SUPREME COURT OF QUEENSLAND

CITATION:	*Hwang v Lawrie & Anor* [2013] QCA 204
PARTIES:	**KUMOK HWANG** (appellant) **v** **KEITH JOHN LAWRIE by his litigation guardian THE PUBLIC TRUSTEE OF QUEENSLAND** (first respondent) **LAWMAR PTY LTD** ACN 009 775 866 (second respondent)
FILE NO/S:	Appeal No 473 of 2013 SC No 9495 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2013
JUDGES:	Holmes and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring at to the order made
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the appellant appealed against a judgment requiring her to repay funds obtained through fraud and undue influence – where the respondents contended that the Court should not hear the appellant because of her *prima facie* contempt of orders of the Court below – where those orders included four made in an earlier ancillary proceeding between the parties and the judgment orders in the proceeding the subject of this appeal – whether there is an absolute bar on a party in contempt being heard or whether the court has a discretion to hear the contemnor – whether contempt of orders in a different but related proceeding should attract the application of the rule or discretion – whether the interests of justice militate in favour of permitting an appellant to challenge the correctness of the orders of which he or she is *prima facie* in contempt – where counsel for the appellant submitted that the appellant wished

to take steps to purge her contempt – whether the Court should exercise its discretion to hear the appellant and deal with the appeal on its merits

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where the appellant was found to have acted unconscionably and defrauded and exercised undue influence over her husband, the first respondent, in obtaining control of large sums of money from his bank accounts and those of his company, the second respondent – where the appellant did not give evidence at the trial – where the appellant submitted that the trial judge overlooked matters raised in her "Defence", placed too much weight on the evidence of the respondents, and failed to take "language and cultural barriers" into account – where the "Defence" document filed by the appellant in no way conformed with the *Uniform Civil Procedure Rules* 1999 and was unsupported by any affidavit material – where no evidence of language or cultural barriers was placed before the trial judge – where the appellant sought to rely on inadmissible material to argue a contractual relationship between her and the first respondent – whether in all the circumstances the trial judge erred in entering judgment for the respondents

Uniform Civil Procedure Rules 1999 (Qld)

Bastion Holdings Ltd v Jorril Financial Inc [2007] UKPC 60, cited
Burnett v Burnett (1903) 3 SR (NSW) 513, considered
Grant-Taylor v Jamieson [2002] NSWSC 634, cited
Hadkinson v Hadkinson [1952] 2 All ER 567; [1952] P 285, considered
In Marriage of Fahmi [1995] FLC 92-637; (1995) 19 Fam LR 517; [1995] FamCA 106, considered
Kayserian Nominees (No 1) Pty Ltd v J R Garner Pty Ltd [2008] NSWSC 1011, considered
Motorola Credit Corporation v Uzan (No 2) [2004] 1 WLR 113; [2003] EWCA Civ 752, considered
Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW) [1978] 35 NSWLR 365, considered
Short v Short (1973) 7 SASR 1, cited
X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1; [1990] 2 WLR 1000, considered
Young v Jackman (1986) 7 NSWLR 97, considered

COUNSEL: W F Brown for the appellant
D B O'Sullivan, with S J Webster, for the respondents

SOLICITORS: Panacea Lawyers for the appellant
Office Solicitors to the Public Trustee of Queensland for the respondents

[1] **HOLMES JA**: The first respondent, Mr Lawrie, is an 82 year old man who, it was found at first instance, is suffering from dementia. The Queensland Civil and Administrative Tribunal (QCAT) appointed the Public Trustee of Queensland as administrator for all his financial matters on 24 August 2011. The second respondent, Lawmar Pty Ltd, is a company through which Mr Lawrie held most of his assets. The appellant, Ms Hwang, is Mr Lawrie's wife, having married him in 2011.

