SUPREME COURT OF QUEENSLAND

CITATION:	*Conde v Gilfoyle & Anor* [2010] QCA 109
PARTIES:	**MILTON ARNOLDO CONDE** (appellant/respondent) **v** **BURCHILL & HORSEY LAWYERS** (first respondent/first applicant) **JULIE GILFOYLE** (second respondent/second applicant) **MYLTON BURNS** (third respondent/not party to the application) **McINNES WILSON LAWYERS** (fourth respondent/not party to the application)
FILE NO/S:	Appeal No 1182 of 2010 Appeal No 11377 of 2009 Appeal No 11430 of 2009 Appeal No 14595 of 2009 SC No 13341 of 2009 SC No 8610 of 2009 SC No 8609 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Applications to Strike Out
ORIGINATING COURTS:	Court of Appeal at Brisbane Supreme Court at Brisbane
DELIVERED ON:	14 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2010
JUDGES:	McMurdo P and Fraser JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In Appeal No 1182 of 2010:** **(a) Abridge the time for service of the respondents' application for summary dismissal of the appeal to permit service of that application on 19 February 2010 for the hearing of it on 22 February 2010;** **(b) Dismiss the appeal;** **(c) Order that the appellant pay the respondents' costs of their application to dismiss the appeal.** **2. In Appeal No 11377 of 2009:** **(a) Vary the stay ordered by Byrne SJA on 22 February 2010 to the extent necessary to allow the**

respondents to apply for the following orders;

(b) Dismiss the appeal;

(c) Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

3. In Appeal No 11430 of 2009:

(a) Vary the stay ordered by Byrne SJA on 22 February 2010 to the extent necessary to allow the respondents to apply for the following orders;

(b) Dismiss the appeal;

(c) Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

4. In Appeal No 14595 of 2009:

(a) Vary the stay ordered by Byrne SJA on 4 February 2010 to the extent necessary to allow the respondents to apply for the following orders;

(b) Dismiss the appeal;

(c) Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the respondents applied for summary dismissal of four appeals initiated by the appellant – where two appeals were stayed by this Court after the appellant failed to provide security as directed by the Court – where the remaining two appeals were stayed by Supreme Court pursuant to s 6(2)(a) *Vexatious Proceedings Act* 2005 (Qld) – where the respondents seek a variation of the orders of this Court and the Supreme Court to bring the applications for summary dismissal of the four appeals – where the respondents applied for an abridgment of time to hear the applications for summary dismissal – whether an abridgment of time should be granted in the circumstances – whether the applications for summary dismissal should be granted – whether the appeals should be dismissed

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – SUBSTANTIVE RIGHT OR MATTER OF PROCEDURE – where two of the appellant's appeals were stayed by order of the Supreme Court pursuant to s 6(2)(a) *Vexatious Proceedings Act* 2005 (Qld) – where the order prohibited the appellant from instituting any proceeding without the prior leave of a Judge of the Supreme Court – whether the order prohibited the appellant from bringing the appeals against that order without first obtaining the requisite leave – whether the *Vexatious Proceedings Act* 2005 (Qld) precludes the right to appeal against a vexatious proceedings order

Supreme Court of Queensland Act 1991 (Qld), s 69
Vexatious Proceedings Act 2005 (Qld), s 5, s 6, s 6(2), s 7, s 10, s 11, s 11(6), s 13
Uniform Civil Procedure Rules, r 774

Bhamjee v Forsdick (No 2) [2004] 1 WLR 88; [2003] EWCA Civ 1113cited
Brown v Brook (1971) 125 CLR 275; [1971] HCA 30, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2, cited
Conde v Burchill & Horsey Lawyers & Anor [2009] QCA 367, cited
Conde v Burchill & Horsey Lawyers & Anor [2009] QSC 291, cited
Gilfoyle and Ors v Conde [2010] QSC 14, cited
K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309; [1985] HCA 48, cited
Lohe v Mansukhani [2007] QSC 69, cited
National Australia Bank Ltd v Freeman [2006] QSC 86, cited
Ramsey v Skyring (1999) 164 ALR 378; [1999] FCA 907, cited
von Risefer & Ors v Permanent Trustee Company Limited [2005] 1 Qd R 681; [2005] QCA 109, cited
Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited

COUNSEL: The appellant/respondent appeared on his own behalf
R Dickson for the respondent/applicants

SOLICITORS: The appellant/respondent appeared on his own behalf
McInnes Wilson Lawyers for the respondent/applicants

[1] **McMURDO P:** I agree with Fraser JA's reasons for abridging the time for service of the respondents' application for summary dismissal of appeal No 1182 of 2010, and for summarily dismissing that appeal and appeals No 11377 of 2009; No 11430 of 2009 and No 14595 of 2009. I agree with the orders proposed by Fraser JA.

[2] **FRASER JA**: The respondents to four appeals started in this Court by Mr Conde (Appeal No 11377 of 2009, Appeal No 11430 of 2009, Appeal No 14595 of 2009 and Appeal No 1182 of 2010) have applied for summary dismissal of those appeals. I will discuss the issues that arise in those applications after I have first identified the orders against which Mr Conde has appealed and the circumstances in which those orders were made.

The orders against which Mr Conde has appealed

[3] On 14 September 2009 the Chief Justice ordered that Mr Conde's claim and statement of claim in proceeding 8609 of 2009 (by Mr Conde against Burchill & Horsey Lawyers) and in proceeding 8610 of 2009 (by Mr Conde against Ms Gilfoyle, a solicitor with Burchill & Horsey Lawyers) be struck out and that Mr Conde pay those defendants' costs of the proceedings to be assessed on the standard basis.[1] On 9 October 2009 Mr Conde filed two notices of appeal (Appeal No 11377 of 2009 and Appeal No 11430 of 2009) against those orders.

1 *Conde v Burchill & Horsey Lawyers & Anor* [2009] QSC 291.

