SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Jorgensen & Ors* [2009] QCA 20
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (applicant) **v** **ALAN BRADLEY JORGENSEN** (first respondent/respondent) **ZHI LI also known as LYNA JORGENSEN** (second respondent/not a party to the application) **JIM'S WATER TANKS PTY LTD** ACN 123 918 721 (third respondent/not a party to application) **ROBERT WILLIAM MORTON** (fourth respondent/not a party to application) **THE BANKRUPT ESTATE OF ALAN BRADLEY JORGENSEN** (fifth respondent/not a party to application)
FILE NO/S:	Appeal No 12536 of 2008 SC No 7032 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 February 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2009
JUDGES:	Keane, Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application to strike out Notice of Appeal granted** **Ex tempore order of Keane JA:** **Leave to apply for costs by way of written submissions granted**
CATCHWORDS:	PROCEDURE — SUPREME COURT PROCEDURE — QUEENSLAND — PROCEDURE UNDER RULES OF COURT — JUDGMENT AND ORDERS — RELIEF AGAINST — where appellant framed grounds of appeal against all issues raised in originating court judgment — where originating court orders referred only to costs — where appellant lodged appeal absent leave of primary judge — whether appeal relates to costs only — whether leave of

primary judge required under r 307 of the *Uniform Civil Procedure Rules* 1999 (Qld) — whether appeal incompetent for want of leave

Corporations Act 2001 (Cth), s 1323, s 1324
Supreme Court Act 1995 (Qld), s 253
Uniform Civil Procedure Rules 1999 (Qld), r 307

Conway v The Queen (2002) 209 CLR 203; [2002] HCA 2, cited
Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd [2004] 2 Qd R 11; [2003] QCA 516, cited
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478; [2002] HCA 22, cited
Re Golden Casket Art Union Office [1995] 2 Qd R 346; [1994] QCA 480, cited

COUNSEL: P J Davis SC, with J W Peden, for the applicant
The respondent appeared on his own behalf

SOLICITORS: Australian Securities & Investment Commission for the applicant
The respondent appeared on his own behalf

[1] **KEANE JA:** By originating application filed on 14 August 2007 (and amended on 28 November 2007) the Australian Securities and Investments Commission ("ASIC") brought proceedings against Mr Jorgensen and others including a corporation, Jim's Water Tanks Pty Ltd ("the Company"), of which Mr Jorgensen was the sole director. ASIC sought, inter alia, orders for the winding up of the Company and (by paragraph 9 of its originating application) a permanent injunction pursuant to s 1323 and s 1324 of the *Corporations Act* 2001 (Cth) to restrain the respondents from dealing with property of the Company.

[2] After the commencement of proceedings there was a considerable amount of interlocutory skirmishing between the parties. In the course of that skirmishing, injunctive relief was granted to ASIC to preserve the property of the Company pending the final determination of the proceedings.

[3] On 31 December 2007 the Company entered into voluntary administration. On 16 March 2008, the Company entered into a deed of company arrangement ("the DOCA"). By the terms of the DOCA the management of the Company's affairs was vested solely in the administrators.

The decision at first instance

[4] On 22 September 2008 the Chief Justice heard ASIC's application for orders which would finally dispose of the proceedings on the basis that the winding-up of the Company was no longer necessary. ASIC's position was that there was also no longer any utility in the pursuit of permanent relief in accordance with paragraph 9 of the originating application.

[5] At the hearing before the learned Chief Justice, Mr Jorgensen did not oppose the granting of leave to ASIC to discontinue the claim for a winding up of the

Company, and on 22 September 2008, the Chief Justice made an order giving leave to discontinue that claim.

[6] There was controversy, however, as to the consequential order for costs were then to be made. ASIC and the administrators of the Company had agreed that there should be no order for costs as between ASIC and the Company. They sought an order to give effect to that agreement. Mr Jorgensen asserted that ASIC should pay the Company's costs of the proceedings, and to that end he sought, as director of the Company, to represent the Company in the hearing. Mr Jorgensen also sought an order that ASIC pay his costs of the proceeding commenced on 14 August 2007.

[7] Mr Jorgensen took his stand in this regard upon the provisions of r 307 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR"). That rule is in the following terms:

> "(1) A party who discontinues or withdraws is liable to pay–
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> (a) the costs of the party to whom the discontinuance or withdrawal relates up to the discontinuance or withdrawal; and
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> (b) the costs of another party or parties caused by the discontinuance or withdrawal.
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> (2) If a party discontinues or withdraws with the court's leave, the court may make the order for costs it considers appropriate."