[2] Lawmar and Mr Lawrie, through his litigation guardian, brought a proceeding (numbered 9495/12) against Ms Hwang and a company of which she was sole director and shareholder. They alleged fraud, the exercise of undue influence over Mr Lawrie and unconscionable conduct, in the procuring of the transfer of large sums of money from bank accounts held by Mr Lawrie and Lawmar into Ms Hwang's control. Judgment was given against Ms Hwang, resulting in this appeal. The respondents resist the appeal, but also contend in the first instance that this court should not hear Ms Hwang because of what is said to be her *prima facie* contempt of earlier orders of the court.

The application in 9404/12

[3] The respondents' first step in the trial division of this court was an originating application, given the number 9404/12, which resulted on 11 October 2012 in the making, *ex parte*, of a search order and a freezing order. The latter prevented Ms Hwang from dealing with her assets up to an unencumbered value of $3 million. The following day, Ms Hwang appeared before the court by counsel, having filed one affidavit in which she set out her assets and another in which she deposed that she was required to attend court proceedings in Korea and needed her passport (which had been taken pursuant to the freezing order). Ms Hwang was cross-examined on her affidavits on that occasion. The freezing order was varied in certain respects, which included adding to it four South Korean properties Ms Hwang had deposed to owning.

[4] The order permitted Ms Hwang to retrieve her passport and leave Australia, upon her undertaking that she would return by 26 October 2012. As the trial judge found in proceeding 9495/12, she did not do so. On 12 November 2012, another set of orders was made in proceeding 9404/12. They included an order that the appellant attend at the Supreme Court on 5 December 2012 to be examined as to her financial affairs. Again, the trial judge noted, she did not appear.

The second proceeding against the appellant

[5] Meanwhile, the respondents had filed a claim and statement of claim in 9495/12, the proceeding of immediate concern here. Orders were made in that proceeding on 12 November 2012. Among other things, an expedited trial was set down for hearing for three days from 5 December 2012, with evidence-in-chief to be given by affidavit. The respondents were given leave to rely on the affidavits filed in 9404/12 and were ordered to file any further affidavits by 19 November 2012. Ms Hwang was ordered to file and serve any notice of intention to defend and defence by 26 November 2012 and to file and serve any affidavits to be relied on, subject to privilege claims, on or before 26 November 2012. The same order restrained her from dealing in any way with the South Korean properties. It was not known at that stage that she had already signed mortgage agreements in respect of those properties, on 26 and 31 October 2012.

[6] On 29 November 2012, Ms Hwang filed a "Defence" which in no way conformed with the requirements of the *Uniform Civil Procedure Rules* 1999 but was, instead, a long, discursive and unsworn statement of her innocence. In it she asserted that Mr Lawrie had promised to give her $2.3 million if she would marry him; that he had, purely of his own volition, transferred various funds to accounts to which she had access; and that they had purchased properties under her name to gain a tax advantage. Annexed to the statement was a series of documents. The first purported to be a schedule from a courthouse in Korea for an action by a plaintiff with the appellant's name, in which 6 December 2012 was listed as a "Date for pleading". Other documents appeared to be copies of a newspaper article reprinted in various Korean newspapers, in which it was said that an unnamed Australian millionaire in his 80s was looking for a Korean wife, whom he promised to pay large amounts of money. The source of that information was said in the article to be a local match-making agency.

The trial in 9495/12

[7] At trial, Ms Hwang was represented by counsel instructed by a Korean law firm, but she did not herself attend. Nor did she adduce any evidence. As to her absence, her counsel asked the court to consider, in relation to her health, two medical certificates previously placed before the court, apparently on 12 November 2012, and referred to a paragraph of the "Defence" document in which Ms Hwang said that she did not have funds to retain Brisbane solicitors. He asked also that regard be had to other paragraphs of that document, in which Ms Hwang asserted her intention of co-operating with the Public Trustee to restore the remaining funds if that were the court's order; said that she had not been able to understand the QCAT hearing on 24 August 2011, which resulted in the appointment of the Public Trustee as administrator; and maintained that that she had not exerted undue influence on Mr Lawrie or committed fraud.