[4] On 1 December 2009 Holmes JA made orders in both appeals, including that Mr Conde provide security for any costs of his appeal which may be awarded to Burchill & Horsey Lawyers and Ms Gilfoyle in the amount of $25,000, to be paid to the Registrar within 14 days.[2] Mr Conde did not provide any security within that time limit, with the result that his appeals in Appeal No 11377 of 2009 and Appeal No 11430 of 2009 were stayed.[3] He has not since provided any security. On 23 December 2009 he filed a notice of appeal (Appeal No 14595 of 2009) against the orders made by Holmes JA.

[5] On 4 February 2010, on the application of Ms Gilfoyle, Burchill & Horsey Lawyers, Mr Mylton Burns, and McInnes Wilson Lawyers, Byrne SJA made orders including an order pursuant to s 6(2)(a) of the *Vexatious Proceedings Act* 2005 (Qld) ("the Act") staying six different proceedings started by Mr Conde, including his appeal in Appeal No 14595 of 2009, and an order pursuant to s 6(2)(b) of the Act prohibiting Mr Conde from instituting any proceeding in a Queensland court or tribunal without the prior leave of a judge of the Supreme Court.[4] On 19 February 2010 Mr Conde filed a notice of appeal (Appeal No 1182 of 2010) against those orders.

The circumstances in which those orders were made

[6] Mr Conde started about two dozen court proceedings between about May 2009 and February 2010. Byrne SJA described the pattern of Mr Conde's litigation:[5]

> "Typically, his claims:
>
> - allege that lawyers who have acted for his opponents maliciously prosecuted him and abused court process;
> - do not state facts that could arguably sustain the conclusory imputations of bad faith and other improper motive advanced;
> - are centred on ordinary steps in litigation taken by lawyers apparently acting properly for clients: such as defending a case, applying to a court for orders, and enforcing a costs order by bankruptcy proceedings;
> - involve extravagant, unparticularised claims for compensation for a broad range of grievances, personal injury and economic loss;
> - have no reasonable prospect of success, on the face of the proceedings or on the evidence; [Mr Conde has not sought to prove facts that might suggest a reason to allow him to re-plead in any of the extant proceedings against the applicants. His recent proceedings are not just badly pleaded. Factually, they appear to lack arguable merit.], and
> - do not conform with the *Uniform Civil Procedure Rules* governing pleadings."

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2 *Conde v Burchill & Horsey Lawyers & Anor* [2009] QCA 367.
3 Rule 774 of the *Uniform Civil Procedure Rules*.
4 *Gilfoyle and Ors v Conde* [2010] QSC 14.
5 *Gilfoyle and Ors v Conde* [2010] QSC 14 at [20].

[7] That summary was borne out by his Honour's detailed analysis of Mr Conde's recent litigation. Mr Conde did not identify any error in that analysis, which included reference to the decisions the subject of Mr Conde's appeals in Appeal No 11377 of 2009, Appeal No 11430 of 2009, and Appeal No 14595 of 2009. I will set out the relevant passages:

> "[4] In September 2008, the Sandgate Magistrates Court made a protection order against Mr Conde under the *Domestic and Family Violence Act 1989* on the application of a woman who had retained Burchill & Horsey Lawyers as her solicitors. Those lawyers employed Ms Gilfoyle, a solicitor. Ms Gilfoyle represented the woman in the case. On Mr Conde's appeal, on 20 May 2009, the District Court set the protection order aside. The appeal was allowed on the basis of apparent bias on the part of the Acting Magistrate.
>
> [5] On 10 August 2009, by separate claims filed in this Court, Mr Conde sued Burchill & Horsey [BS 8609 of 2009] and Ms Gilfoyle [BS 8610 of 2009] claiming damages for malicious prosecution [No filing fees were paid, Mr Conde having deposed to lack of means. This happens every time Mr Conde starts litigation]. The statements of claim asserted many things, including that, in unspecified ways, Ms Gilfoyle had "wilfully…mislead" the Magistrates Court and maliciously committed a variety of criminal offences, including fabricating evidence, corruption of witnesses and conspiring to defeat justice. General, aggravated and punitive damages were sought – $900,000 against the firm; $450,000 against Ms Gilfoyle – "for injury to reputation…pain and suffering, distress, stress…mental suffering…injury to health…false imprisonment and pecuniary loss".
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> [6] Burchill & Horsey and Ms Gilfoyle instructed Mylton Burns, the principal of McInnes Wilson Lawyers, to defend them. Mr Burns wrote to Mr Conde drawing attention to his pleadings, claiming that the "wide range of assertions of mixed law and fact" they contained were susceptible of being struck out by court order. Mr Conde replied, refusing to amend. His letter also warned Mr Burns not to underestimate him: to do so, he wrote, would be the same "huge mistake" Ms Gilfoyle and Burchill & Horsey had made; adding, "if you do, then I am legally entitled to sue you and McInnes Wilson Lawyers for Malicious Prosecution".
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> [7] Conditional notices of intention to defend Mr Conde's claims were filed on behalf of the lawyers, disputing jurisdiction; and those defendants applied to have the claims dismissed.
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> [8] The Chief Justice determined those applications, ordering that the claims and statements of claim be struck out, and

that Mr Conde pay costs.[6] His Honour held that a large part of the claims was brought in contravention of s. 9(1) of the *Personal Injuries Proceedings Act 2002*. That provision requires that, before commencing litigation based on a damages claim founded on a liability for personal injury, written notice must be given to the prospective defendant, which Mr Conde had not done. His Honour also decided that the pleadings were in substantial disconformity with the *Uniform Civil Procedure Rules*, mentioning the allegations of criminal offences – all unsupported by stated grounds – and other instances of mere conclusory assertion, such as protestations of malicious conduct by the lawyers: they, too, were not supported by statements of material facts that could arguably sustain the contentions.

[9] Mr Conde had not paid costs ordered against him in District Court proceedings [See para [23]]. A bankruptcy notice issued for that judgment debt, and Mr Conde became a bankrupt on 7 October.

[10] Mr Conde appealed against the Chief Justice's orders.[7] Burchill & Horsey and Ms Gilfoyle filed applications seeking security for the costs of the appeal, particulars of a contention in the Notice of Appeal that the orders were obtained by fraud, and that paragraphs of the Notice be struck out.