[8] Mr Jorgensen's focus was upon r 307(1), whereas the orders which were made actually engaged r 307(2) because the claims were discontinued with the court's leave.

[9] At the hearing on 22 September 2008, Mr Jorgensen's attempt to represent the Company to dispute the order for costs agreed between ASIC and the Company was opposed by the representative of the Company's administrators. Mr Jorgensen intimated an intention to seek to have the matter "adjourned to engage Counsel" if his Honour were "minded to make some ruling on the powers of the director today."

[10] The learned Chief Justice ruled that, by virtue of the terms of the DOCA, Mr Jorgensen's powers as a director to represent the Company were, and remained, suspended, and that Mr Jorgensen did not have the right to be heard as such in relation to the disposition of the winding up application. His Honour also declined to grant Mr Jorgensen an adjournment to seek legal advice on his right to represent the Company on the basis that Mr Jorgensen "would seek simply to cavil with the ruling I have just made to facilitate his making submissions in relation to the costs on the disposition of the winding-up order."

[11] The learned Chief Justice reserved his decision on the balance of ASIC's application. On 26 September 2008, his Honour made an order which granted ASIC leave to discontinue the claim for relief set out in paragraph 9 of its amended originating application. His Honour also ordered that Mr Jorgensen pay ASIC's costs of the proceeding to be assessed on the standard basis.

Mr Jorgensen's appeal

[12] On 20 October 2008 Mr Jorgensen filed a notice of appeal. The notice of appeal is to some extent unclear, and therefore embarrassing, in that it does not dispute that the orders discontinuing ASIC's proceedings were correctly made but nevertheless

seeks orders that "[t]he Judgments of de Jersey CJ of 22nd and 26th September 2008 be set aside", apparently referring to all the orders made by his Honour on 22 and 26 September 2008. There is simply no contention in the notice of appeal to the effect that the learned Chief Justice erred in granting ASIC leave to discontinue its claims.

[13] In the body of the notice of appeal, Mr Jorgensen complains that he was not permitted to speak for the Company and that he was not granted an adjournment to enable him to take legal advice in that regard. It is to be noted, however, that he does not suggest that the discretionary power of the court under r 307(2) of the UCPR had not arisen.

[14] Mr Jorgensen's appeal has been listed for hearing on 24 March 2009.

ASIC's application to strike out the appeal

[15] ASIC applied to have Mr Jorgensen's notice of appeal struck out. That application was heard by this Court on 9 February 2009.

[16] ASIC's principal contention on the strike out application was founded upon Mr Jorgensen's failure to comply with s 253 of the *Supreme Court Act* 1995 (Qld). Section 253 provides:

> "No order made by any judge of the [Supreme Court] … 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."

[17] It is clear that Mr Jorgensen, who represented himself in the proceedings at first instance and in this Court, did not obtain, or for that matter seek, the leave of the Chief Justice before filing his notice of appeal. ASIC argues that the filing of the notice of appeal was contrary to s 253 of the *Supreme Court Act*. Accordingly, ASIC submits that Mr Jorgensen's notice of appeal should be struck out as incompetent.

[18] ASIC also argued that Mr Jorgensen's grounds of appeal are without substance. It seems to me that the efficient course, in terms of the due administration of justice, is to confine my attention to the s 253 issue and to reserve my opinion on these other arguments which might conveniently be agitated on the hearing of the appeal if, indeed, that appeal is to proceed. Mr Davis SC, who appeared with Mr Peden of Counsel for ASIC, was not disposed to argue for a different approach.

The arguments in this Court

[19] During the course of argument in this Court, Mr Jorgensen was invited to consider the possibility that he might wish to seek to apply now to the learned primary judge for leave to appeal. Mr Jorgensen might have been able to obtain leave to appeal; and if leave to appeal were refused by the learned primary judge in circumstances where that decision was arguably erroneous, Mr Jorgensen would then have been in a position to pursue his appeal against the refusal of leave to appeal unimpeded by the contention that his appeal was incompetent by virtue of s 253 of the *Supreme Court Act*.[1] Mr Jorgensen declined to seek an opportunity to cure any defect in his proceeding which might be said to arise by virtue of the operation of s 253 of the

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[1] Cf *Emanuel Management Pty Ltd (In Liq) v Foster's Brewing Group Ltd* [2004] 2 Qd R 11 at 15 – 16; [2003] QCA 516 at [10].

