SUPREME COURT OF QUEENSLAND

CITATION:	*Kilvington v State of Queensland & Anor* [2012] QCA 174
PARTIES:	**KIM THOMAS KILVINGTON** (applicant) **v** **STATE OF QUEENSLAND** (first respondent) **SRIDHAR KASHIVISHWANATH** (second respondent)
FILE NO/S:	Appeal No 10617 of 2011 Appeal No 10618 of 2011 DC No 52 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal Miscellaneous Application - Civil
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	26 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2012
JUDGES:	Holmes JA and Fryberg and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applications for extension of time refused with costs.** **2. The remaining extant application for orders and declarations as to the conduct of the appeal is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the first respondent operated a medical service and the second respondent was employed as a doctor in it – where the second respondent did not provide a certificate as to disability which the applicant needed to obtain release of his superannuation – where the applicant sued the respondents for damages alleging breaches of various obligations and duties – where the second respondent said he did not consider the applicant's condition sufficiently stable to issue a certificate – where the trial judge found that the second respondent had not treated the applicant for long enough to

meet the insurer's requirements – whether that finding correct – whether open to trial judge to accept second respondent's evidence – whether the applicant's application for an extension of time to appeal the judgment of the primary judge should be allowed

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the applicant sued the respondents for damages by alleging breaches of various obligations and duties – where the primary judge found the respondents to be wholly successful – where the applicant was ordered to pay the first and second respondents' costs of and incidental to the proceeding apart from in a specified six month period – where the applicant contended that no order for costs should have been made as the law was improperly applied by the primary judge – whether there was a miscarriage of justice in the making of this order – whether the applicant should receive an extension of time to appeal the costs order

Uniform Civil Procedure Rules 1999 (Qld), r 660, r 744, r 748

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Magill v Magill (2006) 226 CLR 551; [2006] HCA 51, cited
Wilkinson v Downton [1897] 2 QB 57, cited

COUNSEL: The applicant appeared on his own behalf
C J Fitzpatrick for the respondents

SOLICITORS: The applicant appeared on his own behalf
Corrs Chambers Westgarth for the respondents

[1] **HOLMES JA**: The applicant unsuccessfully sued the respondents for damages, alleging breaches of various obligations and duties arising, essentially, from the fact that the second respondent did not provide him with a medical certificate he had requested to enable him to seek early release of his superannuation funds on the grounds of permanent incapacity. He now applies for an extension of time within which to seek leave to appeal the judgment on his claim, given against him on 23 December 2010, and, separately, an extension of time within which to seek leave to appeal a costs order made against him on 25 March 2011. A third application sought a number of orders and declarations in relation to the conduct of the appeal, none of which now appear to be relevant.

[2] Rule 748 of the *Uniform Civil Procedure Rules* 1999 requires that a notice of appeal be filed within 28 days of the decision appealed from, unless the Court of Appeal otherwise orders. "Decision" is defined in r 744 as meaning "an order, judgment, verdict or an assessment of damages." The applicant did not attempt to file a notice of appeal until 20 April 2011, when he went to the Registry at Ipswich and was referred to the Supreme Court Registry in Brisbane, where he attended the following day. According to his affidavit, he was then refused leave to file a notice of appeal which, apparently, sought to appeal against both the substantive judgment

and the costs order. The applicant's explanation for the delay to that point was that he believed that the judgment was incomplete until a costs order had been made and that the appeal could not be filed until then. Plainly that was not so; the order giving judgment for the defendants was made on the date it was pronounced (r 660), and the appeal period then commenced to run.

[3] It seems probable that the applicant became unwell not long after his attempt at filing the notice of appeal, because in mid May 2011 he was admitted for four weeks to hospital. He made a further attempt to file the notices of appeal in late August, but was unsuccessful because he could not produce a copy of the formal order. Thereafter he was unwell again during September and October 2011. He finally filed these applications in November 2011.