[11] Three days later, in this Court, Mr Conde filed a claim [BS 13341 of 2009] against Ms Gilfoyle, Burchill & Horsey, Mr Burns and his firm seeking $4,000,000 against each for "…pain and suffering, distress, stress…mental suffering…family breakdown, huge pecuniary loss…job opportunities loss", alleging:

> "The Defendants Julie Gilfoyle (Solicitor), Burchill & Horsey Lawyers, Mylton Burns (Solicitor) and McInnes Wilson have engaged in an Abuse of Legal Process for improper purposes to gain a collateral advantage (that is, other than of winning the action) by fraudulently, unlawfully, willfully (sic), knowingly, maliciously, premeditated, callously, contrary to the *Uniform Civil Procedure Rules* 1999 (UCPR) and with scant regards to the rules of pleading, on the 23 November 2009, filed in the Court of Appeal, Supreme Court of Queensland, Brisbane, the Abusive Application Number: CA11377/09 (BS8609/09 – BS8610/09), to obtain security for costs, exemption and extension to file and serve their submissions or to submit a draft to

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[6] This is the decision mentioned in paragraph 3 of these reasons: *Conde v Burchill & Horsey Lawyers & Anor* [2009] QSC 291.

[7] Appeal No 11377 of 2009 and Appeal No 11430 of 2009.

> Appeal Book, further directions that the Appellant give more particulars regarding the allegations of fraud, and to struck out a lot paragraphs of the Notice of Appeal, costs of Appeal, costs of Application, and further orders, etc. The Defendants are and have wrongly or using *Rules 671, 761 and 72(1)* of the UCPR 1999, and inducing the Court, Judges or Judicial Officers to apply Misuse of Legal Powers."

[12] Mr Dickson, a barrister, had been retained by the lawyers to argue the security for costs application. Two days after his outline of argument was filed, Mr Conde sued him [BS 13445 of 2009]. Mr Dickson was alleged to have abused court process because of the outline of argument. General, ordinary, aggravated and punitive damages of $6,000,000 were sought "for injury to reputation and feelings, loss of reputation, humiliation, loss of dignity, loss of self-esteem, loss of enjoyment of life, pain and suffering…mental anguish, discomfort, loss of time, family breakdown, huge pecuniary loss, study loss and job opportunities loss".

[13] As with the proceedings against the other lawyers, the claim and statement of claim against Mr Dickson involved conclusory assertions of improper motive or other misconduct, unaccompanied by any statement of primary fact to indicate that there might be substance in any of the several scandalous assertions.

…

[15] The day before the application for security for costs of the appeal against the Chief Justice's orders was to be heard by a judge of appeal, Mr Conde sued [BS 13461 of 2009] the Chief Justice claiming "misuse of legal powers" and "actual bad faith". Unsurprisingly, neither claim nor statement of claim mentioned a single fact that might by any possibility sustain any of the nasty assertions raised.

[16] On 1 December, Holmes JA ordered $25,000 security for costs of the appeal; that, after giving security, Mr Conde particularise the fraud alleged; that many paragraphs of the Notice be struck out; and that Mr Conde pay costs.

…

[17] On Christmas Eve, Mr Conde appealed against the decision of Holmes JA [CA 14595 of 2009].

[18] On that day, conditional notices of intention to defend were filed by the lawyers sued in 13341 and 13445 of 2009. Those notices prompted Mr Conde to launch fresh proceedings against the lawyers.

[19] Claim 17 of 2010 sought damages for the by now familiar indignities, personal injury and economic loss for having filed "the Abusive Conditional Notice of Intention to Defend" in 13341 of 2009. $4,000,000 was sought against each lawyer. The same day, Mr Conde filed another claim [BS 18 of 2010] against those defendants, this time adding Mr Dickson, claiming another $16,000,000 because the lawyers had delivered conditional notices of intention to defend in 8609 and 8610 of 2009. Two days later, Mr Conde sued [BS 165 of 2010] Mr Dickson for $6,000,000 simply because he had filed a conditional notice of intention to defend in 13445 of 2009.

…

[22] Mr Conde started a proceeding in 2007 in the Queensland Anti-Discrimination Tribunal ("QADT") alleging that John Hunter had racially vilified him by offensive remarks. After a three day hearing in November 2008 before that tribunal constituted by Peter Roney, a barrister, the case was dismissed last May. Mr Conde's evidence about the remarks was not accepted.

[23] Mr Conde also sued Mr Hunter for defamation in the District Court. His amended statement of claim alleged that Mr Hunter had insulted him. Mr Hunter brought an application complaining of deficiencies in the pleading. On 14 November 2008, a judge struck it out, gave leave to re-plead, and ordered that Mr Conde pay costs [There was a further order that the defamation proceedings be stayed pending payment. On 13 October 2009, the Court of Appeal refused Mr Conde's application for an extension of time within which to appeal and ordered that he pay $11,000 costs].

[24] On 17 August 2009, in this Court, Mr Conde sued [BS 8910 of 2009] Anthony Macklin, who was Mr Hunter's solicitor in the defamation litigation, claiming $550,000 "compensation for general, ordinary, aggravated, and punitive damages for injury to reputation and feelings, loss of reputation, harm caused such as: humiliation, loss of dignity, loss of self-esteem, loss of enjoyment of life, pain and suffering, distress, stress, emotional trauma, mental suffering, discomfort, injury to health, loss of time, and pecuniary loss". Assertions were made that "the defendant always acts unlawfully, wilfully, knowingly, recklessly, maliciously, by misleading the Courts and have (sic) committed the following offences…": and then reference is made to provisions of the *Criminal Code* relating to fraud, perjury, fabricating evidence, conspiracy to bring false accusations, conspiring to defeat justice, attempting to pervert justice, and false declarations. That day, by a

separate claim, Mr Conde sued Connor Hunter Law Firm, which employed Mr Macklin, making substantially the same allegations against that firm. Damages of more than $1,000,000 were sought. Mr Conde's other similar claim filed that day was against John Hunter. None of the claims had reasonable prospects of success. On 3 September, Mullins J dismissed them; and more costs orders were made against Mr Conde.