[8] The trial judge noted that nothing which could be considered a defence had been filed and that the "Defence" document was unsupported by any affidavit material; that Ms Hwang had previously retained both senior and junior counsel as well as local lawyers and had engaged counsel to make submissions; that she had not supported the assertion of a lack of funds with any affidavit material; that she had produced no evidence to support the medical certificates; and that she had given no contemporaneous explanation of why she could not attend the trial.

[9] The respondents relied upon a number of affidavits, some of which dealt with transactions conducted by Ms Hwang leading to the transfer of the respondents' funds to her and her company, while others provided both lay and specialist evidence of Mr Lawrie's dementia. The trial judge required the respondents, over the course of three days, to make good each aspect of their case by reference to that evidence.

The primary judge's findings and orders

[10] Her Honour found, on the basis of the respondents' evidence, that Mr Lawrie did not have the capacity to make or understand the decisions about his assets or finances which had been the subject of the relevant transactions. Nor did he understand the nature or effect of documents he had signed in that regard. Because of frontal lobe damage, he would have been far more susceptible to Ms Hwang's influence in relation to entering into financial transactions than someone with

ordinary cognitive function. Ms Hwang knew that the Public Trustee had been appointed as his administrator for financial matters on 24 August 2011 as a protective measure and, among other things, to prevent her from taking advantage of his mental impairment. She also knew at the time of each of the impugned transactions that he did not have capacity to make decisions about his assets or finances.

[11] Ms Hwang had, the trial judge found, "implemented a scheme to orchestrate and effect the transfer of moneys to her and [her company]". Her Honour drew the inference of dishonesty, and was satisfied that Ms Hwang had exercised undue influence over Mr Lawrie and that her conduct was unconscionable. She was further satisfied that Mr Lawrie had no legal capacity and no authority from Lawmar to make a series of identified payments which led to the movement of money into Ms Hwang's control and that, at the time of those transactions, Ms Hwang knew that Mr Lawrie lacked capacity.

[12] The learned trial judge ordered that Ms Hwang pay Lawmar $3,011,619.61 with interest and declared that she held various identified funds and assets on constructive trust for Lawmar. Her Honour further ordered that within 14 days Ms Hwang execute and deliver to Lawmar, or its nominee, instruments of transfer for the Korean properties and file and serve on the respondents an affidavit recording specified details of her assets.

The notice of appeal

[13] The notice of appeal which the appellant filed contained these purported grounds:

> "(a) The Court found wrong and incorrect facts and applied mistaken rule of law.
>
> Appellant did nothing wrong to acquire assets from Mr. Lawrie, appellant's husband. Mr. Lawrie gave appellant his money according to his own voluntary and free decision. Appellant exercised no undue influence. And appellant always used and spent his money with exact understanding and consent by him.
>
> (b) The Court Orders are undue hardships and extremely unjustified.
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> (c) Appellant did not receive necessary notices and information of the trial.
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> (d) Grounds of appeal in detail will be submitted within soon after receiving the Reasons for Judgment, etc."

No amended notice of appeal containing the proposed "grounds of appeal in detail" was filed.

The appellant's prima facie contempt

[14] The respondents submitted that this court should decline to entertain submissions from Ms Hwang and should dismiss the appeal summarily because she was *prima facie* in breach of a number of pre-trial undertakings and orders. They were:

(a) The undertaking given to the Chief Justice on 12 October 2012 to return to the jurisdiction by 26 October 2012.

(b) The order that the appellant attend court on 12 November 2012 to be examined as to her assets.

(c) The freezing order made on 11 October 2012 and varied the following day, restraining the appellant from encumbering any of her assets up to an unencumbered value of $3 million.

(d) The order that the appellant attend court on 5 December 2012 to be examined as to her assets and financial dealings.

In addition, Ms Hwang had not complied with the orders made in the present proceeding that she execute and deliver instruments of transfer, provide an affidavit giving details of her assets and pay the judgment of $3,011,619.61.

