SUPREME COURT OF QUEENSLAND

CITATION:	*Fritz v O'Brien* [2011] QCA 181
PARTIES:	**DENNIS MELVIN FRITZ** (applicant) **v** **MELISSA THELMA LEPOIDEVIN** (first respondent/not a party to the appeal) **PHILIP MARTIN O'BRIEN** (second respondent/respondent)
FILE NO/S:	Appeal No 2306 of 2011 DC No 1515 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2011
JUDGES:	Margaret McMurdo P, Muir JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant have leave to file and read the three affidavits sworn by him, copies of which commence respectively at pages 131, 168 and 186 of the appeal record.** **2. The application for leave to appeal be refused with costs on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – GENERAL PRINCIPLES – FUNCTIONS OF APPELLATE COURT – SUBSTANTIVE RIGHT OR MATTER OF PROCEDURE – MATTERS OF PROCEDURE – INTERLOCUTORY ORDERS – where the applicant filed an amended claim against the respondents alleging defamation – where much of the amended pleadings were struck out by the primary judge due to substantial deficiencies – where the applicant was required to serve a further amended statement of claim and to particularise certain matters – where the applicant was required, following agreement between the applicant and the second respondent's solicitor, to serve a list of documents on the respondents within 21 days – where the primary judge ordered that the

applicant pay the second respondent's costs – where the applicant sought leave to appeal against those orders – where the applicant submitted that there was an unexplained delay by the respondents in filing their notice of intention to defend and defence – where the applicant alleged that the primary judge failed to give adequate consideration to the evidence and to misconduct on the part of the respondents – whether the primary judge erred in striking out certain paragraphs of the applicant's statement of claim – whether the orders of the primary judge gave rise to a substantial injustice – whether the discretion of primary judge miscarried

Defamation Act 2005 (Qld), Pt 3 Div 1
District Court of Queensland Act 1967 (Qld), s 118
Personal Injuries Proceedings Act 2002 (Qld), s 8, s 9, s 18
Uniform Civil Procedure Rules 1999 (Qld), r 138

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
In re the Will of FB Gilbert (dec'd) (1946) 46 SR (NSW) 318, considered
Pickering v McArthur [2005] QCA 294, cited

COUNSEL: The applicant appeared on his own behalf
S D Loudon (*sol*) for the respondent

SOLICITORS: The applicant appeared on his own behalf
Michael O'Brien Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for refusing the application for leave to appeal with costs. I agree with the orders proposed by Muir JA.

[2] **MUIR JA:** The applicant applies for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 against orders made by a judge of the District Court on 2 March 2011. The orders:

(a) Required the applicant to serve a list of disclosed documents on the second respondent within a stated time;
(b) Struck out a number of paragraphs of the applicant's amended statement of claim;
(c) Required the applicant to serve on the respondents a copy of his further amended statement of claim within 21 days;
(d) Directed that the amended statement of claim particularise certain matters;
(e) Dismissed an application by the applicant for an order that the second respondent's notice of defence and application filed on 25 February 2011 be struck out or, alternatively, that default judgment be given in favour of the applicant; and
(f) Required the applicant to pay the second respondent's "costs of and reasonably associated with" the application made by the second respondent for, inter alia, the striking out of various paragraphs of the amended statement of claim and the application made by the applicant against the respondents.

[3] Filed with the application for leave to appeal was a proposed notice of appeal in which the sole grounds of appeal were:[1]

> "2.1 The Honorable Primary Judge gave irrelevant consideration to the 2nd respondent's application and in doing so, gave inadequate regard to the exceptional and special circumstances contained in the appellant/plaintiff's application at to costs.
>
> 2.2 The appellant/plaintiff was denied natural justice when His Honor considered the 2nd Respondent's application then struck out his application with costs against him of both applications. without adequate regard to the appellant's application and supporting affidavit.
>
> 2.3 The exercise of the discretion by the honorable primary Judge in making an order for costs against the appellant/plaintiff miscarried resulting in an injustice to the appellant/plaintiff."

