

SUPREME COURT OF QUEENSLAND

CITATION: *Fung v Tam & Anor* [2012] QCA 10

PARTIES: **ESTHER SAU KUEN FUNG**
(appellant)
v
CHUNG SHUN TAM
(first respondent)
SHARON SAU FONG PUN
(second respondent)

FILE NO/S: Appeal No 3666 of 2011
SC No 6756 of 2007

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 February 2012

DELIVERED AT: Brisbane

HEARING DATE: 30 August 2011

JUDGES: White JA and Philippides and North JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The application to adduce fresh evidence be refused.**
2. The appeal be dismissed.
3. The appellant pay the respondents' costs of and incidental to the appeal to be assessed.

CATCHWORDS: APPEAL – VEXATIOUS LITIGANT – PROCEDURAL FAIRNESS – LACK OF JURISDICTION – APPEAL BE DISMISSED – original matters arose from proceedings relating to the appellant's parents estates and family company – where the appellant had frequently instituted and conducted proceedings which were vexatious – whether the trial judge had erred in declaring the appellant a vexatious litigant – whether the trial judge lacked jurisdiction – whether procedural fairness was afforded to the appellant – appeal dismissed

Constitution of Queensland 2001, s 58
Succession Act 1981 (Qld), s 41(1)
Vexatious Litigants Act 1981 (Qld)
Vexatious Proceedings Act 2005 (Qld), s 5, s 5(1)(a), s 5(1)(b), s 5(1)(c), s 5(1)(d), s 5(1)(e), s 5(2), s 6, s 6(1)(a), s 7, s 8

Bhamjee v Forsdick (No 2) [2004] 1 WLR 88; [2003] All ER (D) 429; [2003] EWCA Civ 1113, applied
Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364; [2006] HCA 32, applied
du Boulay v Worrell & Ors [2009] QCA 63, applied
Emanuele & Anor v Australian Securities Commission & Ors (1997) 188 CLR 114; [1997] HCA 20, cited
Gamester Pty Ltd & Anor v Lockhart (the Honourable Mr Justice) (1993) 67 ALJR 547; (1993) 112 ALR 623; [1993] HCA 79, cited
Hambleton & Anor v Labaj [2011] QCA 17, cited
Johns v Johns [1988] 1 Qd R 138, cited
National Australia Bank Ltd v Freeman [2006] QSC 86, applied
Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19, cited
Re Cameron [1996] 2 Qd R 218; [1996] QCA 37, applied
Riches v Hogben [1986] 1 Qd R 315, cited
von Risefer v Permanent Trustee Company Limited [2005] 1 Qd R 681; [2005] QCA 109, cited

COUNSEL: L Stephenson for the appellant
 J Cremin for the respondents

SOLICITORS: Rajesh Gopal for the appellant
 Davellin Lawyers for the respondents

- [1] **WHITE JA:** I have read the reasons for judgment of North J and agree with his Honour's reasons and the orders which he proposes.
- [2] **PHILIPPIDES J:** I agree with North J that the appeal should be dismissed with costs for the reasons stated in his judgment.

Introduction

- [3] **NORTH J:** The appellant appeals from orders made by Justice Martin in the trial division on 5 April 2011 declaring her a vexatious litigant pursuant to s 6 of the *Vexatious Proceedings Act 2005 (Qld)* ("the Act").¹
- [4] The matters sought to be agitated by the appellant in the proceedings affected by his Honour's declaration and ancillary orders have their genesis in the dealings between the appellant and her parents many years ago.
- [5] At the hearing of the appeal, the appellant was represented by counsel. At times in the hearings before his Honour below the appellant was self-acting but significantly² at other times she was represented by counsel.
- [6] Before turning to the grounds of appeal and the submissions made in support, it is convenient to outline the history of the matters the subject of dispute and the history of the litigation.

¹ And also from certain restraining orders and stay orders made by his Honour ancillary to his declaration.

² Particularly in the circumstance of one of her matters agitated on this appeal.

History - Family Dealings & Litigation

- [7] In argument before the Court, the appellant's counsel conceded the accuracy of the history as recited by his Honour in his reasons³ and it is convenient to quote from his Honour's reasons:

"[11] The parties are siblings. The applications made by Ms Fung arise out of, or are said to relate in some way, to the estate of the parties' late father (Kwong Tam) who died in 1992. His estate has been completely administered. His executors were Ms Fung and Mr Tam.

[12] In 2002 the parties' mother died and Ms Fung brought an application for further provision in relation to her mother's estate. This was settled following mediation and an amount was paid to Ms Fung in accordance with the terms of the settlement.