[15] Ms Hwang's counsel conceded that his client was in *prima facie* contempt of the orders restraining her from dealing with her assets and of the orders made at trial. He said, however, that his client had returned to the country and would wish to take steps to purge her contempt. He did not elaborate on what those steps might be, nor was any affidavit filed in that regard. As the respondents pointed out, their submissions on the contempt issue were provided to Ms Hwang some two months before the hearing of the appeal but she had, to date, done nothing to remedy matters.

[16] The respondents submitted that there were two lines of authority as to whether there was an absolute bar on a party in contempt being heard or whether, instead, the court had a discretion in that regard. They identified as authorities in support of the first view *Young v Jackman*[1] and *Kayserian Nominees (No 1) Pty Ltd v J R Garner Pty Ltd*;[2] in support of the second view were *X Ltd v Morgan-Grampian (Publishers) Ltd*,[3] *Motorola Credit Corporation v Uzan (No 2)*;[4] *Bastion Holdings Ltd v Jorril Financial Inc*[5] and *Grant-Taylor v Jamieson*.[6]

[17] The court reserved the question of whether the acknowledged *prima facie* contempt should lead it to refuse to hear the appeal. Ms Hwang's counsel was permitted to articulate submissions on her behalf, with the caveat that they would not be acted on if the court reached the view that the appeal should not be heard.

Rule or discretion, and the extent of its application

[18] In *Young v Jackman*, Young J dealt with two issues of relevance here. The first was whether a contemnor had actually to have been dealt with for the relevant contempt before any question could arise as to whether he should be heard; the second, whether there existed a discretion to hear the application of a party in contempt. As to the first, Young J, having reviewed the authorities, concluded that it was sufficient that the contempt "had *prima facie* been demonstrated to the court".[7] As to the second, his Honour said that there were two appellate decisions, *Burnett v Burnett*[8] and *Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW)*,[9]

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1 (1986) 7 NSWLR 97.
2 [2008] NSWSC 1011.
3 [1991] 1 AC 1.
4 [2004] 1 WLR 113.
5 [2007] UKPC 60.
6 [2002] NSWSC 634.
7 At 101.
8 (1903) 3 SR (NSW) 513.
9 [1978] 35 NSWLR 365.

which bound him and which established that there was no discretion in the court to allow the hearing of proceedings where the applicant was in contempt.[10]

[19] With respect, however, I do not think that the appellate authority cited by Young J is quite as certain in its effect as he perceived it to be. In the first of the decisions to which he adverted, *Burnett v Burnett*, the petitioner for access to her child had not paid the costs of a previous access petition, although she had notice of the relevant order. The court concluded that she was in contempt in the same suit as that in which the current petition was brought. Owen J, with whom the other members of the court agreed, said

> "That being so, I am of opinion that the petitioner cannot take any steps in this suit until the costs are paid."[11]

The use of the word "cannot" might suggest the application of a rule, rather than the exercise of a discretion; but it is hardly a clear pronouncement for the existence of an invariable rule.

[20] Nor is *Permewan Wright* compelling as an authority for an absolute rule. Hutley JA (in a passage quoted by Young J) described a

> "fundamental rule that a party guilty of contempt should not be heard in respect of an application made on his part to a court."[12]

He expressed his opinion that the rule was that stated by Romer LJ in *Hadkinson v Hadkinson*,[13] with the concurrence of Somervell LJ: that no application would be entertained by a person in contempt until he had purged the contempt. (In the same case, Denning LJ had described it as a matter of discretion whether the court would refuse to hear such a party where

> "his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make..."[14])

Hutley JA concluded that the court should refuse to entertain the application before the court until the applicant purged its contempt to the extent that it could.