Supreme Court Act. Rather, Mr Jorgensen sought to maintain that the orders subject to his appeal are not "orders as to costs only".

[20] Mr Jorgensen's notice of appeal was, as has been noted, somewhat embarrassing in the terms in which it was cast. Recognising Mr Jorgensen's disadvantage as an unrepresented litigant, and in an endeavour to ascertain precisely what relief Mr Jorgensen sought on his appeal, the Court invited Mr Jorgensen to identify the orders which he would ask the Court to make in the event that his appeal were to be successful. He indicated that he would seek the following further orders:

(a) that he has standing in any matter concerning applications by ASIC;

(b) that the orders agreed between ASIC and the administrators be declared non-binding on the Company; and

(c) that there was no requirement on ASIC to seek leave from the court to discontinue the claim in paragraph 9 of its amended originating proceeding as that claim was redundant, the interlocutory injunctions having expired.

[21] If the contentions underlying these further orders afforded Mr Jorgensen arguable answers to ASIC's contention then the Court might have been disposed to grant leave to Mr Jorgensen to amend his notice of appeal so that his appeal could proceed. I am unable, however, to accept that these contentions are fairly arguable, and so I would not be disposed to grant Mr Jorgensen leave to amend his notice of appeal.

[22] As to the first point, the question of Mr Jorgensen's standing to represent the Company in **any** matter concerning ASIC is a broad question which was not before the learned primary judge, and in respect of which his Honour made no order. This Court should not entertain this question for the first time. It should also be noted that, in any event, complaints about the learned primary judge's refusal to allow Mr Jorgensen to speak for the Company and the refusal of an adjournment in that regard, can have no bearing upon the order for costs made in ASIC's favour against Mr Jorgensen.

[23] As to the second point, Mr Jorgensen would need the leave of the primary judge to challenge the order for costs agreed between ASIC and the Company. Accordingly, Mr Jorgensen's new proposed order (b) does not avoid the problem which s 253 of the *Supreme Court Act* puts in Mr Jorgensen's way.

[24] As to the third point, the discontinuance of the claim for the relief in paragraph 9 was not disputed by Mr Jorgensen at the hearing. He cannot now seek to dispute that ruling on appeal.

[25] ASIC argues that, once the provisions of r 307(2) of the UCPR were engaged, the orders made by the learned Chief Justice were orders "as to costs only which by law are left to the discretion of the judge." It is said that the circumstance that Mr Jorgensen also seeks to appeal about the learned primary judge's refusal to give him leave to represent the Company in the proceedings before his Honour, and his Honour's refusal of an adjournment to enable him to take advice on his right to represent the Company in order to dispute the costs order as between ASIC and the Company does not defeat this argument. These complaints are about a step in the process by which the orders as to costs as between ASIC and the Company ultimately came to be made. It is the order ultimately made which determines the

rights and liabilities of the parties. It is the character of that order, not the grounds of complaint or the form of the appeal, that is decisive of the application of s 253 of the *Supreme Court Act*. ASIC relies upon the decision of this Court in the *Re Golden Casket Art Union Office*.[2]

[26] The second aspect of ASIC's argument is that, to the extent that Mr Jorgensen appeals against the order made against him that he pay ASIC's costs, that order is plainly an order as to costs only which was by law left to the discretion of the Chief Justice. It may be said immediately in relation to this second aspect of ASIC's argument that it is clearly correct.

[27] As to the first aspect of ASIC's argument, it is said that, on an appeal from a final order, an appellate court can correct any interlocutory order which affected the final result. There is high authority which supports this proposition.[3] But to say that is not, strictly speaking, to say that an appeal as to the order ultimately made cannot be regarded as an appeal as to the interlocutory orders which led to the final order, nor is it to answer the question whether the appeal is one as to costs only which are left by law in the discretion of the judge below. That having been said, however, the only matters in dispute below, so far as the rights and liabilities of the parties were concerned, related to costs, the orders which were made affected the rights and liabilities of the parties only in respect of the costs of the proceedings, and the only orders which this Court could make, in respect of the rights and liabilities of the parties if the appeal were to be successful, would be orders as to costs. While this observation may not be decisive in ASIC's favour it does, I think, afford some assistance in forming an appreciation of the true scope of the operation of s 253 of the *Supreme Court Act* in this case.