[13] In 2007 Ms Fung filed an originating application seeking orders:

- (a) Permitting her to inspect and take copies of all document in the possession or power of Cameron Tam and herself as trustees of the estate of Kwong Tam and their solicitor,
- (b) Permitting her to obtain a similar right of inspection with respect to Sharon Pun and any documents she held.

Consent orders were made with respect to that application by Atkinson J on 31 October 2007.

[14] A further application was made in February 2010 seeking further inspection and copying.

[15] At or about this time Ms Fung somehow managed to change the records held by the Australian Securities and Investments Commission relating to the directors and shareholders of Shiu Yuk Kwong Tam Pty Ltd by inserting her name as a director and shareholder when she was neither. The manner in which she did that was raised before me. It is not entirely clear how it occurred, but it and other matters were the subject of orders made by Applegarth J on 28 April 2010.

[16] On 28 April 2010 Applegarth J gave leave to Ms Fung to file an application for further provision out of the estate of 'the above named deceased'. The application did not contain the name of any deceased, but the matter proceeded on the basis that the application concerned the estate of her late father.

³ Specifically Reasons for Judgment at [11]-[35], footnotes omitted.

- [17] Further, on the 28 April 2010, Walker Lawyers were granted leave to withdraw from acting as Ms Fung's lawyers. Ms Fung had notified the court previously, on 4 February 2010, of a change of solicitors from Tobin King Lateef to Walker Lawyers.
- [18] Justice Applegarth heard the matter on 28 April 2010 and dismissed both applications filed by Ms Fung. He made the following orders:
- (a) That she be restrained until further or other order from representing herself as a director and/or shareholder of Shiu Yuk Kwong Tam Pty Ltd.
 - (b) That her name be removed as a director and shareholder of the company.
 - (c) That she pay the costs of Mr Tam and Ms Pun on an indemnity basis.
- [19] On 4 May 2010 Ms Fung filed an application seeking the following orders:
- (a) An order pursuant to r 990 of the *UCPR* for leave to withdraw from the record in these proceedings.
 - [(b)] Direction.
 - [(c)] That the order of 28 April 2010 lodged by Davellin Lawyers was inappropriate and be dismissed.
 - [(d)] That there be no order as to costs.'
- [20] On 2 June 2010 Ms Fung filed an application seeking the following orders:
1. That the order 28 April 2010 lodged by Davellin Lawyers did not meet the compliance of Civil Uniform Rules and be dismissed.
 2. That both parties be agree to share the "Residues" one sixth each and be accept that 11th September 1998 the late Shiu Yuk Tam True Will.
 3. That the respondent pay the applicant's costs of the application;
 4. Such further or other order as the court may consider appropriate.
 5. Dismiss Sharon Pun.
 6. That liberty to apply on seven days notice by any party.'

[21] On 8 June 2010 Ms Fung filed an affidavit apparently in support of the application filed on 2 June 2010. Part of it consists of documents which had been tendered before Applegarth J. It also contains a further list of orders sought by Ms Fung:

- '1. Bank Accounts in name of Esther Sau Kuen Fung to be returned to the accountholder Esther Sau Kuen Fung inclusive those jointly with her mother.
2. The Probate in held by George Hatzis to be return to Esther Sau Kuen Fung subject that there is no objection from Cameron Tam.
3. Trust deed of Esther Fung in the matter of "Shiu Yuk Kwong Tam Pty Ltd" to be returned to Esther Fung subject to that there is no objection from Cameron Tam.
4. The Company Folios in held by George Hatzis and or Sharon Pun as third party to be returned to beneficiary owner Esther Fung subject that there is no objection from Cameron Tam.
5. A life tenancy granted to Esther Sau Kuen Fung on Property 40 Redland Bay Road Capalaba subject to her need base and her age and no objection from her sibilings.
6. Dismiss Cameron.
7. Dismiss Sharon Pun as secretary and director in the company affairs and executor.
8. The cost of the applicant Esther Sau Kuen Fung to be pay out of respondent Sharon Pun to be assessed on an indemnity basis.
9. "Davellin Lawyers" role as a third party representing Sharon Pun that at no time a shareholder undue influence Sharon Pun amended ASIC forms - substituted market shares replaced capital shares was illegal and found to be negligence.
10. "Davellin Lawyers" dismiss as executors and estates files to be return to Esther Sau Kuen Fung.
11. Both parties to be agree to set aside the agreement dated 01/12/03 and agree to cooperate with each other to sort out Tasmania properties one-sixth each.
12. That the judge thinks fit.'