[21] But neither of the other judges in *Permewan Wright* adopted that course. Reynolds JA observed that while

> "a court may properly withhold relief to which a litigant is otherwise entitled in cases where that litigant is in contempt of the court's process",

that was not relevant in the case under consideration.[15] The contempt alleged was not serious and was to be dealt with elsewhere; consequently, he thought it unnecessary to make a finding as to whether there was in fact contempt. Both his

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10 In *Kayserian Nominees*, Brereton J adverted to Young J's decision and said that he would not readily depart from the view expressed as to contempt as a bar to further hearing; but as it happened, he was not satisfied on a *prima facie* basis that the applicant before him was guilty of contempt.

11 At 515.

12 AT 369.

13 [1952] P 285 at 288.

14 At 298.

15 At 367.

form of expression and his conclusion suggest a view that a discretion was involved. Mahoney JA noted that the court had been referred to authorities such as *Hadkinson* which established "the attitude which should be adopted to an application made by a party who is in contempt".[16] But if the applicant was in contempt, it should be properly dealt with in other proceedings; he found it unnecessary to make any finding on that score and joined with Reynolds JA in making the stay order which the applicant sought.

[22] I do not think that those cases establish any clear and binding rule that a party in contempt may not be heard. And by way of other intermediate appellate authority, I note that in *In the marriage of M K A and S H Fahmi*,[17] the Full Court of the Family Court expressed itself satisfied, after a review of authorities and texts, that the question was one of discretion. In particular, the Family Court referred to the decision of the House of Lords in *X Ltd v Morgan-Grampian*, which concerned an appeal by a journalist and his publishers against a disclosure order of which the journalist had been held to be in contempt. He had refused to deliver notes of his dealings with an informant and maintained that position in the Court of Appeal, which declined to hear his appeal because of that contempt. Lord Bridge of Harwich, delivering the leading speech in the House of Lords, observed that the more flexible treatment of the jurisdiction as one of discretion

> "better accord[ed] with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions";

although, he observed, the two approaches were likely to lead to the same result.[18]

[23] There is a further question as to the necessary connection between the contempt and the proceeding in which the contemnor seeks to be heard. In *Short v Short*;[19] the Full Court of the Supreme Court of South Australia described the rule that a party in contempt would not be heard as relaxed by its restriction to those proceedings in which the contempt had occurred. In *Fahmi*, the Family Court, referring to *Short* and other cases and texts, described the discretion as

> "limited, at least in its modern operation, to circumstances in which the person in contempt makes an application in the same proceedings or in the same cause in which the contempt has been committed."[20]

In that case, the court regarded an application for dissolution of marriage as made in a different proceeding from an earlier claim for a property settlement and maintenance, so that there was no occasion for the exercise of the discretion.

[24] This court, in my view, should treat the question of whether a party in contempt will be heard as one of discretion, which, in general terms, depends on where the interests of justice lie. As enlivening the discretion in this appeal, the respondents relied on four alleged contempts of orders made in proceeding 9404/12, one of which Ms Hwang acknowledged, and on the admitted failure in the present proceeding, 9495/12, to comply with the orders of the trial judge. (Although an order was made in 9495/12 preventing Ms Hwang from dealing with the Korean

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16 At 374.
17 (1995) 19 Fam LR 517.
18 At 46.
19 (1973) 7 SASR 1.
20 At 524.

properties, it came after she had already done so; it could not be said that she was in breach of it.)

[25] The *prima facie* contempts in 9404/12 were, strictly speaking, committed in a different proceeding; but it was an application ancillary to 9495/12, made for the purposes of preserving the property the subject of the latter proceeding. It is difficult to see why apparent contempts in the former proceeding which so directly bore on the subject matter of the present proceeding would not justify consideration of whether the applicant should be heard. However, for present purposes, I find it unnecessary to reach any final view as to whether and when proceedings may be so closely related that regard should be had in one to contempt committed in the other. I am prepared to proceed on a basis favourable to the appellant, that the *prima facie* contempts in 9404/12 should not form part of this court's considerations now.