[25] A week later, Mr Conde filed another claim in this Court against Mr Macklin. On 23 September, he initiated claims against Connor Hunter and John Hunter for malicious prosecution. These proceedings were based on the fact that Mullins J had refused applications by Mr Macklin, Connor Hunter and Mr Hunter for orders under the Act. Douglas J struck those claims out, with costs against Mr Conde.

[26] On 19 October, Mr Conde sued [BS 11721 of 2009] Mr Hunter, Mr Macklin, Connor Hunter and a barrister, Matthew Foley, for abuse of legal process. Those lawyers had advanced Mr Hunter's successful application in the District Court defamation case [The costs order against Mr Conde was the foundation of the sequestration order made in respect of Mr Conde's estate.].

[27] On 4 November, Mr Conde sued [BS 12325 of 2009] Mr Hunter and others, including a barrister, Craig Eberhardt, who had represented Mr Hunter in the QADT. Next day, another claim [That hopeless claim was struck out by Douglas J on 16 December, with costs against Mr Conde on an indemnity basis] was initiated against the same defendants because they had arranged for a defence to be delivered in proceeding 11721 of 2009.

[28] On 10 December, Mr Conde sued [BS 13994 of 2009] Mr Eberhardt, Dan Rogers, a solicitor, and the firm which employed Mr Rogers, Robertson O'Gorman. For their temerity in representing clients in an apparently proper fashion, Mr Conde sought $15,000,000 for abuse of legal process. His complaint was that the lawyers had applied to strike out Mr Conde's 4 November claim. His pleading was struck out by Margaret Wilson J on 20 January; and another costs order was made against Mr Conde.

[29] In yet another unmeritorious claim, Mr Conde sued Mr Roney because of his decision when presiding in the QADT. Mr Conde was ordered to pay costs in respect of that litigation."

[8] The schedule in the Act defines "vexatious proceedings" as including proceedings that are an abuse of the process of a court or tribunal, proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose,

proceedings instituted or pursued without reasonable ground, and proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose. Byrne SJA found that:

> "[31] Mr Conde has frequently instituted proceedings in Australia. And those proceedings to which reference has been made, with one exception [The successful appeal to the District Court against the protection order], all look to have been instituted without reasonable ground [In view of this conclusion, it is unnecessary to decide whether proceedings were "instituted to …annoy"].

[9] His Honour referred to other proceedings started by Mr Conde (including his appeal in Appeal No 14595 of 2009) and concluded that it was highly probable that Mr Conde would, unless restrained, cause serious mischief by commencing more vexatious litigation. Indeed Mr Conde made it plain that he considered he was entitled to sue lawyers who acted for his opponents and took a step with which he disagreed.[8] Byrne SJA concluded that the Court should make vexatious proceedings orders, including orders having the effect of prohibiting Mr Conde from instituting proceedings in Queensland without the leave of the Court.

[10] On 4 February 2010 Byrne SJA made the following orders:

> "1. The applicants have leave pursuant to s. 5 (2) of the *Vexatious Proceedings Act 2005* to bring this application.
>
> 2. The following proceedings instituted by Milton Arnoldo Conde be stayed pursuant to s. 6 (2)(a) of the *Vexatious Proceedings Act 2005:*
>
> (a) Milton Arnoldo Conde v Julie Gilfoyle and Burchill & Horsey Lawyers and Mylton Burns and McInness Wilson Lawyers (BS 13341 of 2009);
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> (b) Milton Arnoldo Conde v Ross Dickson (BS 13445 of 2009);
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> (c) Milton Arnoldo Conde v Julie Gilfoyle and Burchill & Horsey Lawyers and Mylton Burns and McInness Wilson Lawyers (BS 17 of 2010);
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> (d) Milton Arnoldo Conde v Julie Gilfoyle and Burchill & Horsey Lawyers and Mylton Burns and McInness Wilson Lawyers and Ross Dickson (BS 18 of 2010);
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> (e) Milton Arnoldo Conde v Ross Dickson (BS 165 of 2010);
>
> (f) Milton Arnoldo Conde v Burchill & Horsey Lawyers and Julie Gilfoyle (CA 14595 of 2009).
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> 3. Pursuant to s. 6 (2)(b) of the Vexatious Proceedings Act 2005 ("the Act"), Milton Arnoldo Conde be and is hereby

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[8] *Gilfoyle and Ors v Conde* [2010] QSC 14 at [35] - [37].

> prohibited from instituting any proceeding (within the meaning of that word in the definition of "proceeding" in the dictionary in the schedule to the Act) in a court or tribunal of the State of Queensland without prior leave of a Judge of the Supreme Court of Queensland granted pursuant to Part 3 of the Act.
>
> 4. Milton Arnoldo Conde pay the applicants' costs of and incidental to the application to be assessed on an indemnity basis."

[11] On 17 February 2010, on the application of the Attorney-General for the State of Queensland, Byrne SJA made further orders concerning numerous other proceedings started by Mr Conde in the Supreme Court and in the District Court, including an order that the proceedings instituted by Mr Conde against Burchill & Horsey Lawyers and Ms Gilfoyle in Appeal No 11377 of 2009 and Appeal No 11430 of 2009 be stayed pursuant to s 6(2)(a) of the Act. The applicants seek a variation of those orders staying those appeals to allow the applicants to bring their applications for summary dismissal in Appeal No 14595 of 2009, and they seek a variation of the stay in order 2 (f) of 4 February 2010 to enable them to bring their application for summary dismissal of Appeal No 14595 of 2009.

Appeal No 1182 of 2010: Application to dismiss Mr Conde's appeal against the orders made by Byrne SJA on 4 February 2010

[12] In Appeal No 1182 of 2010 Mr Conde appeals against the vexatious proceedings orders made by Byrne SJA. The respondents to that appeal are the successful applicants for the vexatious proceedings orders, Ms Gilfoyle, Burchill & Horsey Lawyers, Mylton Burns, and McInnes Wilson Lawyers. They are the applicants for the summary dismissal of Mr Conde's appeal in Appeal No 1182 of 2010.