- [22] Ms Fung filed an affidavit on 28 July 2010 in which she alleged that her father promised her a share in the company, Shiu Yuk Kwong Tam Pty Ltd, upon his death. Ms Fung also made other assertions as to promises her father made.
- [23] On 6 August 2010, the applicant filed another application in this matter seeking the following orders:
- '1. That the name of Esther Sau Kuen Fung DOB 18 February 1956 be reinstated as Recipient Owner with Shareholdings Identity Number:4230393 and OFFICE HOLDER of the captioned Company located at 40 Redland Bay Road Capalaba Q4157 namely **SHIU YUK KWONG TAM PTY LTD ACN 010 357 178 Granted by the Late Kwong Tam deceased on or about 17th August 1992; Reference is made to Notification of Change to Officeholders in Australia, Form 304 Corporations Law 242 (7), 361(1)(c) and that it is patented on or about 5 February 1993 ASIC File: 00317777.**
 2. That the name of Sharon Sau Fong Pun be removed as secretary and Director until further or any other order.
 3. That the Respondent pays the Applicant's cost of the Application.
 4. Such further or other order as the Court may consider appropriate.
 5. Dismiss Sharon Pun and Davellin Lawyers as executors in the matter of **Shiu Yuk Tam.**
 6. That **Probate ECC. No. 1151 of 1995** dated First August 1995 ESTATE KWONG TAM and **Trust deed** in name of SAU KUEN FUNG (aka ESTHER FUNG) DOB 18.02.1956 Granted by the LATE KWONG TAM in held at Hatzis Lawyers be returned to ESTHER SAU KUEN FUNG.
 7. That both parties be agree to share the "Residues properties" in Hobart Tasmania and the "Principal houses" of the deceased one-sixth each and be accept that 11th September 1998 was the Late Shiu Yuk Tam True Will.
 8. Liberty to apply on a 7 days notice by any party.'
- [24] On 16 August 2010 Ms Fung filed an affidavit in which she stated that she is the 'trustee and owner of Shiu Yuk Kwong Tam Pty Ltd'.

- [25] On 19 August 2010 Ms Fung filed a further affidavit in which she reiterated that her father had intended to hand the company over to her and that she legitimately held ownership of the company.
- [26] On 24 August 2010 Ms Fung filed an affidavit in which she alleged:
- (a) That both her parents had already divested their interest in the company to her prior to the death of her father;
 - (b) That a trust deed was executed prior to his death dealing with that transfer of ownership; and
 - (c) A number of other allegations relating to the residue of her mother's estate which are not capable of being understood.
- [27] The case for Ms Fung so far as it concerns any part of her mother's estate is subject to the mediated agreement based upon her application for further provision with respect to that estate. The case apparently mounted by her with respect to her father's estate is that he promised her, among other things, that he would leave his share in the company to her. His will did not have that effect. I note that Ms Fung was an executor of the estate and that these applications are brought some 12 years after probate was granted.
- [28] Apart from the difficulty in understanding large parts of what is said by Ms Fung in her affidavits and how she claims to be entitled to the relief she seeks, she also makes assertions in her affidavit filed on 19 August 2010 relating to the provenance of the will of Kwong Tam. It appears that Ms Fung is attempting to demonstrate that a document has been altered but, as the document is one which was provided by her to the document examiner, and is not the document for which probate was granted, nothing more can be said about it.
- [29] Since this matter was heard in August Ms Fung has filed further applications in the same matters, seeking the same orders.
- [30] On 31 August 2010, Ms Fung filed an application seeking the following orders:
1. That, pursuant to **s41(1) of the Succession Act 1981 Interstate**, adequate provision be made for the proper maintenance and support of the said **Esther Sau Kuen Fung** out of the estate of the abovenamed deceased;

2. That the name of **Esther Sau Kuen Fung DOB 18 February 1956** be hold her privacy as owner and she hold her own beneficiary Right as Trustee and be reinstated as Recipient beneficiary with **Shareholder Identity Number: 4230393** and that she is a True and Correct OFFICE HOLDER of the captioned Company located at 40 Redland Bay Road Capalaba Q4157 namely **SHIU YUK KWONG TAM PTY LTD ACN 010 357 178** Granted by the Late Kwong Tam deceased on or about 17th August 1992; Reference is made to Notification of Change to Officeholders in Australia, Form 304 Corporations Law 242(7), 361(1)(c) and that it is patented on or about 5 February 1993 ASIC File: 00317777 through a solicitor George Hatzis.
3. **The applicant's costs of an incidental to this application be paid out of the estate of the above-named deceased on an indemnity basis;**
4. That there be no order as to costs;
5. That the order of 28 April 2010 lodged by Davellin lawyers be dismissed.
6. That both parties be cooperate and agree to share the 'residual properties' in Hobart Tasmania and the 'three Principal houses' of the deceased one-sixth each.
7. That both parties be accept that **11th September 1998 was the Late Shiu Yuk Tam True Will.**
8. Dismiss Sharon Pun (aka Sharon Su Fung appears as a **wrong Name** shown on the **Incorrect order drafted by David Lin - 28/04/10**).
9. Dismiss Chun-Hong David Lin (appears as an unidentified name on the Will of Shiu Yuk Tam.
10. Dismiss Nancy Mei-Hesung Lin (appears as an unidentified name)
11. Liberty to apply on a 7 days notice by any party.
12. Adjourn to a date to be fixed.'