Contempt of orders the subject of appeal

[26] In *Hadkinson*, Romer LJ described an exception to the general rule that a contemnor was barred from being heard: such a person could

> "appeal with a view to setting aside the order upon which his alleged contempt is founded".[21]

X Ltd v Morgan-Grampian was a case in which the appeal and the contempt concerned the same order. Consistently with its general approach, The House of Lords regarded the question as one of discretion, rather than exception from the application of a general rule, Lord Bridge of Harwich saying

> "Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal, the court must, in my opinion, have a discretion to decline to entertain his appeal against the order."[22]

In *Fahmi*, the court agreed that, where there was a question as to whether a person in contempt should be heard when he sought to appeal the order in respect of which he was in contempt, the discretionary approach was appropriate.[23]

[27] In *Motorola Credit Corp v Uzan (No 2)*,[24] Potter LJ, delivering the judgment of the court, observed that, although modern authority made it clear that the approach was one of exercise of discretion by reference to the interests of justice, rather than the application of a general rule with exceptions,

> "[T]he proposition that the court will hear a person in contempt when the purpose of his application is to appeal against the order disobedience to which has put him in contempt, has the merit not only of good sense; it seems to us necessary to satisfy considerations of fairness. Whether or not a party is in contempt of court by refusing to obey an order irregularly made, or one consequent upon and/or ancillary to an order so made, the circumstances will be rare indeed where it can be right to shut him out from arguing an appeal or application to appeal against that order made in due time."[25]

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21 At 289.
22 At 46-47.
23 At 525.
24 [2004] 1 WLR 113.
25 At 128.

[28] That view has a great deal to commend it. It is an unattractive prospect to say that an appellant might ultimately be found to be in contempt of orders the correctness of which he was not permitted to challenge. And the intimation that Ms Hwang wished to purge her contempt, although not backed by any affidavit or action, distinguishes her circumstances from that of the recalcitrant journalist in *X Ltd v Morgan-Grampian* and goes some little way to supporting a favourable exercise of discretion. In all the circumstances of this case, I have concluded that the appeal should be heard and dealt with on its merits, such as they are.

The appeal

[29] The appellant's first argument was that a "contractual issue" had been overlooked. The primary judge had failed to give proper consideration to "evidence pleaded in the Defence" that Mr Lawrie was looking for a wife and would enter into a contract with a suitable person, once found, in an arrangement which included the payment of money. For evidence of this, counsel pointed to the newspaper articles which accompanied the "Defence", which he described as Mr Lawrie's "advertisements" for a wife.

[30] The newspaper articles were by no stretch of the imagination admissible, nor were they even tendered as evidence; had they been, they showed nothing more than that a Korean match-making agency was touting an unnamed Australian millionaire as a lucrative marital prospect. There was no evidence of anything remotely approaching a contract before the learned primary judge. Consequently, there was nothing for her to consider in this regard.

[31] The appellant's next argument was that the primary judge had failed to take into account "language and cultural barriers" and placed "undue weight on the material submitted by the representatives for Mr Lawrie" in reaching her decision. Pressed on this point, the appellant's counsel said that she should have been provided with an interpreter throughout the course of the proceedings. For evidence, he pointed to the fact that when Ms Hwang was called by her counsel to give evidence on 12 October 2012, the Chief Justice, who was hearing the application, said to her counsel, "She doesn't require an interpreter, I take it?". There was no answer recorded in the transcript, but Ms Hwang was sworn and cross-examination proceeded. Nothing in that cross-examination, which dealt with her assets and their sources and Ms Hwang's intentions to return to Australia, indicated that she had any difficulty in understanding the questions or in giving detailed answers.

[32] No other piece of evidence was pointed to here. The appellant was represented at the trial; she had been represented previously. There was no evidence before the primary judge of any language or cultural barriers. The affidavits filed by the respondents were the only evidence placed before her Honour. On the basis of that unchallenged evidence, it is inconceivable that she could have arrived at different findings from those she made.

[33] Nothing has been put to this court which has even the faintest semblance of substance. I would dismiss the appeal, with costs.

[34] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.

[35] **MULLINS J:** I agree with Holmes JA.