[28] In my respectful opinion, it is the intention of s 253 of the *Supreme Court Act* to require leave from the primary judge to appeal against such orders as those made by the primary judge in the circumstances of the present case.

[29] The evident purpose of s 253 of the *Supreme Court Act* is to impose a filter upon appeals about the exercise of the discretion to award costs where the disposition of the costs is left by law in the discretion of the judge. The evident intent of the provision is to ensure that the primary judge's balancing of discretionary considerations should not be reconsidered on appeal save in cases where the primary judge has first addressed the question whether there is good reason to allow his or her exercise of the discretion to be reviewed.

[30] In this case, there can be no doubt that the occasion for the exercise of the judicial discretion reposed by the law in the primary judge had truly arisen under r 307(2) of the UCPR. This Court could come to a different view as to the proper exercise of the discretions as to costs which Mr Jorgensen seeks to challenge only if it were to take a different view of the proper balance of the considerations which bear upon the exercise of the discretion from that taken by the primary judge. To put the point in another way, even if this Court were to conclude that the rulings as to representation and adjournment of which Mr Jorgensen seeks to complain were indeed erroneous, it would not follow that the exercise of the judge's discretion as to costs could be said to be erroneous as a result. This Court would need to perform the same kind of exercise as that undertaken by the learned primary judge in terms

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2 [1995] 2 Qd R 346 at 349; [1994] QCA 480.

3 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 483 – 484; [2002] HCA 22 at [6] – [7].

of striking the just balance between competing discretionary considerations in order to determine whether there should be a different outcome. And, of course, this outcome would concern only the orders as to costs. This view of the matter is, I think, consistent with the common law rule that an interlocutory error on the way to a final judgment will not result in an order setting aside the judgment unless the final judgment itself can be said by the appellate court to involve a miscarriage of justice.[4]

[31] So far as the first aspect of ASIC's argument is concerned, the disposition of the costs was committed by law to the discretion of the learned Chief Justice. Rule 307(2) of the UCPR was the provision which had immediate operation in this regard. The learned Chief Justice's refusal to allow Mr Jorgensen to speak for the Company in relation to the order as to costs between it and ASIC, and the refusal of an adjournment to enable him to obtain legal assistance in that regard were not apt to take the disposition of the costs outside of r 307(2) of the UCPR. Mr Jorgensen's complaints that he was not permitted to speak for the Company and that he was wrongly refused an adjournment to refine his urgings that he should be allowed to do so are not apt to deny to the orders which he seeks to set aside the character of order as to costs only which were in the discretion of the trial judge. As I have said, the position in relation to the second aspect of ASIC's argument, that is, the argument in relation to the order that Mr Jorgensen pay ASIC's costs of the proceedings, is clearly in ASIC's favour.

[32] I should mention that I was at one time concerned that the orders against which Mr Jorgensen seeks to appeal might be properly characterised, not as orders "as to costs only which by law are left to the discretion of the judge", but as orders concerned with the terms upon which ASIC was to be granted leave to discontinue its claims. The transcript of proceedings is, however, tolerably clear that his Honour's decisions to grant leave to discontinue ASIC's claims were made quite independently of his Honour's determinations of the issues as to costs. As I have said, Mr Jorgensen did not oppose the discontinuance of the proceedings before the learned primary judge.

Conclusion and orders

[33] I am of opinion that the orders subject to Mr Jorgensen's appeal are orders as to costs only left by law to the discretion of the learned Chief Justice. Accordingly, by reason of the operation of s 253 of the *Supreme Court Act*, leave was required to allow those orders to be appealed. As leave was not sought or obtained, Mr Jorgensen's appeal is incompetent, and I would strike out the notice of appeal.

[34] I would, however, note that on the hearing of ASIC's application in this Court, ASIC acknowledged through its counsel that the order for costs made by the learned Chief Justice was not intended to encompass the costs of the proceedings concerned with the pursuit of orders for the winding up of the Company. The Court would expect that ASIC, as a model litigant, would, in the course of enforcing that order, conform to this assurance.

[35] **HOLMES JA:** I agree with the reasons of Keane JA and with the order proposed.

[36] **FRASER JA:** I agree with the reasons of Keane JA and with the order proposed by his Honour.

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4 Cf *Conway v The Queen* (2002) 209 CLR 203 at 217 – 220; [2002] HCA 2 at [29] – [38].