the adjacent owner, other than as the owner of the land to be transferred, may be adversely affected by an order under s 185(1)(b). To the extent that an order under s 185(1)(b), such as that in question here, may be apt adversely to affect the rights of an adjacent landowner such as the Wise parties, that loss may be the subject of an award of compensation. Thus the circumstance that such rights or interests, other than those inhering in the adjacent landowner as such, are adversely affected by such an order cannot deny to an order the character of an order with respect to the conveyance or transfer of the subject land.

[28] For these reasons, I am of the view that the circumstance that any "rights" of the Wise parties to object to the relaxation of the setback requirement were set at nought by the order of the learned primary judge is not apt to deny the order the character of an order with respect to the conveyance or transfer of the subject land.

[29] At this point, it should also be said that the analogy pressed by the Wise parties with the approach taken to the interpretation of s 51 of the *Constitution* by Kitto J in *Fairfax* is far from perfect. The phrase "with respect to" has long been recognised as being of wide import in a number of different statutory contexts.[17] It has been said to be synonymous with the phrase "in respect of",[18] a phrase about which Mann CJ famously said:

> "The words … are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer."[19]

[30] Recently, in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc*,[20] the High Court took a similarly expansive approach to the meaning of "with respect to" in the context of s 51 of the *Constitution* when it stated unanimously that:

> "If a connection exists between the law and the relevant head of power the law will be "'with respect to' that head of power" unless the connection is "'so insubstantial, tenuous or distant' that it cannot

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17 See, eg, *Corporation of Huddersfield v Great Northern Railway Co* (1881) 50 LJQB 587 at 591 - 592, 593; *Sherwood v Sherwood* (1969) 16 FLR 18 at 21; *The Queen v Gee* [2003] HCA 12 at [39]; (2003) 212 CLR 230 at 248.

18 The authorities in this regard are discussed by O'Keefe J in *Director of Public Prosecutions v Webb* [2000] NSWSC 859; No 10819 of 2000, 14 September 2001 at [17] - [29]. It may be noted that in the appeal from this decision, which was dismissed, Mason P, with whose reasons Brownie A-JA and Studdert J agreed, noted in passing that the phrases "in respect of" and "with respect to" were analogous: see *Director of Public Prosecutions v Webb* [2001] NSWCA 307 at [9]; (2001) 52 NSWLR 341 at 343.

19 *The Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111. See also *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 416.

20 [2003] HCA 43 at [35]; (2003) 214 CLR 397 at 413.

> sensibly be described as a law 'with respect to' that head of power'." (citations omitted)

[31] It might be said that the approach described by Kitto J in *Fairfax* is simply one method of determining whether or not there is a connexion between a law or, as in this case, a court order and the head of power authorising that law or order, that may be described as being more than "insubstantial, tenuous or distant".

[32] It may be, for example, that another way of determining whether there is a sufficient connexion between a court order and a head of power in a case like the present is to examine whether or not the order is substantially directed to the achievement of the purpose for which the power to make the order has been conferred. There can be no doubt that the order in the present case would satisfy this test. The order was necessary in order to compel the execution of an application which was a step on the way to enabling the Shadbolts to obtain legal title to the subject land. An order which is apt to facilitate the conveyance or transfer of the subject land is readily, and unremarkably, to be characterised as an order with respect to the conveyance or transfer of the subject land.[21]

The vesting order and the finding of reprehensible conduct

[33] The Wise parties complain that the vesting order had not been sought by the Shadbolts before the learned primary judge suggested it. However that may be, I note in passing that s 190 of the *Property Law Act* provides that where a court may make or has made an order with respect to an encroachment it may "make such vesting order as it may deem proper instead of or in addition to the order". In any event, this complaint is said by the Wise parties to be of practical significance only in relation to the order for costs made below.

[34] The Wise parties also acknowledge that the significance of their argument in relation to the learned primary judge's description of their conduct as "reprehensible" goes only to whether the order as to costs of the proceedings below made by the learned primary judge should be set aside.

[35] The Wise parties seek to have the order for costs made below set aside irrespective of their success on the substantive ground of the appeal which I have already discussed. That circumstance engages s 253 of the *Supreme Court Act* 1995 (Qld), which provides that an appeal against the exercise of the discretion to order costs lies only with the leave of the judge who made the order. That s 253 operates in this way has been clearly established by previous decisions of this Court including *Re Golden Casket Art Union Office*[22] and *Emanuel Management Pty Ltd (in liq) v Fosters Brewing Group Ltd*.[23]

[36] The Wise parties did not seek or obtain leave to appeal from the order as to costs from the learned primary judge. That being the case, their appeal on the issue of costs alone is incompetent by reason of the operation of s 253 of the *Supreme Court Act* 1995 (Qld).

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21 Cf *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No 5157* [1997] 1 Qd R 102 esp at 108 - 109.

22 [1994] QCA 480 at [13] - [14]; [1995] 2 Qd R 346 at 349.

23 [2003] QCA 516 at [6]; [2004] 2 Qd R 11 at 14.

[37] As a result, the complaints of the Wise parties as to the learned primary judge's conclusion that they had behaved reprehensibly is of only academic interest, as is the complaint of the Wise parties that the Shadbolts had not sought a vesting order prior to the hearing before the learned primary judge. Because the appeal is incompetent in this regard, these matters cannot have any effect upon the order for costs made by the learned primary judge, and it is unnecessary to consider these matters further.

Conclusions and orders

[38] The appeal should be dismissed.

[39] The Wise parties should pay the Shadbolts' costs of the appeal to be assessed on the standard basis.