Abridgment of time

[13] It is first necessary to rule upon the applicants' application for an abridgment of time for the hearing of their summary dismissal application. The application for summary dismissal of Mr Conde's appeal in Appeal No 1182 of 2010 was filed and served on Mr Conde on Friday 19 February 2010, the day upon which Mr Conde filed his notice of appeal. At the hearing of these matters on Monday 22 February 2010 Mr Conde repeatedly made it plain that he was ready to argue and wished to argue the whole question whether Byrne SJA was right in making the orders against which Mr Conde appealed. He declined the suggestion of an adjournment for that purpose and confirmed that he wanted this Court now to decide that substantial question. He then presented his argument against the application for summary dismissal and more generally in support of his appeal. After the applicants' counsel made submissions Mr Conde replied. In the course of that reply, Mr Conde for the first time complained that he was not served with the application for summary dismissal until the Friday before the Monday hearing. However, Mr Conde subsequently asked the Court to "do it, yes". He then made further submissions on the merits.

[14] It is right to approach the application for an abridgment of time with great caution in view of Mr Conde's status as an unrepresented litigant, his evident difficulty in

articulating any reasonable argument in support of his appeals or against the applications for summary dismissal, and the fact that English is not his first language. (Mr Conde spoke English well, I thought, though with a strong accent and sometimes too quickly for his words to be accurately transcribed.) Taking those matters into account I think that the necessary abridgment should be granted for these reasons: Mr Conde initially and ultimately enthusiastically supported that course; Mr Conde made no suggestion that he would seek legal advice or other assistance if the application were adjourned; he said all that he apparently wished to say both in opposition to the applications for summary dismissal and more generally in support of each of the appeals he had started; and after hearing all of the arguments I was convinced that the quality of Mr Conde's arguments could not improve if, contrary to his own expressed wishes, he were given more time to prepare them. Accordingly I would abridge time to enable the application for summary dismissal to be heard and determined.

Is Mr Conde's appeal in Appeal No 1182 of 2010 precluded by order 3?

[15] The applicants contended that Mr Conde's appeal was incompetent because order 3 prohibited such an appeal without prior leave of a Judge of the Supreme Court of Queensland, which Mr Conde had not sought or obtained. Their counsel argued that, absent the requisite leave, order 3 prohibited an appeal against that very order; that so much was subjectively intended; and that this was the literal effect of order 3, when regard was had to definitions in the Schedule in the *Vexatious Proceedings Act* 2005 (Qld). Mr Conde opposed the applicants' contention but he did not advance any argument directed to the point. For the following reasons I do not accept the applicants' contention.

[16] Section 69 of the *Supreme Court of Queensland Act* 1991 (Qld) provides that, subject to that and any other Act, an appeal lies to the Court of Appeal from any judgment or order of the Supreme Court in the Trial Division. In my opinion the *Vexatious Proceedings Act* 2005 (Qld) does not exclude that right to appeal against a vexatious proceedings order made under s 6(2)(b) of that Act.

[17] Section 5 of that Act authorises the Attorney-General, the Crown Solicitor, the Registrar of the Court,[9] a person against whom another person has instituted or conducted a "vexatious proceeding", and a person who has a sufficient interest in the matter, to apply to the court for a vexatious proceedings order under s 6. Section 6 of the Act empowers the court to make various "vexatious proceedings orders" if the court is satisfied that a person falls into one of two categories. Subsections 6(1) and (2) provide:

> "**6 Making vexatious proceedings orders**
>
> (1) This section applies if the Court is satisfied that a person is—
>
> (a) a person who has frequently instituted or conducted vexatious proceedings in Australia; or
>
> (b) a person who, acting in concert with a person who is subject to a vexatious proceedings order or who is mentioned in paragraph (a),

[9] The term "Court" is defined in the Schedule to mean the Supreme Court.

has instituted or conducted a vexatious proceeding in Australia.

(2) The Court may make any or all of the following orders—

(a) an order staying all or part of any proceeding in Queensland already instituted by the person;

(b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in Queensland;

(c) any other order the Court considers appropriate in relation to the person."

[18] Byrne SJA found that Mr Conde had "frequently instituted…vexatious" proceedings within the meaning of s 6(1)(a). In such a case s 6(2) confers upon the court a discretion to make the "vexatious proceedings orders" mentioned in s 6(2). Order 3 made by Byrne SJA is an order of the kind described in s 6(2)(b).

[19] The consequences of vexatious proceeding orders are set out in Part 3 of the Act, in ss 10 - 13. Subsection 10(1) provides, so far as is here relevant, that if the court makes a vexatious proceeding order of the kind identified in s 6(2)(b) prohibiting a person from instituting proceedings then the person may not institute proceedings without the leave of the court under s 13. Subsection 10(2) provides that a proceeding instituted in contravention of s 10(1) is "permanently stayed" by s 10(2). The applicants contended that the prohibited proceedings included appeals against a s 6(2)(b) order because of the breadth of the definitions in the schedule in the Act: "proceedings" includes "any calling into question of a decision… of a court …and whether by appeal…", and "institute, in relation to proceedings" includes, for civil proceedings, "the taking of a step … that may be necessary to start an appeal".

[20] The role to be played by definitions in a Queensland Act is provided by s 32A of the *Acts Interpretation Act* 1954 (Qld). That section provides that definitions in an Act apply "except so far as the context or subject matter otherwise indicates or requires." It is not uncommon to find in an interpretation statute a provision to the effect that a definition found in a statute applies unless the context otherwise requires.[10] Section 32A differs from the provision more commonly encountered in two respects. Regard is to be had, not simply to the context, but also to the subject matter of the provision in which the defined term occurs. Moreover, the application of the definition may be affected not only because the context otherwise requires; it may be affected because the context (or subject matter) otherwise indicates. These features evince an intention by the legislature that a more flexible approach be taken to the application of a statutory definition, when interpreting Queensland legislation, than would be required under some other interpretation provisions. That approach is expressed in the language of s 32A.