[4] Grounds 2.1 and 2.3 seem to relate only to the order for costs made against the applicant. Ground 2.2 is ambiguous. On one view of it, it complains not only about the costs order but about the striking out of the applicant's application and the ordering of costs in respect of both applications. That appears to me to be the more obvious construction of the paragraph.

[5] In his application for leave to appeal, the applicant alleged as follows. He was denied natural justice by the primary judge's striking out of his application with costs without having had adequate regard to an affidavit filed by the applicant which alleged delays on the part of the second respondent in the filing of his notice of intention to defend and defence. The applicant elaborated on this contention, alleging that the second respondent's delay in both filing and serving the notice of intention to defend and defence was very extensive and unexplained. The delay is alleged to have occurred around the time that the respondents allegedly made false complaints of stalking and harassment against the applicant leading to his arrest and imprisonment and to the imposition of strict bail conditions which hampered his ability to progress his claim. It is further asserted that the evidence in the applicant's trial in the Magistrates Court for the offence of stalking established that the respondents gave false and misleading evidence under oath. Other contentions were that the primary judge held that the applicant had prospects of success in his defamation claim and that the conduct of the respondents disentitled the second respondent to the exercise of a discretion in his favour in relation to costs.

[6] On the hearing of the application for leave to appeal, the applicant sought leave to adduce the further evidence identified in an affidavit sworn by him on 19 March 2011, which he sought leave to file and read together with two other affidavits. In the 19 March affidavit, the applicant further developed his theme of unexplained delay in the filing and service of the notice of intention to defend and defence and claimed that the primary judge gave inadequate consideration to the evidence and the applicant's submissions concerning alleged misconduct on the part of the respondents. He referred, somewhat opaquely, to evidence given on the trial of the stalking offence. Exhibited to the affidavit were: letters from the applicant to each of the respondents dated 26 May 2010; a copy of the claim; a letter dated 22 October 2010 from the applicant to the respondents' solicitors rejecting a

---

1 Without spelling and grammatical corrections.

settlement offer; letters dated 19 August 2010 from the applicant to each of the respondents giving notice of intention to make application for a default judgment; an affidavit of Ms Irwin sworn 12 March 2011 concerning the service on the applicant on 11 November 2010 of some unidentified documents (probably the notice of intention to defend and defence) and describing an alleged "threatening gesture with his arms" made by the second respondent to her after the second respondent walked past her in a court room on 21 February 2011 and the notice of intention to defend and defence.

[7] In his outline of argument, the applicant sought to defend or justify only three of the many paragraphs or sub-paragraphs in the amended statement of claim struck out by the primary judge. The provisions in question were:

> "The Motive and ill-will Background
>
> 13. Particulars as to the abuse of the children Tegan-Ann and Abigail-Skye, and motive to defame the plaintiff made manifest by the state of mind of the 1st Defendant and the 2nd Defendant between the above periods referred to in paragraphs 2,6,9[a],l0,11, satisfying the requirements of section 36 of the *Defamation Act 2005* are as follows:-
>
> …
>
> [k] On or in 24th April 2010 when the Plaintiff brought Tegan-Ann home, the 1st Defendant and 2nd Defendant began emotionally and psychologically abusing the child. Tegan-Ann and denigrated the Plaintiff in her company.
>
> [i] …
>
> [ii] The 2nd Defendant said with words to the effect:- "*You blew it Tegan, i'm fucking finished with you…you think it's alright for you and this scum-bag Dan to go around complaining to everybody about Mel and me....get to your room.*
>
> [iii] …
>
> …
>
> 15. The manner or respects of alleged suffering by the Plaintiff in accordance with s36 of the *Defamation Act 2005* is as follows:-
>
> a. Effects of pre-existing post-traumatic stress disorder were exacerbated by the 2nd Defendant's unjustified and malicious attack on the Plaintiff when he was accused of being a paedophile purely to discredit any complaints of child abuse.
>
> b. Effects of pre-existing post-traumatic stress disorder were also exacerbated by the 2nd Defendant's unjustified and malicious attack of the Plaintiff as he was accused of paedophile acts with Tegan-Ann, again purely to discredit any complaint of child abuse.
>
> c. Continued trauma, stress and nervous shock at being unjustifiably forced to refrain from being in contact with Tegan-Ann to discuss the method of producing her evidence in the plaintiffs future trial. And also to see how she and her sister are coping with any further abuse.

