SUPREME COURT OF QUEENSLAND

CITATION:	*Osachy v O'Sachy* [2013] QCA 212
PARTIES:	**VICHISLAVE OSACHY** (applicant) **v** **GEORGE YOURY O'SACHY** (respondent)
FILE NO/S:	Appeal No 1180 of 2013 DC No 2141 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2013
JUDGES:	Chief Justice and Gotterson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. Applicant to pay respondent's costs of the application.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – WHEN REFUSED – where the applicant and respondent are brothers – where the respondent succeeded in a claim for one half of the proceeds of an insurance policy payment made following the destruction by fire of a house on land at Woolloongabba which he and the applicant owned as tenants in common – where the applicant made a counterclaim in respect of three amounts against the respondent – where the trial judge concluded that there was no merit in the counterclaim and dismissed it accordingly – where the applicant has brought his application outside of the limitation period – whether the application for leave to appeal should be allowed based on the merits on the proposed appeal *Limitation of Actions Act* 1974 (Qld), s 10 *Uniform Civil Procedure Rules* 1999 (Qld), r 661, r 748 *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323; [1972] VicRp 34, cited *Ford v La Forrest* [2002] 2 Qd R 44; [2001] QCA 455, followed

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344; [1984] FCA 176, cited

COUNSEL: The applicant appeared on his own behalf
G R Coveney for the respondent

SOLICITORS: The applicant appeared on his own behalf
Minter Ellison for the respondent

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **GOTTERSON JA**: On 16 December 2011 reasons for judgment were delivered in proceedings which had been commenced by George Youry O'Sachy against Vichislave Osachy in the District Court at Brisbane on 27 July 2010.[1] The reasons were delivered after a one day trial on 30 August 2011 at which each party was a litigant in person.

[3] The plaintiff and the defendant are brothers. The plaintiff, George, succeeded in his claim for one half of the proceeds of an insurance policy payment made following the destruction by fire of a house on land at Woolloongabba which he and his brother owned as tenants in common. In the same proceedings, the defendant, Vichislave, had counterclaimed against the plaintiff for three separate amounts of $74,000, $35,000 and $3,200, in total, $112,200.

[4] At the conclusion of her reasons for judgment, the learned trial judge ordered that the defendant pay the plaintiff the sum of $99,189.98 and his costs of the action to be assessed unless otherwise agreed. The components of the judgment sum are:

Amount	**$**
• 50% of the insurance payout of $151,628	75,814
• Interest on $75,814 calculated at 10% p.a. for 37 months	23,375.98

An order for judgment for the plaintiff against the defendant for payment of the judgment sum and costs was filed in the District Court on 17 January 2012.[2]

[5] After considering the counterclaim, the learned trial judge expressed the following conclusion on it in her reasons:

> "[16] In my view there is no merit in the counterclaim and accordingly it is dismissed."[3]

The order filed on 17 January makes no reference to the dismissal of the counterclaim. It appears that no other order dismissing the counterclaim has ever been filed.

The application for leave to appeal

[6] Vichislave Osachy has no quarrel with the judgment entered against him. On 11 February 2013, he filed an application in this Court for leave to appeal. In these

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1 Proceedings No 2141 of 2010.
2 AB 272.
3 AB 279.

reasons, it is convenient to refer to him as "the applicant" and to his brother as "the respondent". The language of the application document is apt to suggest that the applicant wishes to appeal against the dismissal of the two larger components of his counterclaim.

[7] The application is premised upon the need for a grant of leave under *UCPR* r 748 which requires a grant of leave to appeal where a notice of appeal is not filed within 28 days after the date of the decision under appeal. The applicant filed an affidavit on the same date in which he swears to circumstances why the notice of appeal was not filed within time.

[8] There is, however, another basis upon which the leave of this Court is required. Rule 661(4)(b) provides that no appeal may be brought against an order of a court without the leave of the court to which the appeal would be made, unless a document embodying the order is drawn up and filed in the court in which it is made: see r 661(2). As noted, no such order has been filed in respect of the dismissal of the counterclaim.

[9] The applicant's filed material also includes a proposed Notice of Appeal. Although it lacks clarity, it, too, suggests that the applicant wishes to appeal against the dismissal of the counterclaims for $74,000 and $35,000. Under the heading "Grounds", there is a narrative which is divided into seven paragraphs (A to G inclusive). They do not present seven separate grounds of appeal. The applicant's affidavit also swears to this narrative. He is a litigant in person in this appeal.