[21] I am indebted to Peter Lyons J for the reference to s 32A and to *Brown v Brook*,[11] in which Barwick CJ considered a provision which expressly incorporated a definition

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10 See Pearce, D. C. and Geddes, R. S, *Statutory Interpretation in Australia* (6th Ed., 2006), at p 195.

11 (1971) 125 CLR 275.

found in a definition section of an earlier Queensland Act. The definition section stated that the definitions applied "unless the context otherwise indicates". His Honour held that part of the definition section was also incorporated into the enacting provision and then observed:[12]

> "In other words, in my opinion, the whole of the relevant part of the definition section is to be regarded including its critical opening words. This result is conveniently expressed, in my opinion, by saying that the context governs what part, if any, of the defined meaning is to apply in the enacting provisions; or by the common expression that the defined meaning must yield to context."

[22] It is therefore necessary to consider whether the context and subject matter of s 6(2) and s 10 indicate or require that the definition of the term "proceedings" does not apply in those provisions in such a way as to prohibit an appeal from an order under s 6(2)(b).

[23] The substantive effect of an order under s 6(2)(b) turns in part upon the provisions concerning applications for leave under s 13. What are of particular significance here are the quite stringent requirements of such applications and, particularly, that the Act expressly provides that the refusal of such an application may not be challenged by appeal. Section 11 applies to a person in Mr Conde's position: s 11(1) provides that s 11 applies to "a person (*the applicant*) who is— (a) subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or proceedings of a particular type, in Queensland; or (b) acting in concert with another person who is subject to an order mentioned in paragraph (a)." Subsection 11(2) provides that such a person may apply to the court for leave to institute a proceeding that is subject to the order. Subsection 11(3) requires an applicant for leave to file an affidavit listing all the occasions on which the applicant has applied for leave, listing all of the other proceedings the applicant has instituted in Australia, and disclosing all facts material to the application, supporting or adverse to the application, known to the applicant. Section 12 provides that the court must dismiss such an application if the court considers that the affidavit does not substantially comply with s 11(3) or that the proceeding is a vexatious proceeding.

[24] The destruction of any right of appeal against the refusal of an application for leave is effected by s 11(6). Subsections 11 (5) and (6) provide:

> "(5) The Court may dispose of the application by—
>
> (a) dismissing the application under section 12; or
>
> (b) granting the application under section 13.
>
> (6) The applicant may not appeal from a decision disposing of the application."

[25] The freedom of access to the courts by citizens has been regarded as a fundamental right.[13] The stringent conditions upon the court's power to make vexatious proceedings orders expressed in s 6(1)(a) reflect the importance attributed by the

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12 At p 278.

13 cf *Williams v Spautz* (1992) 174 CLR 509 at 519; *Ramsey v Skyring* (1999) 164 ALR 378 at 389, [51].

legislature to that right. An order under s 6(2)(b) erodes that right even though the erosion is limited by the provisions which empower the court to vary or set aside a vexatious proceedings order (s 7), and by the right of a person affected by the vexatious proceedings order to apply for leave to institute a particular proceeding, or proceedings of a particular type (s 11(2)). So much erosion of freedom of access to the courts has been found to be demanded by the seriously adverse effects upon the community resulting from vexatious litigation. The Act was based upon the model legislation approved by the Standing Committee of Attorneys-General, legislation which was plainly designed to expand the court's powers to control vexatious litigants. The kinds of considerations which informed the Act were discussed in *Bhamjee v Forsdick (No 2)*.[14] The Master of the Rolls there noted that the objectives of the United Kingdom *Civil Procedure Rules* (which are similar to those of the *Uniform Civil Procedure Rules* in this State) were undermined by vexatious litigation, and observed:

> "The court, therefore, has power to take appropriate action whenever it sees that its functions as a court of justice are being abused … A court's overriding objective is to deal with cases justly. This means, among other things, dealing with cases expeditiously and allotting to them an appropriate share of its resources (while taking into account the need to allot resources to other cases). This objective is thwarted and the process of the court abused if litigants bombard the court with hopeless applications. They thereby divert the court's resources from dealing with meritorious disputes, delay the handling of those disputes, and waste skilled and scarce resources on matters totally devoid of any merit".

[26] Opponents of litigants who bring vexatious proceedings may also be put to considerable expense, including costs incurred in responding to appeals against vexatious proceeding orders. This may prove to be quite oppressive, especially because vexatious litigants are often unable to meet costs orders made against them, having squandered what assets they possessed in the pursuit of hopeless cases.

[27] Those considerations arguably provide a rationale for legislation excluding appeals against vexatious proceedings orders. The applicants' argument also finds a foothold in the breadth of the general definitions of "proceeding" and "institute, in relation to proceedings"; but the context of s 6(2)(b) militates against acceptance of that argument. In the interpretation of statutes the context must "be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise".[15] On the applicants' construction s 6(2)(b) would authorise a vexatious proceedings order which (under s 10(1)) would prohibit any appeal from that order except after a successful application for leave to appeal, even though (under s 11(6)) the refusal of any application for leave to appeal could not itself be challenged. If the legislative

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14 [2004] 1 WLR 88 at 93; [2003] EWCA Civ 1113 at [15] per Lord Phillips MR. This passage was quoted by Keane JA (with whose reasons MacPherson JA and Philippides J agreed) in *von Risefer & Ors v Permanent Trustee Co P/L & Ors* [2005] QCA 109 at [22] as forming a rationale for making appropriate protective orders in the Court's inherent jurisdiction.