d. Aggravated stress and trauma caused by the 1st Defendant's false and misleading complaint to Police on two occasions.

e. Effects of pre-existing post-traumatic stress disorder were also exacerbated by 1st and 2nd Defendants malicious attempts to continue to threaten witness for the Plaintiff, not to give evidence of both Defendants child abuse.

f. Effects of pre-existing post-traumatic stress disorder were also exacerbated by the 1st Defendant's unjustified accusations that the Plaintiff kidnapped Tegan-Ann for paedophile purposes, purely to discredit any complaint by Tegan-Ann to authorities of child abuse.

g. Both defendants knew or ought to have known that the Plaintiff suffered from a pre-existing Post Traumatic Stress Disorder and another life-threatening condition, and that shock at their vicious intentions to cause hurt to the Plaintiff and the child Tegan-Ann, whilst making defamatory statements, inflamed those conditions

16. The plaintiff claims the following relief:
[a] $250.000.
[i] Particulars of the relief are:-
…
d. Aggravated damages [exacerbated pre-existing post traumatic stress disorder]: $95.700"

[8] The primary judge was plainly justified in striking out much of the amended statement of claim. It was defective in a number of significant respects:

(a) It was not "as brief as the nature of the case permits";[2]

(b) It contained not only "evidence by which the facts are to be proved"[3] but much material which was entirely irrelevant to the applicant's case, argumentative expressions of opinion and allegations scandalous in nature.

[9] Because of the manifold and manifest defects in the pleading it would have been better if it had been struck out in its entirety. The primary judge, however, was requested to strike out only certain paragraphs.

[10] I turn now to the few parts of the pleading which the applicant attempted to support. Paragraph 15 contains a mish-mash of matters. Some of the allegations (sub-paragraphs (c), (d), (e)) have no relevance to the allegations that the second respondent published words defamatory of the applicant which caused the applicant loss and damage. Sub-paragraph (a) impermissibly asserts a particular motive for the making of the alleged defamatory statements. Sub-paragraphs (b) and (f) contain irrelevant allegations as to the reason why the second respondent made allegedly defamatory statements.

---

2 *Uniform Civil Procedure Rules* r 149(1)(a).

3 *Uniform Civil Procedure Rules* r 149(1)(b).

[11] Even apart from these considerations, the primary judge was justified in striking out the allegations of personal injury in paragraph 15 and also paragraph 16(d) on the basis of non-compliance with the requirements ss 8, 9 and 18 of the *Personal Injuries Proceedings Act* 2002 (Qld).

[12] Complaint was made about the part of the subject order requiring the applicant to serve his list of documents on the second respondent within 21 days. He claimed that the conduct of the second respondent and his solicitors in seeking this order amounted to an abuse of process as, according to him, he had provided all relevant documents to the solicitors. There is no substance in the allegation. The transcript of proceedings before the primary judge shows that the part of the order under consideration was made consequent on an agreement between the applicant and the solicitor for the second respondent.

[13] It is plain from the above observations on the merits of the strike out application that not only was the primary judge justified in ordering costs against the applicant but no other order, apart from an order for costs on the indemnity basis, would have been appropriate.

[14] The thrust of the applicant's argument for why costs should not have followed the event on the dismissal of his application was that the second respondent had been extremely slow in filing a notice of intention to defend and defence and had not explained the delay. The applicant also sought to rely on "outrageous conduct" on the respondent's part unconnected with his defamation claims but associated with his prosecution for the stalking offence. In his outline of submissions, the applicant made a number of allegations of wrongful conduct on the part of both respondents in connection with the defamation trial. Allegations of unprofessional conduct were also made about the second respondent's solicitors. The connection between any of these unproven allegations of misconduct and the striking out of the applicant's application at first instance was tenuous, to put it at its highest.

