COURT OF APPEAL

McMURDO P

Appeal No 10865 of 2010
SC No 5637 of 1996

ARCHIE STEPHEN ST CLAIR	**Applicant**
and	
TIMTALLA PTY LTD	**Respondent**

BRISBANE

DATE 29/10/2010

JUDGMENT

THE PRESIDENT: Yes, would you announce your appearances.

MR GRIFFIN: Yes, if your Honour pleases, my name is Griffin, initials J A. I'm appearing with my learned friend, Mr Egan, initials G N, and we appear for the applicant Archie Stephen St Clair, and we're instructed by Messrs. Clearly and Lee.

THE PRESIDENT: Yes. Yes, Mr Newton.

MR NEWTON: Yes, good morning, your Honour. May it please the Court, my name is Newton, initials G C, senior counsel for the respondent Timtalla Pty Ltd, and I appear for that party with Mr Michael Trim of counsel and instructed by CLS Lawyers, your Honour.

...

THE PRESIDENT: The applicant, the plaintiff at first instance, applies for a declaration that the time within which he might file a notice of appeal against the decision of Justice Martin in the Trial Division of this Court on 20th August 2010 dismissing the applicant's claims against the respondent in Supreme Court proceedings number BS 5637 of 1996 has not expired. Alternatively, he applies for an extension of time to appeal in that matter.

In respect of the first application for a declaration, the applicant makes the remarkable

contention that under the *Uniform Civil Procedure Rules* (UCPR) rule 748, time did not commence to run at the time Justice Martin pronounced the order on 20 August 2010 because his Honour adjourned the question of costs and received further submissions on them. Justice Martin has not yet handed down his decision in respect to costs, and also, the contention goes, the appeal period has not yet commenced to run.

Rule 748 provides "A notice of appeal must, unless the Court of Appeal orders otherwise, (a) be filed within 28 days after the date of the decision appealed from; and (b) be served as practicable on all other parties to the appeal."

The recognised appellate practice in this jurisdiction is well-established. It is that an order of the kind made by Justice Martin is considered as a decision from which time runs under rule 748 from the time of pronouncement of the order.

Justice Martin ordered that the claim against the first defendant be dismissed and it is in respect of that order that this application is made.

Rule 748 is contained in UCPR chapter 18, which deals with appellate proceedings. "Decision" in rule 748 is relevantly defined in rule 744 as meaning "an order, judgment, verdict or an assessment of damages." As I have said, it is accepted appellate practice that, for the purpose of rule 748, time runs from the pronouncement of an order of this kind.

The applicant contends that rule 748 and the definition of "decision" in rule 744 should be read subject to UCPR rule 659 and rule 765.

Rule 765 is contained in chapter 18 of the UCPR, but in my view it is of no assistance whatsoever in determining the meaning of "decision" in rule 748.

Rule 659 is not contained in chapter 18. It provides "Final relief granted in a proceeding

started by claim is granted by giving a judgment setting out the entitlement of a party to payment of money or another form of final relief."

The applicant's submissions seem to be to the effect that Justice Martin's order of 20 August 2010 in so far as it dismissed the applicant's claim against the respondent was an interlocutory order of the kind discussed in *Coulter v Ryan* [2008] QCA 567. This is plainly wrong. There can be no doubt that Justice Martin's order was a final order and not an interlocutory order.

The applicant otherwise submits that the term "decision" in UCPR rule 748 means "complete decision". The difficulty with that submission is that rule 748 does not say that, and 744 defines "decision" in another way. There can be no doubt that the order made by Justice Martin dismissing the applicant's claim against the respondent is a decision to which UCPR rule 748 applies and that the 28 day time limit runs from the time of that decision. The application for a declaration must be refused.

I turn now to the alternative application for an extension of time to appeal from Justice Martin's decision. As the respondent points out, the explanation provided by the applicant's solicitor in a number of affidavits placed before this Court in which he stated that he believed the time period to appeal did not commence to run until the handing down of Justice Martin's decision as to costs is neither impressive nor persuasive. Rather, it seems disingenuous in light of counsel's advice. But there is no doubt that the fact that the costs order had not been handed down was a factor weighing heavily in the applicant's decision as to whether to appeal in this case. What is in the applicant's favour is that the time involved was very short, in effect only four or five days.

The respondent has argued that there are little prospects of success in the applicant's appeal, but in the circumstances of this application, I do not consider it appropriate to consider in detail the merits of the proposed appeal. I am not prepared to conclude there are no, or even slight prospects. It is relevant that the applicant was successful in his claim against the fifth

defendant. The fifth defendant has lodged an appeal within time in respect of the judgment given in favour of the plaintiff and the plaintiff has cross-appealed in respect of that. The fifth defendant is therefore not a party to the present application.

To refuse the plaintiff an extension of time to appeal against the first defendant in that context is, in my view, a big step to take. It would close him out of the appellate process in respect of the respondent when his successful judgment against the fifth defendant is subject to appeal and where his appeal against the respondent was but five days out of time.

In all these circumstances, the interests of justice are best met by extending time as necessary to appeal. I propose the following orders. The application for a declaration is refused. The application to extend time to appeal is granted and time is extended until today.

I propose to direct that this appeal be heard with Appeal No CA 996 and that the parties follow the directions of the Registrar in terms of preparing the matter for hearing.

As to costs, my preliminary view is that I would order that the costs of this application be the respondent's costs in the appeal, but I will hear submissions if any party wishes to make them.

THE PRESIDENT: Both sides have asked for their costs of this application. The respondent has asked for the costs on an indemnity basis.

The application for a declaration was plainly unmeritorious and, as I noted in my reasons, a remarkable one.

The application for an extension of time to appeal was, however, not in that category. The respondent could easily have agreed to it. That is often done in circumstances where the appeal is but a few days late. But the respondent's reluctance to do so in light of the unimpressive and disingenuous explanation put forward by the applicant is understandable.

Certainly the applicant was asking for an indulgence from the Court because of his own error. I am satisfied that the applicant's conduct warrants the payment of the respondent's indemnity costs if the respondent is ultimately successful in the appeal. If the plaintiff is ultimately successful, these should be no costs order in respect of this application. In the circumstances, the appropriate order is that the costs of this application be the respondent's costs in the appeal on an indemnity basis.