15 *K& S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408, in which Brennan CJ, Dawson, Toohey and Gummow JJ observed: "Instances of general words in a statute being so constrained by their context are numerous."

purpose extended to authorising orders which exclude the general right of appeal under s 69 of the *Supreme Court of Queensland Act* 1991 (Qld) against such fundamentally important orders as those made under s 6(2)(b) of the Act, one would expect the legislation to make that unmistakeably clear. The general words of s 6 and the definitions do not make it clear that it was intended. The marked contrast between those general words and the plain terms used in s 11(6) to exclude a right of appeal strongly suggests that s 6(2)(b) does not empower orders which immunise those very orders against appeal

[28] It is of particular significance that, in an appeal against an order made under s 6(2)(b), the condition stated in s 10(1) for the prohibition on the institution of proceedings is itself in issue. That differentiates such a proceeding from any other proceeding potentially affected by the prohibition. An additional contextual matter is to be found in s 6(4). That section prohibits a court from making an order under s 6(2) "without hearing the person or giving the person an opportunity of being heard." It evinces an intention on the part of the legislature to permit the person against whom the order is sought, the opportunity to challenge the making of the order. It makes it unlikely that the legislature intended to prevent such a person from appealing against an order when made. The conferral of power to make a vexatious proceedings order under s 6(2) and the effect given to such an order under s 10 should be similarly construed. The context and subject matter of those provisions indicate that the definition of the term "proceedings" does not apply in such a way that s 10(1) should be construed as prohibiting an appeal against an order made under s 6(2)(b). Obviously, by virtue of s 4 the Court retains its inherent jurisdiction to deal with an appeal made vexatiously against an order made under s 6(2).

[29] The applicants' counsel submitted that the facility for seeking leave to bring an appeal under s 13 of the Act demonstrated that an order under s 6(2)(b) was not of such fundamental importance as to justify rejection of what he argued was the literal construction of that provision. He cited *Lohe v Mansukhani*,[16] but that case did not deal with the present point. Mackenzie J observed:[17]

> "Section 10 sets out the consequences of a vexatious proceedings order. The order prohibits a person from instituting proceedings without the leave of the court and prohibits another, acting in concert with the person prohibited, from instituting proceedings without leave of this court Because proceedings may be instituted with leave of the court, a vexatious proceedings order is not an absolute bar to proceedings being instituted. A person subject to a vexatious proceedings order who could persuade the court that there is a legitimate cause of action, properly pleaded, would ordinarily obtain the necessary leave. On the other hand, an application for leave having the characteristics of further vexatious proceedings would be doomed to fail.
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> …
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> There is plainly no "grave injustice", as the respondent claims in the written material which he asked to have taken into account, if a person who has frequently engaged in litigation which has the characteristics of vexatious proceedings is required to establish, on

16 [2007] QSC 69.

17 [2007] QSC 69 at [50] - [51].

> any subsequent occasion he wishes to litigate, that the proposed litigation is not just more of the same. Nor, contrary to his allegation in the written material, does a declaration deprive him of the chance to seek legitimate remedies to which he may be entitled. All he has to do is make out a case for leave to proceed sufficient to persuade a judge that leave should be given."

[30] I respectfully agree with those remarks, but his Honour's statement that there was no "grave injustice" was made on the footing that the relevant person had frequently started vexatious litigation: that is the very issue which a person whose right of free access to the courts was qualified by a vexatious proceedings order would ordinarily wish to challenge in any appeal. That Mackenzie J did not regard the prospect of an application for leave to appeal as justification for denying an appeal from an order under s 6(2)(b) appears from the form of his Honour's order. That order excluded from the general prohibition of future proceedings without leave "any appeal in this proceeding". The same exclusion qualified the order made by Muir J in *National Australia Bank Ltd v Freeman*.[18] In my respectful opinion that form of order appropriately expressed the proper construction of s 6(2)(b).

Merits of the application for summary dismissal of Appeal No 1182 of 2010

[31] It is therefore necessary to consider the merits of the application for summary dismissal of Mr Conde's appeal from the vexatious proceedings order. Mr Conde's notice of appeal filed on 19 February 2010 set out nine purported grounds of appeal. In my opinion the appeal lacks substance. I will give my reasons for rejecting Mr Conde's arguments under three headings in which I have endeavoured to summarise both Mr Conde's grounds of appeal and his arguments.

(1) The argument that the Vexatious Proceedings Act 2005 (Qld) has no application in relation to his claims because they concern the established, common law torts of "abusive legal process", "misuse of legal powers", and "malicious prosecution".

[32] Mr Conde argued that the *Vexatious Proceedings Act* 2005 (Qld) could not be invoked in relation to his claims because they were based upon "established torts". That argument is hopeless. The definition of "proceeding" in the Schedule in the Act comprehends "any" proceeding "of any kind within the jurisdiction of any court or tribunal". The Act applies regardless of the particular alleged cause of action – in tort or otherwise – which formed the alleged bases of frequent vexatious litigation.

(2) The argument that lawyers and judges have dishonestly, corruptly, in bad faith, and improperly invoked the Vexatious Proceedings Act 2005 (Qld) in order to prevent Mr Conde from pursuing legitimate legal claims.

[33] This argument (like the preceding argument) assumed that Mr Conde's claims were legitimate, but Mr Conde did not identify any arguable error in Byrne SJA's analysis of those claims or his Honour's conclusion that they were hopeless. The argument also asserted misconduct by lawyers without alleging any particular fact or identifying any evidence that provided any support for those assertions. That is another reason for rejecting it as hopeless.

[34] Mr Conde also attributed his universal lack of success in his numerous civil claims for damages to asserted misconduct on the part of each of the separate judicial

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18 [2006] QSC 86.

officers who found against him. In fact, the fate of Mr Conde's litigation resulted from his failure to articulate arguably valid claims. Again, Mr Conde made these assertions in general terms without pointing to any fact or any evidence that was arguably capable of justifying them.

(3) The argument that an order made on 20 May 2009 provides evidence which proves Mr Conde's contentions but that evidence has been ignored by all the judges who have found against Mr Conde.

[35] Mr Conde argued that an order made on 20 May 2009 in his favour (1) supported his claims and (2) had been ignored by the judges who have found against him. In oral argument Mr Conde suggested that this was his best point, but both assertions are manifestly wrong. Byrne SJA referred to the order of 20 May 2009 as the sole exception to the conclusion that all of Mr Conde's proceedings were instituted without reasonable ground.[19] The 20 May 2009 order was made in proceedings of a kind which markedly differed from the frequent vexatious proceedings Mr Conde instituted. His success in that one proceeding hardly detracted from the inevitability of the conclusion that Mr Conde had "frequently instituted or conducted vexatious proceedings". Nor does that one island of success in an ocean of misconceived litigation indicate that there was any arguable error in the exercise of the discretion made by Byrne SJA. On the contrary, there was an overwhelming case for the exercise of the discretion to make the vexatious proceedings orders.