[4] The applicant's explanation for delay is plainly more acceptable in relation to the appeal against costs, given that there was an attempt to file the latter appeal within time. The original failure to file the notice of appeal against the substantive judgment was purely the product of mistake, less understandable in this case than it might be in another. The applicant is admitted as a barrister and practised as one for a considerable period; he might be expected to have the advantage of knowing the rules or knowing how to ascertain their content. That delay, then, is not readily excused; but the merits of the proposed appeal should be examined before a conclusion is reached on the application for an extension of time.

[5] The second respondent was, at the relevant time (late 2008 and early 2009) a doctor undergoing a training program to specialise in psychiatry. He was employed as a principal house officer, serving a six month rotation at a mental health service operated by the first respondent at Ipswich. While there, he treated the applicant for a combination of psychiatric illness and alcoholism. He saw him on four occasions, in August, September and October 2008 and January 2009. There was no charge for the service; the applicant was neither required to pay a fee nor to assign any Medicare benefit.

[6] The applicant's evidence was that he had, on a number of occasions, delivered a written request, with a copy of a certificate for completion by the second respondent, to the receptionist at the mental health service premises. The second respondent denied receiving any such request, but admitted that in October 2008 the applicant had asked him to complete a certificate to enable him to obtain early release of his superannuation funds. The matter had been discussed again at their final consultation in January 2009. He did not complete any such certificate. He said in evidence that he had considered that the applicant's condition was not stable and was hopeful that alteration of his medication regime and an attempt at moderating his alcohol consumption would produce substantial improvement. Those steps were necessary before completion of the certificate could be contemplated; he was not in a position to say that the applicant was permanently incapacitated.

[7] The applicant brought the action against the respondents alleging, relevantly for present purposes, that there existed between him and the second respondent a contract arising from the doctor/patient relationship, an implied term of which was that the second respondent would honestly complete the medical certificate within a reasonable period. A further express agreement made in January 2009 was also alleged: that the second respondent would complete and deliver the medical

certificate, provided the applicant furnished a document setting out what he intended to do with the superannuation funds.

[8] The contractual relationship also gave rise, the applicant pleaded, to a fiduciary duty: the second respondent having undertaken to complete the certificate and being in a position of ascendancy was in the position of a fiduciary and had breached his duty by requiring the applicant to identify his intended uses of the funds. It was alleged, too, that the second respondent had combined with the applicant's general practitioner to require the applicant to provide the document setting out the intended destination of the funds and that this was an unlawful agreement amounting to the tort of civil conspiracy. Finally, it was pleaded that the second respondent was also liable in tort for the mental distress he had caused the applicant by resiling from an undertaking to complete the certificate. That, it was said, was an act calculated to cause harm, to which the *Wilkinson v Downton*[1] line of authority applied.

[9] The learned trial judge dealt with each of these pleaded causes of action, and others not now pressed, in a long and careful judgment. He did not accept that there was, by virtue simply of the doctor/patient relationship, any contract between the applicant and the second respondent. Nor was there any more specific agreement that the second respondent would sign the certificate; his Honour accepted the contrary evidence of the second respondent, that he had not agreed to complete the certificate. Given that finding, the claim for breach of fiduciary duty had inevitably to fail. In any event, if there were any fiduciary duty, it could not, his Honour considered, require the second respondent to provide a certificate which was contrary to his honest opinion.

[10] The trial judge, accepting the evidence of both the second respondent and the applicant's general practitioner on the point, found as a matter of fact that there was no agreement between them which entailed their undertaking to complete medical certificates if the applicant gave them a document setting out what he intended to do with his funds. Consequently, the tort of civil conspiracy was not made out. The learned judge noted statements by the High Court in *Magill v Magill*[2] to the effect that the *Wilkinson v Downton* cause of action had been subsumed into the tort of negligence generally. In any case, he said, what was concerned here was far removed from the kind of act covered by the *Wilkinson v Downton* line of cases; and it could hardly be the case that a doctor would be liable for causing psychiatric injury through his refusal to provide a certificate which did not reflect his opinion. His Honour also pointed out that there was a difficulty with causation: the second respondent did not meet the insurer's requirements for a certificate certifying the doctor, because he was not a specialist and he had not seen the applicant over a six month period.

