

COURT OF APPEAL

MUIR JA

**Appeal No 2692 of 2012
LAC No 6 of 2011**

MENTECH RESOURCES PTY LTD	Applicant
v	
MCG RESOURCES PTY LTD	Respondent
and	
ROBERT WILLIAM KIRKBY	Respondent
and	
JUDY-ANNE GALWAY	Respondent
and	
TERRENCE BURT	Respondent

BRISBANE

DATE 25/07/2012

ORDER

HIS HONOUR: On 4 May 2012 Holmes JA ordered that the applicant provide security for costs by 4 pm on 21 May 2012. It was a term of the order that:

"Failing the furnishing of such security by that time the application for leave to appeal stand dismissed with costs without further order".

The applicant did not comply with the terms of the order. Mr Nagle, the applicant's in-house counsel, swears that he came to Brisbane on 21 May (he refers mistakenly to 22 May in his affidavit) with a view to providing the security to the Registry by cheque. It seems that he missed his flight and caught a later flight which was delayed, albeit shortly, with the result that he arrived at the Registry, cheque in hand, at two minutes past four. The Registry was

closed. He then attended at counsel's chambers for a conference and attempted to pay the \$30,000 at the Registry the following day, but the Registry, quite properly, declined to accept it.

The applicant applies for an order setting aside the judgment by default arising in consequence of the operation of the order of 4 May.

The application is opposed. Mr Martin, who appears for the first respondent, submits that the principles relevant to this application are those propounded in *Chavez v Moreton Bay Regional Council* [2009] QCA 348. He submits that the consent order is, in effect, a "free and voluntary agreement between the parties" and that, in accordance with the principles expounded by Keane JA in *Chavez*, the respondents should not be deprived of the fruits of their bargain. I do not accept that submission.

Rather, it seems to me that the consent order here arose merely by the applicant consenting to an order proposed by the respondents "in the sense of not objecting - but without there being any intention of entering into a formal and binding contract".¹

The applicant had failed to comply with the requirements of the rules with respect to the appeal. The details of the non-compliance are recorded in an affidavit of Ms Twemlow. I do not need to set out the detail here, but as a result of the applicant's default the respondents made application, it would seem on 20 April 2012, for an order for security for costs. Precisely what transpired after that is not recorded in the evidence, but it is plain that the order which was made by Holmes JA was made with the consent of the applicant.

I remarked in the course of argument that the applicant appeared to have behaved in a somewhat cavalier fashion in respect of payment. Perhaps I was a little harsh, but certainly

¹ See *R D Werner & Co Inc v Bailey Aluminium Products Pty Ltd* (1988) 18 FCR 389 at 390-1; also referred to by Keane JA in *Chavez* at [35].

the applicant could have made rather more useful and timely efforts than it did to comply. Nevertheless, in the end it did attempt to comply and failed only a very narrow margin.

In the circumstances it would not seem to me to be a reasonable exercise of discretion to deprive the applicant of the ability to pursue its appeal in consequence of such a minor and accidental default. The role of the Court in these circumstances is not to punish parties for transgressions.

For reasons I explained in the course of argument it is appropriate that the applicant pay the first respondent's costs of, and incidental to, this application.

The orders I make then are:

1. That the judgment arising from non-compliance with the order of 4 May 2012 be set aside.
2. That the time for payment of monies under paragraph 1 of that order be extended to 4 pm on Friday 27 July 2012.
3. And to make it perfectly clear, I further order that failing the furnishing of the security referred to in paragraph 1 of the order of 4 May 2012 the application for leave to appeal stand dismissed with costs without further order.
4. I order that the applicant, pay the first respondent's costs of this application on the standard basis.