Approach to the application

[10] The difficulty the applicant has with r 661(4)(b) is capable of resolution on his part. He could now file a document which contains the order dismissing the counterclaim. For this reason, primary consideration should be given to whether leave ought to be granted under r 748 to appeal out of time. This rule is engaged because under it time runs from the date of the decision appealed from, and not the date on which an order is filed.[4] That date was 16 December 2011.

[11] It is well settled that in considering applications of this kind, factors such as the explanation for the failure to commence within time; action taken by the applicant, such as informal notice to the respondent of the intention to appeal; prejudice to the respondent; potential for unsettling other people or established practices; the merits of the appeal which it is sought to institute and general considerations of fairness are all relevant factors to the exercise of the discretion.[5]

[12] The applicant attributes delay in making the application to circumstances where a file containing many documents relating to the insurance payout and a document containing copies of five cheques to which I shall refer later in these reasons, were sent by the District Court registry to the respondent after judgment had been delivered. In short, the applicant says that he did not receive the file and document until 7 November 2012. The applicant's material raises unanswered questions concerning when he first requested documents from the court registry – which appears to have happened after the time for filing a notice of appeal had expired; and why it was necessary for him to have any of them in order for him to pursue his

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4 *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323.

5 *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 349.

proposed appeal. Particularly is this so in the case of the cheques, receipt of which by the respondent was admitted in the pleadings.[6] It is sufficient to observe that, overall, the applicant has not provided a cogent, satisfactory explanation for a delay of well over one year in signalling his intention to appeal.

[13] To my mind, however, the factor which is determinative of this application relates to the merits of the proposed appeal. I now turn to consider them.

Merits of the proposed appeal

[14] The learned trial judge considered the counterclaimed $74,000 and $35,000. She expressed her reasons for not allowing them as follows:

> "[13] In the counterclaim lodged by the defendant he has claimed that he lent to the plaintiff $74,000 in 1995 which despite demand has never been repaid. He has produced copies of cheques and a document which the plaintiff has signed, (Exhibit 5) 'Received with thanks five bank cheques from V. O'Sachy for a total sum of $74,000'. The plaintiff says this money was his parents' money which the defendant had invested on their behalf and it was a loan from his parents which he paid back to them over time. It was clear during the hearing of this matter that the parents of the parties were very dependent on them to provide financial and other assistance to them particularly during the later years of their lives. The finances of both the plaintiff and the defendant seems to have been interlinked with their parents over time and the parents were involved in gifting and lending money to their children over time as is evidenced by the gift of the houses in Broadway St. Whilst it is clear that the money did come from accounts held by the defendant, I accept the plaintiff's contention that the money belonged to his parents and that he has since paid that money back to them. I do not accept the defendant's evidence that the money was a loan from him and therefore do not accept that the debt is owed to him.
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> [14] The defendant also claims that his parents instructed the plaintiff to give him $35,000 of their money which he never handed over. This claim seems to be made on the basis of a piece of paper (exhibit 7) which is signed by the parties parents and is in Russian. There is a dispute in relation to the translation of the document and unfortunately there was no translator called to interpret the document. The plaintiff claims that the document indicates that his parents lent $35,000 to the defendant and the defendant claims that the document indicates that the plaintiff was required to give the defendant $35,000 to the defendant which he did not do. In the absence of any independent evidence of the correct meaning of the document, I accept the plaintiff's evidence that it evidences a loan from the parents to the defendant that was paid to him by them."[7]

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6 AB241; Answer to Counterclaim para 1.

7 AB 277-278.

[15] Her Honour's preference for the evidence of the respondent on these topics occurred against a background in which she had made the following observations concerning their respective credit:

> "[9] Generally the plaintiff impressed as a more credible witness than the defendant. His claim is supported by documentary evidence and the admissions made by the defendant in his defence. The defendant's claim that he was not acting on behalf of the plaintiff in dealing with the insurance is unconvincing and in my view this has affected the credibility of all of his evidence."[8]

[16] The narrative headed "Grounds" begins with an assertion that the applicant lent the $74,000 to the respondent to purchase a house in Rochedale and that copies of the five cheques, each receipted as described in the reasons, were tendered at the trial.[9] Then, it is said that the respondent admitted that he had received the cheques but claimed that the money was sourced in funds owned by the parents, as her Honour explained his evidence.[10] The applicant also refers to correspondence from the respondent in which the respondent said that the moneys were paid to him by the applicant on direct instructions from their mother and that no requirement for repayment was imposed.