[11] The applicant has annexed a proposed notice of appeal to his affidavit asserting a great number of errors of law and fact. However, to succeed on an appeal on any of those grounds, he must be able to convince the court that the learned judge erred in accepting the second respondent's evidence. If the finding were properly made that the second respondent did not agree to complete a medical certificate and honestly believed he should not do so at the time it was sought, no duty or obligation can be identified which required it of him.

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1 [1897] 2 QB 57.

2 (2006) 226 CLR 551 at 562 (per Gleeson CJ) and 589 (per Gummow, Kirby and Crennan JJ).

[12] The applicant placed particular reliance on this question and answer from his cross-examination of the second respondent:

> "Now, doctor, when you last saw Mr Kilvington on the 5th of January, last year, had you made your mind on that date to refuse Mr Kilvington the certificate, or was it the case that you were still making up your mind?-- Never came across to my mind that I should refuse the certificate to Mr Kilvington. I was only acting on the - on the clinical grounds that he was unwell, and was not - not having sound judgment to make a decision about that. So my decision not to fill the certificate was based on that - that period of time where he was unwell."

That statement showed, the applicant contended, that the second respondent did not have a belief that he should not provide the certificate. But to read it to that effect is to take it out of context. The witness went on to explain that the applicant at the relevant time was recovering from a hypomanic episode, and he was hopeful that he would benefit from an increase in his medication and abstinence from alcohol. He had not resolved that he would never give the applicant a certificate; rather, he considered that it was not appropriate to do so at that time because of the prospect of improvement in his condition.

[13] The applicant asserted, more generally, that the trial judge could not properly have accepted the second respondent's evidence. But if an appeal were to take place, this court would have to recognise the disadvantage under which it laboured as compared with the trial judge in seeking to assess the second respondent's credibility.[3] The applicant argued that the second respondent's evidence as to his reasons for declining to provide the certificate, particularly in relation to the prospect of improvement with changed medication and abstinence from alcohol, emerged for the first time at the trial and was not consistent with the pleading. That is not, I think, correct. The defence filed on behalf of the first and second respondents denied any obligation to complete a medical certificate but pleaded that if there were any such obligation, it was to consider whether the applicant met the insurer's criteria for incapacity as well as to consider whether the applicant was at risk of self-harm, and that that obligation was discharged. The second respondent's evidence was to the effect that he had not concluded at the relevant time that the applicant was permanently incapacitated; in other words, that the applicant did not then meet the insurer's criteria.

[14] Finally, the applicant said, the trial judge should have rejected the second respondent as a witness of truth because of his evidence that he had not received telephone messages or a series of documents: the applicant's original letter with certificates and medical reports in October 2008; the replacement forms he delivered to the mental health service in November; the document in which he set out what he proposed to do with the money, which he said he delivered to the mental health service in late January 2009; and a later demand that the certificate be completed, which was served on the mental health service in late February 2009. The learned judge accepted the second respondent's account that he had not received the documents, but that evidence, the applicant said, was at odds with the evidence of a mental health service employee, Mr Forward, about passing on messages and documents.

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3 *Fox v Percy* (2003) 214 CLR 118 at [23].

[15] What Mr Forward said was that after the second respondent left the mental health service (in early January), he forwarded to him at his new placement at the Ipswich Hospital documents left for him at the service. His evidence, however, was far from unequivocal:

> "I think - if it was - if he had seen you in January '09, then I guess I'm just assuming that it would have been after that, if in fact, I did send them up to Ipswich Hospital, because that would have been after he was moved from the Ipswich Rural Continuing Care team, up to Ipswich, but I'm only surmising that I might add."

Mr Forward could not recall any details, but, he said, he would personally have passed telephone messages on to the second respondent at the Ipswich Hospital; he was "pretty sure" he had spoken to him about the applicant. But he did not identify any particular time period in which he had done so, whereas the applicant cross-examined the second respondent specifically about whether he had received messages from the end of January 2009. The second respondent said that he had not; he was in India then, and until mid-February.