[31] On 20 September 2010, Ms Fung filed another application seeking the following orders:

1. 'That the application of interim order filed on the 18th, April 2010 by "Davellin Lawyers" for respondent parties that were rejected several times by the registry be dismissed.

2. That the **unjust order** filed on the 28th April 2010 by the respondent "Davellin Lawyers" be dismissed for the ground that the hearing was adjourned at 1pm.
3. That the Plaintiff Esther Sau Kuen Fung be hold her Shareholder Right and be reinstated as beneficiary Owner and Director of the captioned Company namely Shiu Yuk Kwong Tam Pty Ltd ACN 010 357 178 at ASIC; reference to S 157 (1) 1994 Land Act.
4. That the respondent Sharon Sau Fong Pun be restrained until further or other order from representing herself as a Director, secretary and or shareholder of the company until further or other order.
5. Liberty to apply on 7 days notice by any party.
6. The application of costs assessment by the respondents dismissed by Court on 18/06/10 at 3pm already at Court.
7. That the Respondent Sharon Sau Fong Pun comtempt of the Courts order and therefore be responsible to pay the Plaintiff costs on an indemnity basis to be assessed.
8. That both parties be accept that [*11th September 1998 Will Shiu Yuk Tam*] was the deceased Will'.

[32] In the applications filed 31 August 2010 and 20 September 2010, Ms Fung has added a third and fourth respondent, David Chun-Hong Lin, ("Chun-Hong David Lin") the solicitor and Principal of Davellin Lawyers and Mei Hesung Lin ("Nancy Mei-Hesung Lin"), another solicitor who was formerly employed by Davellin Lawyers. I can discern no basis for their addition as third and fourth respondents.

[33] On 11 October 2010, Ms Fung filed a further affidavit alleging, through an annexure, the same claim of ownership over her father's company.

[34] On 26 October, 2010, Ms Fung filed another application seeking the following orders:

1. 'That the name of ESTHER SAU KUEN FUNG (aka Esther Fung DOB 18 February 1956) be reinstated as Recipient Owner with Shareholdings Identity Number: **4230393** and OFFICE HOLDER of the Company located at 40 Redland Bay Road Capalaba QLD 4157 [**SHIU YUK KWONG TAM PTY LTD ACN 010 357 178**] **Granted by the Later Kwong Tam deceased 17th August 1992; Reference is**

made to Notification of Change of Officeholders in Australia, Form 304 Corporations Law 242(7), 361(1)(c) and that it is patented 3 February 1993 ASIC File: 00317777.

2. That the name of Sharon Sau Fong Pun be removed as secretary and Director until further or any other order.
3. That the Respondent pays the Applicant's costs of the Application.
4. That there be no order as to costs.
5. Such further or other order as the Court may consider appropriate.
6. Dismiss Sharon Pun.
7. Liberty to apply on a 7 day notice by any party'.

[35] On 27 October 2010, Ms Fung filed a supporting affidavit, reiterating her claim as director and shareholder of her father's company."

- [8] Additionally counsel who appeared at the appeal conceded the accuracy of a chronology of events attached to certain written submission prepared by counsel who appeared for the appellant before his Honour.⁴ Relevantly that attachment (in part) contained the following:

Date	Event
1985	K Tam (father) and S.Y. Tam (mother) visit Esther Fung in Hong Kong and inform her that she will receive rental income from the shops and will take over the family company.
August 1986	This agreement confirmed at family party in Brisbane before the brothers and sisters.
1987	Mrs Fung returns to Brisbane, and on her case is entitled to take over the company in consideration of her fulfilling the agreement with her father whereby she take over the company upon returning from Hong Kong and work in the bakery (the claim is therefore of the style of a <i>Riches v Hogben</i> (1986) 1 Qd R 315 case).
2 October 1989	Will of Mr K Tam (father).
2 August 1992	Father dies.

⁴ See attachment "A" to the "Respondent's submissions" prepared by Mr Somers of counsel dated 6 December 2010 contained in the "supplementary" Appeal Record book at p 946.

