

# SUPREME COURT OF QUEENSLAND

CITATION: *Conde v Hunter* [2009] QCA 305

PARTIES: **MILTON ARNOLDO CONDE**  
(applicant)  
v  
**JOHN HUNTER**  
(respondent)

FILE NO/S: Appeal No 7008 of 2009  
DC No 395 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time  
General Civil Appeal

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 13 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 2 October 2009

JUDGES: Keane and Fraser JJA and Cullinane J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDERS: **1. Application refused.**  
**2. Applicant to pay the respondent's costs fixed in the sum of \$11,000.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where applicant brought a defamation action against the respondent – where applicant's statement of claim struck out below and he was given leave to re-plead – where other orders below that the applicant pay the respondent's costs and that proceedings were stayed until payment was made – where applicant seeks to appeal these other orders and such appeal is out of time – whether an extension of time in which to appeal should be granted – whether costs of this application should be fixed and in what amount

COUNSEL: The applicant appeared on his own behalf  
M J Foley for the respondent

SOLICITORS: The applicant appeared on his own behalf  
Connor Hunter Solicitors for the respondent

- [1] **KEANE JA:** I have had the advantage of reading the reasons for judgment prepared by Fraser JA. I agree with those reasons and with the orders proposed by his Honour.
- [2] **FRASER JA:** The applicant sued the respondent in the District Court for damages for defamation. In the applicant's amended statement of claim filed on 4 August 2008 the applicant alleged that the respondent abused and insulted the applicant at various places and on various dates between 9 March 2007 and 20 April 2007. The pleading did not properly plead the intended causes of action in defamation because it did not allege that on each occasion the respondent's allegedly defamatory remarks were published to someone other than the applicant. The pleading also lacked some necessary details and contained various other defects. After the applicant failed to rectify deficiencies alleged by the respondent in his solicitor's letter, the respondent applied to strike out the pleading and for other orders.
- [3] On 14 November 2008 a District Court judge acceded to the respondent's application and made the following orders:
- “1. The Amended Statement of Claim be struck out;
  2. That the Plaintiff be given leave to replead within twenty-one (21) days;
  3. Order that Plaintiff pay Defendant's costs of today's application to be assessed on the standard basis; and
  4. Order that proceedings be stayed pending payment of the Defendant's costs of today's application by the Plaintiff.”
- [4] On 1 July 2009 the applicant filed an application in this Court seeking leave to appeal from orders 3 and 4. The time for filing the proposed appeal expired in December 2008 (see *Uniform Civil Procedure Rules 1999 (Qld)*, r 748(a)) so that the applicant requires a very substantial extension of time for his proposed appeal.
- [5] The applicant's proposed notice of appeal does not challenge the order striking out his amended statement of claim. In the applicant's written argument he foreshadowed such a challenge but he did not articulate a comprehensible ground for it. Furthermore, he has availed himself of the grant of leave to re-plead. It follows that questions concerning the sufficiency of the pleading which the primary judge struck out are irrelevant in the present context. For that reason I need say no more than that, in light of the obvious deficiencies in the pleading, it was plainly within the primary judge's discretion to strike it out and grant the respondent leave to re-plead.
- [6] The applicant argues that the orders he seeks to challenge should be set aside on the ground that they were procured by fraud, malicious prosecution, and various other forms of alleged misconduct by the respondent and his solicitor. These are very serious allegations, but they are made in the most general of terms and without a shred or scintilla of evidence to support them.
- [7] The amount of the costs payable by the applicant was subsequently assessed at \$7,980.87. The respondent then issued a bankruptcy notice based upon the applicant's failure to pay that sum. The parties have made submissions about the question whether the costs order made in the District Court was a final order. That question was resolved unfavourably to the applicant in the Federal Court in a

decision which upheld the validity of the respondent's bankruptcy notice: see *Conde v Hunter* [2009] FCA 1016. In any case, resolution of that question in a different way would not advance the applicant's argument for leave to appeal in this Court.

- [8] All relevant considerations point to refusal of the present application: there is no satisfactory explanation for the applicant's lengthy delay; the orders which he seeks to challenge were discretionary; they concerned matters of practice and procedure; they related only to costs; the applicant has not identified any arguable error in the primary judge's decision to make those orders; and those orders have not worked any substantial injustice to him. Those orders left the applicant free to pursue his defamation claim provided that he paid the respondent the amount of the costs the respondent had incurred in obtaining the unchallenged order.
- [9] I would refuse the application with costs. The respondent sought an order that the Court fix those costs. An affidavit by the respondent's solicitor estimated that the respondent's costs (including GST) in relation to the appeal totalled \$13,834.01, comprised of \$7,234.01 for professional costs and outlays and \$6,600 for counsel's fees. The components of those figures are not identified, but they include unspecified amounts for conferences between the solicitor and counsel totalling two and a half hours. It is not clear to me that those conferences were required. Whilst I accept that it is appropriate to award costs on the indemnity basis I consider that the suggested total sum for costs of \$13,800 is too high, particularly in light of the obvious and readily ascertainable lack of merit in the application. In my opinion a reasonable sum for the respondent's costs is \$11,000.
- [10] In my opinion the application should be refused and the applicant should be ordered to pay the respondent's costs fixed in the sum of \$11,000.
- [11] **CULLINANE J:** I have read the reasons of Fraser JA in this matter and agree with those reasons and the orders proposed.