[15] The applicant's application was doomed to fail from the outset. Had it been granted, the applicant would have been entitled to judgment on a thoroughly defective pleading in a claim made by the applicant arising out of a contretemp between the parties over contact between the applicant and the first respondent's daughter. The primary judge recognised that r 138 of the *Uniform Civil Procedure Rules* 1999 (Qld) expressly enabled a defendant to file and serve a notice of intention to defend at any time before judgment, even if the defendant was in default of the requirement imposed by r 137 to file a notice of intention to defend within 28 days after service of the claim. Any delay in filing and serving the notice of intention to defend and defence was readily explicable by the defective nature of the statement of claim, including its lack of particularity, and by the making by the second respondent of an apology and an offer to make amends pursuant to Part 3 Division 1 of the *Defamation Act* 2005 (Qld). Such an offer must be made before service of a defence.

[16] The notice of intention to defend and defence were filed on 30 September 2010. On 24 September 2010, the second respondent's solicitors wrote to the applicant requesting further and better particulars of the statement of claim. That request went unanswered, even though some of the allegations in the pleading lacked the particularity required by the *Uniform Civil Procedure Rules* 1999 (Qld). The applicant was served with an amended defence on 11 November 2010 and, on 19 November 2010, the applicant filed a reply to the second defendant's amended

defence. On 8 February 2011, the second respondent's solicitors wrote to the applicant threatening to make an application to the court in the event that the applicant did not comply with his obligations in relation to disclosure and provide the requested particulars by 4 pm on 17 February 2011. The request was not complied with and the second respondent bought his application on 25 February 2011. It was only after that that the applicant was moved to bring his application. An obvious inference is that the applicant did so as a tactical response to the second respondent's application. The applicant's failure to accept the second respondent's "offer to make amends", made after a written apology, suggests that the applicant's claim may have more to do with furthering the applicant's dispute with the respondents concerning the first respondent's daughter than with a genuine desire to protect his reputation and vindicate his rights.

[17] Leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 is usually granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[4] As the above discussion shows, no error on the part of the primary judge has been identified and nor has the applicant shown that he has suffered any injustice. If that were not enough, his appeal against the order on the strike out application is an appeal against an interlocutory decision. For the reasons eloquently expressed by Jordan CJ in *In re the Will of F B Gilbert (dec'd)*,[5] courts are traditionally reluctant to interfere with exercises of discretion by judges which do not determine substantive rights.[6] The proposed appeal against the costs order made in respect of the applicant's application, although not against an interlocutory order, is also against the exercise of a discretion.

[18] In this case, even if the applicant's arguments had not been so bereft of merit, the nature of the dispute between the parties and the rejection of the second respondent's sensible and timely efforts to resolve the dispute would have been relevant to the exercise of the subject discretion.

[19] I would give the applicant leave to adduce further evidence, even though there is nothing in the material on which he seeks to rely which could improve his prospects of success on this application and much of it is plainly irrelevant. It seems that some of the material was before the primary judge in one form or another. The second respondent's legal representation did not oppose its reception, perhaps because some of it supported arguments he advanced.

[20] For the above reasons, I would order that:

(a) The applicant have leave to file and read the three affidavits sworn by him, copies of which commence respectively at pages 131, 168 and 186 of the appeal record;

(b) The application for leave to appeal be refused with costs on the standard basis.

[21] It was unnecessary to consider whether costs on the indemnity basis should have been awarded as there was no application in that regard. Obviously, the applicant will be at risk of orders against him on the indemnity basis if he continues in his disregard of the *Uniform Civil Procedure Rules* 1999 (Qld) and in pursuing applications which are entirely lacking in merit.

---

4 *Pickering v McArthur* [2005] QCA 294 at [3].

5 (1946) 46 SR (NSW) 318 at 323.

6 See also *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170.

[22] **DALTON J:** I agree with Muir JA's reasons for refusing the application for leave to appeal with costs. I agree with the orders proposed by Muir JA.