[16] Nothing in the evidence from the two witnesses presented inevitable conflict. Whether the second respondent had received telephone messages was not an issue on which any finding was made (or necessary) but it is, obviously, possible that Mr Forward was speaking of messages passed on at times other than the end of January, 2009, the time about which the second respondent was quizzed. The learned judge could conclude, as he did, that administrative inefficiency explained the second respondent's failure to receive the particular documents, without any necessary inconsistency with Mr Forward's general assertion that documents would have been sent on to him at the Ipswich Hospital.

[17] The acceptance of the second respondent's evidence is all the more unremarkable given the absence of any apparent reason for him to make a false denial; he readily accepted he had been asked for a certificate, and it made no difference to the issues in the case whether he had received forms for the purpose. The applicant did not identify any reason for the second respondent to deny that he had received the associated forms if he had, in fact, done so. This is not a case in which any feature clearly demonstrates that the trial judge misused his advantage in seeing the witnesses give evidence so that this court would make a different assessment or would interfere with his findings.

[18] Since the applicant cannot demonstrate error in the learned judge's acceptance of the second respondent's evidence about his refusal to sign the certificate and his reasons for doing so, his prospects of success on an appeal are correspondingly poor. They are also, in my view, blighted by another deficiency. The insurer's form expresses the requirement for medical evidence to support a claim for permanent incapacity thus:

> "It is a Trustee requirement that the patient must be seeing both Medical Practitioners (GP) for a minimum of 6 months."

That was the extent of the evidence before the learned judge as to the requirement. The second respondent was not a specialist, although he was training to become a psychiatrist. He had first seen the applicant on 18 August 2008 and last saw him on 5 January 2009, a period of less than six months.

[19] The applicant's argument was that because the second respondent was completing a six month rotation (from the second week of June 2008 until the second week of January 2009) he was, in effect, the applicant's doctor for the entire period. But the requirement was that the applicant had been seeing the doctor over a six month period; it does not answer that requirement to say that had he gone to the medical service in June or July 2008, the second respondent would have been his treating doctor. I can see no error in his Honour's conclusion that the applicant's treatment by the second respondent did not meet the requirement. It followed that even if there had been any breach of duty or obligation by the second respondent in failing to provide a certificate, it was not causative of any loss, because any certificate from him would not have met the insurer's requirements.

[20] There are reasons to doubt the merits of the applicant's other arguments, as to the existence of a contractual relationship and what damages could be identified, but those to which I have referred to are sufficient to show that any appeal against the judgment on the claim would have no real prospect of success. Accordingly, an extension of time should not be granted.

[21] In making the costs order, the learned judge observed that the respondents had been wholly successful, but he noted that there had been some failure to proceed with the matter efficiently. Consequently, he ordered that the applicant pay the first and second respondents' costs of and incidental to the proceeding, other than costs incurred during a specified six month period. The applicant's notice of appeal contended that no order for costs should have been made at all: that the learned trial judge correctly identified the law as to the circumstances in which a departure from the usual order as to costs might be warranted, but failed properly to apply it. As to what warranted such a departure to the extent of making no costs order, the notice of appeal goes on to say:

> "The First and Second Respondents by their insolence, arrogance, ruthlessness, un-invited paternalism, denial of ethical obligations owed to the Appellant, and repudiation of principles relating to decency and fairness, and defiance in the face of obligations owed to the Honourable Court, by themselves and their solicitors, placed themselves within the above principles, which disqualify them from any favourable order relating to costs."

The learned judge did not find any conduct of that kind on the part of the first and second respondents, and none was identified here. The appeal against the costs order having no prospect of success on that ground, I would refuse an extension of time within which to seek leave to bring it.

[22] The applications for extension of time should be refused with costs. The remaining extant application for orders and declarations as to the conduct of the appeal, which has become superfluous, should be dismissed.

[23] **FRYBERG J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons for those orders.

[24] **MARTIN J:** I agree, for the reasons given by Holmes JA, with the orders proposed by her Honour.