20 January 1993	Sharon Fung (sister) becomes a director of the company.
3 February 1993	Esther Fung contends to be a director of the company (Form 34).
26 August 1996	Esther Fung signs a share transfer from herself as a co-trustee of father's estate to Cameron Tam.
1997	Father's deceased estate finalised.
11 September 1998	First will of S.Y. Tam (mother).
12 July 2002	Subsequent will of S.Y. Tam (mother).
22 September 2002	Mother dies.
1 December 2003	TFM claim by Esther Fung re mother's estate - settled after a mediation began Damian Mullins SC. Esther received \$185,400. Agrees to resign as director of the company.

- [9] The history revealed from the foregoing is telling. The appellant's complaints have their generation in the dealings with her father and mother and other members of her family in 1985 through to 1987. The appellant's father died on 2 August 1992. She and the first named respondent to the appeal were the executors under the appellant's father's will and his estate was finalised in 1997. Subsequent to the death of the appellant's mother on 22 September 2002, the appellant brought a claim for family provision from her mother's estate which claim which, following a mediation conducted before senior counsel, was compromised on terms where the appellant received a substantial sum of money from the estate and agreed to resign as director of the family company.
- [10] On 7 August 2007, almost four years after the compromise of the proceedings in relation to her mother's estate, the appellant commenced proceedings concerning her late father's Will expressing "concerns that my father's Will may not have accurately reflected his intentions."⁵ This was notwithstanding that the appellant was one of the executors named in the last Will of her father, that probate had issued on 1 August 1995 and that the estate had been administered by 1997.
- [11] Thereafter in 2010 the appellant managed to change the records held by the Australian Securities and Investments Commission including her name as a director and shareholder in the family company. This culminated in the orders made by Applegarth J on 28 April 2010 correcting the records of the company and restraining the appellant from representing herself as the director or shareholder of the company.⁶ The appellant did not appeal the orders made by Applegarth J. Rather commencing on or about 4 May 2010 she filed a series of applications and affidavits seeking orders to circumvent the effect of his Honour's orders and also to agitate for other orders relating to her father's estate and the affairs of the family company.
- [12] On 13 May 2010 the respondents to the appeal filed an application seeking orders that the appellant be declared a vexatious litigant. Ultimately that application (together with other pending applications filed by the appellant) came on for hearing

⁵ See Appeal Record p 64.

⁶ See Appeal Record p 927.

before Martin J on 27 August 2010. At that hearing the appellant was not represented, she represented herself but had the assistance of an interpreter. The transcript of that hearing demonstrates that the appellant spoke reasonably fluent English, she was able to participate in the hearing and articulate her concerns.⁷

- [13] His Honour apparently reserved his decision but within days on 31 August 2010 the appellant filed an application seeking further orders. Thereafter she filed further applications and material seeking relief related to the matters the subject of the earlier proceedings. Ultimately on 18 November 2010 there was another hearing before Martin J.⁸ At that hearing the appellant was represented by counsel. Counsel for the respondents at the hearing complained that since the original hearing before Martin J the appellant had filed a further 33 documents.⁹ At that hearing his Honour gave an indication that he required the recently appointed legal representatives for the appellant to inform him through his associate by 23 November 2010 what instructions they had received with respect to the respondent's application for declarations that the appellant be declared a vexatious litigant. Thereafter in accordance with the directions made by his Honour on 18 November 2010 counsel for the appellant made submissions in writing dealing with the outstanding applications before his Honour including the vexatious litigant proceedings.¹⁰

Leave to apply

- [14] In the notice of appeal and at the hearing the appellant contended that his Honour did not have jurisdiction to make the orders under the Act because the application made by the respondents had not been made with the leave of the court as required by s 5(2) of the Act. In the written outline of argument in support of the appeal the appellant contended that his Honour lacked jurisdiction to hear the application brought by the respondents because they had not first obtained leave and contended that the Act requires prior leave before proceedings are commenced. This submission was made relying upon some observations made by Williams J (as his Honour then was) in *Johns v Johns*¹¹ in the context of the then Supreme Court rules and District Court rules relating to appeals from the District Court to the Full Court.
- [15] With respect to the submission the judgment relied upon by the appellant does not suggest that in the context of the matters then being considered by the Full Court the question of the jurisdiction of the Full Court or of the Supreme Court arose. Nothing in the judgment relied upon his authority for the proposition that the question of prior leave raises jurisdictional questions as submitted. In any event the judgment relied upon concerns entirely the different legislative schemes.
- [16] At the hearing of the appeal counsel for the appellant was disposed to submit that the orders made by his Honour under the Act were a nullity or alternatively his Honour lacked jurisdictions to entertain an application because leave had not been obtained before the application was brought. We were not referred to any authority for the first proposition.

⁷ See Appeal Record, transcript of proceedings 27/08/2010, pgs 1-1 to 1-32.

⁸ See transcript, Appeal Record pgs 33-40.

⁹ See Appeal Record p 34 l 35-55.