Summary

[36] The reasons given by Byrne SJA were compelling justification for the vexatious proceedings orders, Mr Conde did not identify any arguable error in any of those reasons, and I have found none. There is no arguable merit in Mr Conde's appeal. It would do Mr Conde no favour to let that appeal linger on until its inevitable dismissal at a later hearing. The respondents to his appeal, the applicants for summary dismissal, should not be vexed by having to respond further or incur further expense in dealing with that hopeless appeal. It should be summarily dismissed.

[37] Mr Conde accepted in argument that if, as I think is the case, his appeal against the vexatious proceedings orders should be dismissed, there was no reason why his other appeals should not be dismissed. Nevertheless I will briefly explain why I have concluded that those other appeals should also be summarily dismissed.

Appeal No 11377 of 2009 and Appeal No 11430 of 2009: Application to dismiss Mr Conde's appeal against the orders made by the Chief Justice on 14 September 2009

[38] The Chief Justice struck out Mr Conde's claim and statement of claim in the decision which Mr Conde seeks to challenge in Appeal No 11377 of 2009 and Appeal No 11430 of 2009 partly because (with one possible exception) Mr Conde's claims for damages for alleged personal injury fell within the definition of "claim" in the *Personal Injuries Proceeding Act* 2002 (Qld) with which Mr Conde had made no attempt to comply.[20] Mr Conde set out extensive grounds of appeal and arguments against that conclusion, but the essence of his argument is his contention

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19 *Gilfoyle and Ors v Conde* [2010] QSC 14 at [4], [31].

20 *Conde v Burchill & Horsey Lawyers & Anor* [2009] QSC 291 at [6] - [7].

that the *Personal Injuries Proceeding Act* 2002 (Qld) has no application because he relied upon "established torts" at common law. The argument is untenable in view of the breadth of the statutory definition of "claim": it specifically includes a claim "however described, for damages based on a liability for personal injury, whether the liability is based in tort or contract."

[39] The Chief Justice also found that Mr Conde's statement of claim very substantially failed to comply with the pleading rules in the *Uniform Civil Procedure Rules*.[21] That non-compliance was far from being a technical matter. In this case, as in others analysed by Byrne SJA, Mr Conde made bald assertions of serious misconduct (including asserted torts) but he did not allege any facts capable of sustaining those conclusions. He was apparently unable to identify any alleged facts which might have justified his claim. His omission to allege facts which were capable of justifying his asserted conclusions that defendants had committed "established torts" was not, as Mr Conde seemed to argue, some mere legal technicality raised to defeat his claims. The procedural rules are flexible enough to accommodate unrepresented litigants who lack legal skills, but natural justice at least demands that defendants be told the essential factual bases of substantial claims against them.

[40] As mentioned earlier, s 10(2) of the Act provides that a proceeding instituted in contravention of s 10(1) is "permanently stayed" by s 10(2). These appeals have suffered that fate as a result of the orders made on 22 February 2010. In addition to the Court's power to dismiss the appeals in the ordinary course and to summarily dismiss them for Mr Conde's non-compliance with the orders for security for costs, the Court is empowered by s 10(3) of the Act to make "any other order in relation to the stayed proceeding it considers appropriate." It is appropriate now to make orders summarily dismissing these appeals.

Appeal No 14595 of 2009: Application to dismiss Mr Conde's appeal against the orders made by Holmes JA in Appeal No 11377 of 2009 and Appeal No 11430 of 2009

[41] Byrne SJA referred to this interlocutory appeal and said:[22]

> "[34] The appeal against Holmes JA's decision is not shown to have a real prospect of success either. The decision was a discretionary one concerning matters of practice. And Mr Conde has not even attempted to identify a fairly arguable ground of appeal. That appeal, too, should be stayed, pursuant to the power conferred by s 6(2)(b). [That "proceeding" is defined to include (see para (c)) "any calling into question of the decision…whether by appeal, challenge, review or in another way".]"

[42] Mr Conde did not argue that there was any error in that analysis or in the detailed reasons given by Holmes JA for the orders made by her Honour, and I have found none. In any event the appeal in Appeal No 14595 of 2009 is futile because the appeals in Appeal No 11377 of 2009 and Appeal No 11430 of 2009 should be dismissed. This appeal, already permanently stayed, is both pointless and hopeless. It too should be summarily dismissed.

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21 *Conde v Burchill & Horsey Lawyers & Anor* [2009] QSC 291 at [9] - [12].

22 *Gilfoyle and Ors v Conde* [2010] QSC 14 at [34].

Proposed orders

[43] The applications for summary dismissal of the appeals seek the costs of those applications but they do not seek orders for the costs of the appeals. For that reason and for the reasons already given I consider that the appropriate orders are:

1. *In Appeal No 1182 of 2010:*
- **(a)** Abridge the time for service of the respondents' application for summary dismissal of the appeal to permit service of that application on 19 February 2010 for the hearing of it on 22 February 2010;
- **(b)** Dismiss the appeal;
- **(c)** Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

2. *In Appeal No 11377 of 2009:*
- **(a)** Vary the stay ordered by Byrne SJA on 22 February 2010 to the extent necessary to allow the respondents to apply for the following orders;
- **(b)** Dismiss the appeal;
- **(c)** Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

3. *In Appeal No 11430 of 2009:*
- **(a)** Vary the stay ordered by Byrne SJA on 22 February 2010 to the extent necessary to allow the respondents to apply for the following orders;
- **(b)** Dismiss the appeal;
- **(c)** Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

4. *In Appeal No 14595 of 2009:*
- **(a)** Vary the stay ordered by Byrne SJA on 4 February 2010 to the extent necessary to allow the respondents to apply for the following orders;
- **(b)** Dismiss the appeal;
- **(c)** Order that the appellant pay the respondents' costs of their application to dismiss the appeal.

[44] **PETER LYONS J:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with his Honour's reasons, and with the orders which he proposes.