¹⁰ See the Respondents' submissions dated 6 December 2010 and the Respondents' supplementary submissions dated 7 December 2010 contained in the supplementary Appeal Record book at pgs 937 and 948 respectively.

¹¹ [1988] 1 Qd R 138 at 142-143.

- [17] The *Act* refers to the Court which is defined as the Supreme Court. Part 2 of the *Act* (particularly sections 5, 6, 7 and 8) invest the Court with jurisdiction to make orders.¹² The Attorney-General, the Crown solicitor, and the registrar of the Court may apply for an order¹³ and "only with the leave of the Court" may a person against whom another person has instituted or conducted a vexatious proceeding or a person "who has a sufficient interest in the matter" apply.¹⁴ His Honour found that both respondents to this appeal had a sufficient interest to make the application as both had been respondents to the appellant's many applications or proceedings.¹⁵
- [18] The purpose of the requirement of leave found in section 5(2) can readily be recognised; to act as a control upon the institution and maintenance of applications by restricting the standing to those who might apply and to prevent vexation of persons that might be occasioned were the jurisdiction conferred by the *Act* to be invoked officiously by persons without any true interest in the disputes before the Court or invoked as an occasion to cause vexation by the bringing of applications. Significantly the section does not contain the word "prior", on its terms there is no imperative that an order for leave be obtained before an application is filed.¹⁶ No doubt that procedure would be consistent with the *Act* and, quite properly, a judge might require that an applicant satisfy the question of whether leave should be granted before hearing an application. But there might be occasions when the question of whether leave should be granted requires consideration of the merits of the application with the consequence that the question of leave and whether an order should be made, particularly in the interest of saving costs and avoiding delay, might properly be considered in the same hearing.
- [19] It is not necessary however, to go further into this and elaborate upon the preferred practice or upon the considerations that might apply either generally or in particular circumstances. In this case his Honour made a grant of leave "nunc pro tunc".¹⁷ The jurisdiction of the Supreme Court to make orders to cure "defects or irregularities in the exercise of its jurisdiction" has long been recognised in the corporations jurisdiction, the absence of prior leave does not affect jurisdiction, the grant of leave "nunc pro tunc" cures any irregularity in the exercise of jurisdiction.¹⁸ In any event, were it necessary, and it is not, there is power in this Court to make an order for leave to correct a mistake.¹⁹
- [20] Concerning the submission that the orders made were a "nullity" it is sufficient to refer to the reasons of the High Court in *Berowra Holdings Pty Ltd v Gordon*²⁰:

¹² That jurisdiction stands apart from but is in addition and supplementary to, not in substitution for nor is it to be understood as an amendment of, the inherent jurisdiction of the Court to prevent abuse of its process, see generally the discussion in *Hambleton & Anor v Labaj* [2011] QCA 17 per White JA at [53]-[57]. See further *von Risefer v Permanent Trustee Company Limited* [2005] 1 Qd R 681 per Keane JA at [13]-[26] and the discussion of the power to prevent anticipated use of process by making restraining orders founded upon section 58 of the *Constitution of Queensland* 2001.

¹³ Section 5 (1)(a)(b) and (c).

¹⁴ Section 5(1)(d) and (e).

¹⁵ Reasons for Judgment [7].

¹⁶ Compare the provisions of Part 3 of the *Act* and Practice Direction No 5 of 2010 concerning applications by persons subject to an order.

¹⁷ Reasons for Judgment [7].

¹⁸ See *Emanuele & Anor v Australian Securities Commission & Ors* (1997) 188 CLR 114 per Brennan CJ at pg 125.

¹⁹ *Hambleton & Anor v Labaj* [2011] QCA 17, [51] and [72].

²⁰ (2006) 225 CLR 364 at [11] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

"[11] In particular, the introduction ... of concepts of 'nullity' and 'invalidity' is misleading because they tend to obscure the distinction between superior courts of record of general jurisdiction and courts of limited jurisdiction. That distinction has been the subject of comment in this Court, although due regard is to be had to the constitutional context. In the case of the superior courts, acts in excess of jurisdiction cannot be characterised as invalid until quashed or set aside on appeal, whereas that is not necessarily true of the latter. Thus, in the majority judgment of Gaudron, Gummow and Callinan JJ in *Pelechowski v Registrar, Court of Appeal (NSW)*, it was decided that, because an order made by an inferior court (in that case the New South Wales District Court) without power to do so was a 'nullity', it could not found a proceeding for contempt. This situation was contrasted to that arising where an order was made within power but improperly, in which case, until set aside by a superior court, the order had to be obeyed."

(Footnotes omitted.)

It is worthwhile considering this passage in the context of their Honours' reasons upon "*Nullity and invalidity*".²¹ There is no substance to the appellant's contentions that his Honour was deprived of jurisdiction or that his orders were a nullity.

The Orders Made

- [21] In the written outline of argument on behalf of the appellant it was asserted that his Honour erred in finding that the appellant had frequently instituted and conducted proceedings which were vexatious within the *Act* and that his Honour had erred in the test to be applied in relation thereto. The outline did not descend to any argument in support of those assertions.
- [22] His Honour turned to address these questions in his reasons after he set out the factual history.²² It is convenient to quote from his Honour's reasons:

"[36] I now turn to the issue of whether Ms Fung should be declared a person who has 'frequently instituted or conducted vexatious proceedings' within the meaning of s 6 of the Act, such that the Court should make a 'vexatious proceedings order' under s6(1)(a). The definition of 'vexatious proceedings' is set out above.

[37] The Court must ensure that its processes are not abused and, apart from the Act, it has an inherent jurisdiction to restrain vexatious proceedings. In considering the court's inherent jurisdiction, Muir J (as he was then) in *National Australia Bank Ltd v Freeman* adopted what Lord Phillips MR (as he then was) said in *Bhamjee v Forsdick*:

²¹ At [10] - [16].
²² Quoted above.

"The Court, therefore, has power to take appropriate action whenever it sees that its functions as a court of justice are being abused. The advent of the Civil Procedure Rules makes the nature of those functions more transparent. A court's overriding objective is to deal with cases justly. This means, among other things, dealing with case 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'.

[38] As to what constitutes vexatious legal proceedings, this Court has adopted a 'broad test' as expressed by Fitzgerald P in *Re Cameron*, which was decided in relation to the *Vexatious Litigants Act 1981* (Qld). In that decision, Fitzgerald P identified the following as factors which are relevant to the determination of whether proceedings are vexatious:

- (a) the legitimacy or otherwise of the motives of the person against whom the order is sought,
- (b) the existence or lack of reasonable grounds for the claims sought to be made,
- (c) repetition of similar allegations or arguments to those which have already been rejected,
- (d) compliance with or disregard of the Court's practices, procedures and rulings,
- (e) persistent attempts to use the Court's process to circumvent its decisions or other abuse of process,
- (f) the wastage of public resources and funds, and
- (g) the harassment of those who are the subject of the litigation which lacks reasonable basis."

(Footnotes omitted.)

[23] Thereafter his Honour addressed the factors identified by Fitzgerald P and also turned to other considerations and in particular in matters raised on behalf of the appellant by her counsel in his written submissions. His Honour then concluded as follows:-

"[54] Ms Fung's claim disregards my dismissal of her application on 27 August 2010 with respect to the ownership of shares in Shiu Yuk Kwong Tam Pty Ltd and the will of her father.

[55] Despite the dismissal of her applications filed on 4 February 2010 and 28 April 2010, Ms Fung's continued to file applications concerning the same subject matter as those previous applications. Ms Fung's insistence that she be reinstated as 'beneficial Owner and Director of Shiu Yuk Kuen Fung', as expressed in her applications filed 6 August 2010, 31 August 2010, 20 September 2010 and 26 October 2010, demonstrates a disregard of the orders made by Applegarth J that she 'be removed as a director and beneficial shareholder of the company Shiu Yuk Kwong Tam Pty Ltd'.

[56] Section 6(1)(a) of the Act requires consideration be given to whether a person a person who has frequently instituted or conducted vexatious proceedings. In *National Australia Bank Ltd v Freeman*, Muir J addressed the meaning of 'frequently' in the context of the Act:

'Frequently' is defined in the Shorter Oxford English Dictionary as: 'At frequent or short intervals, often repeatedly; numerously'. Whether proceedings have been instituted or conducted 'frequently' must be looked at in the context of litigation. In that sense 'frequently is a relative term'.

[57] In the context of the current litigation, I regard Ms Fung's applications as being sufficiently frequent so as to demand the Court's sanction. Since Justice Applegarth dismissed two of Ms Fung's applications on 28 April 2010, she has filed a further six applications. Ms Fung has also filed a further application to be heard on 29 April 2011.

[58] Ms Fung's conduct has led me to conclude that she is a person who has 'frequently instituted or conducted vexatious proceedings' within the meaning of s 6 of the Act. I am satisfied that an order pursuant to the *Vexatious Proceedings Act 2005* (Qld) should be made but that it should be confined to proceedings against Mr Tam and Ms Pun. I would further confine it to matters relating to the estates of their parents and Shiu Yuk Kwong Tam Pty Ltd but Ms Fung's many applications have strayed beyond those issues and I am satisfied that to so limit the order would not necessarily terminate the vexatious proceedings."

(Footnotes omitted.)

[24] It is plain from the above that his Honour addressed the considerations raised by the *Act* turning his mind to tests identified in earlier decisions. In light of the history of the applications made by the appellant and in the circumstances identified by his Honour I can detect no error on his Honour's behalf. His Honour's approach was orthodox and, in my view, his conclusion was compelling.

Procedural Fairness

[25] In the notice of appeal, the appellant raised grounds asserting that the appellant did not understand the proceedings, that she should have been afforded the opportunity to obtain an interpreter and that she should have been afforded the opportunity to obtain legal advice. In the written outline of argument in support of the appeal it was asserted that she did not receive procedural fairness. In argument before the Court, counsel for the appellant, when asked what specifically was submitted his Honour ought to have done it was submitted that his Honour should have adjourned the hearing and directed the appellant to obtain legal representation. A short answer can be made to these complaints. At the hearing before his Honour on 27 August 2010, the transcript of the proceedings shows that the appellant apparently had the assistance of an accredited Chinese and English interpreter who had been privately arranged by the appellant to assist her during the Court proceedings.²³ Further at that hearing his Honour gave the appellant the opportunity to address the Court upon the application under the *Act* inviting her to say what she could or wanted to say in response to that application and the material relied upon by the respondents to this appeal.²⁴ The content of the obligation when litigants are self-represented may vary according to the circumstances but the authorities do not suggest that a judge is obliged to necessarily assist a self-represented litigant in the presentation of his or her case. In *du Boulay v Worrell & Ors*²⁵ Muir JA (with whom Fraser JA agreed) said:

"[69] It may be that self-represented litigants should be afforded a degree of indulgence and given appropriate assistance. But if a self-represented person wishes to litigate, he or she is as much bound by the rules of Court as any other litigant. Those rules exist to facilitate efficient, fair and cost-effective litigation. The Court's duty is to act impartially and ensure procedural fairness to all parties, not merely one party who may be disadvantaged through lack of legal representation. The other party to the litigation is entitled to protection from oppressive and vexatious conduct regardless of whether that conduct arises out of ignorance, mistake or malice."

(Footnote omitted.)

Statements of high authority demonstrate that a judge while bound to give a party a reasonable opportunity to articulate his or her case, the judge is not bound to go further and assist the party:

"In court proceedings, a judge is bound to give a party a reasonable opportunity to state the party's claim for relief and to point to the evidence which supports it. But if the opportunity is not taken, the judge is not bound to set out on a search for supportive evidence to support a claim which the party has failed to articulate intelligibly."²⁶

²³ See these reasons at [10] above and Appeal Record at pgs 1-2.

²⁴ Appeal record pgs 1-30 to 1-31.

²⁵ [2009] QCA 63.

²⁶ *Gamester Pty Ltd & Anor v Lockhart (the Honourable Mr Justice)* (1993) 112 ALR 623 at 626 per Brennan, Deane & Dawson JJ.

- [26] In light of these authorities it may be doubted that his Honour was obliged, in order to ensure that the appellant was accorded procedural fairness, to adjourn the proceedings and direct her to obtain legal representation. But it is not necessary to consider this any further in light of the circumstance that the matter came on for mention before his Honour subsequent to 27 August 2010 on 18 November 2010 the appellant was represented by counsel. His Honour made directions that would have permitted the appellant's then legal advisers to have the hearing re-listed for further argument and further submissions if instructed to do so.²⁷ In the upshot, no request seems to have been made to re-list the matter for further hearing or to provide further evidence. However, the appellant's counsel took the opportunity to make extensive written submissions upon matters relevant to the dispute between the parties and also touching upon the issue of the application which this appeal concerns.²⁸
- [27] Consequently there is no substance in the submission that the appellant was denied procedural fairness.

Fresh Evidence

- [28] At the hearing of the appeal, counsel for the appellant sought leave to read and file a further affidavit of the appellant and an application was made to admit same as fresh evidence. The application was opposed by the respondent and the question of the reception of the affidavit and admitting it as fresh evidence was reserved.
- [29] There are several reasons why the application should be refused. Firstly, it takes matters no further. In light of the history of the appellant's conduct it can be doubted that the affidavit would result in any different order. Further, there is no explanation why this evidence was not forthcoming in November or December 2010 when the appellant was represented by counsel. In all the circumstances the application should be refused.

Orders

- [30] The orders I would propose are:
1. The application to adduce fresh evidence be refused.
 2. The appeal be dismissed.
 3. The appellant pay the respondents' costs of and incidental to the appeal to be assessed.

²⁷ Appeal Record at pgs 35-36.

²⁸ See the supplementary submissions made on behalf of the Appellant dated 6 December 2010 and the further submissions dated 7 September 2010 in the Supplementary Appeal Book at pgs 937 and 948 respectively.