[17] Next, the narrative advances several contentious propositions as to why such an instruction would not have been given. It is said by the applicant that their mother had not worked; that she had little money of her own; and that she died on 15 December 2006.[11] As for their father, the applicant says that he was 81 years old in 1995 and had then been retired for 20 years.[12] The point is made by the applicant that the respondent did not produce at trial any documentary evidence showing repayment of these moneys to his parents. Somewhat at odds with the matters concerning their parents' circumstances, the applicant takes issue with her Honour's finding that the parents "were very dependent" on the sons to provide financial and other assistance to them. He says that the parents had "healthy bank accounts and kept considerable amount of cash at home".[13]

[18] In Particular F, the applicant then refers to a document dated 1 March 2004 which is handwritten in Russian. He says that it was listed in the Index of Documents for the trial. He attributes an English translation to it to the effect that the respondent is acknowledging that he is borrowing $40,000 from his father to be repaid "within 1 week in small sums" and to taking $2,150 in cash from his father to "change to new currency". The applicant says that there is no evidence that this total amount of $42,150 was repaid either. This document has no apparent connection to either the $74,000 or the $35,000. The applicant submitted that it showed that his brother was "a borrower". However, its direct relevance to either counterclaimed amount was unexplained.

[19] In that same paragraph, the applicant proposes that an "accredited whiteness (sic) to translate this document as well as the document regarding the $35,000 loan will be provided". Two things may be said about that proposition. Firstly, given that it was

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8 AB 276.
9 AB Ground A.
10 Paragraph B.
11 Paragraph C.
12 Paragraph D.
13 Paragraph E.

quite open to the applicant to have adduced translation evidence of both documents at the trial, and in the absence of "special grounds" as required by R 766(1)(c), this Court would not receive that evidence on appeal. Accordingly, it ought not be received for the purpose of determining this application either. Secondly, no other circumstance relating specifically to the $35,000 claim is mentioned in the narrative. An explanation of this was provided by the applicant's confirmation, during the course of oral submissions, that he does not wish to pursue an appeal in respect of the $35,000 component of the counterclaim.

[20] The final paragraph in the narrative[14] speaks to the applicant's senior position of employment during 1995 and to his and his wife's ownership of their residential dwelling and of three rental properties. Again, the relevance of this to any arguable ground of appeal is highly problematic.

[21] The applicant's narrative fails to identify any misstatement or misapplication of legal principle in the decision of the learned trial judge. It does not identify any finding of fact made by her Honour which, it is alleged, was unsupported by evidence or was overwhelmed by uncontentious evidence to the contrary. Nor does it identify any relevant fact of which, it is said, her Honour erred in failing to make on the evidence before her. In summary, to the extent that the narrative extends beyond non-contentious fact, it merely seeks to re-argue factual matters on which findings have been made and quite ignores the credit observations made by her Honour. In summary, it quite fails to raise any viable ground of appeal. I am in no doubt that an appeal based on these "grounds" would have no measurable prospect of success. Such an appeal would be dismissed.

[22] It remains to note that the respondent has filed a Notice of Contention in which he seeks to uphold the dismissal of the counterclaim for $74,000 on a ground not taken by him in the proceedings below. The notice contends that by the time it was counterclaimed, recovery of a debt for $74,000 arising from a loan made in 1995, would have already become statute-barred.[15] The applicant has filed a document titled "Reply to Notice of Contention" which is dated 14 March 2013. Its contents suggest that the applicant wishes to contend that the debt of $74,000 was superseded by a fresh debt in that amount in 2009; however, the facts set out in that document would not justify a finding to that effect.

[23] If the respondent's contention is sound, then the limitation defence would simply augment the hopelessness of an already hopeless prospective appeal. It is not necessary to decide whether the contention is sound. Moreover, I would be reluctant to decide it without the benefit of informed argument on both sides. I say this because the limitation point was raised by her Honour several times during the trial.[16] Notwithstanding, the respondent did not seek leave to amend the Answer to the Counterclaim in order to plead a limitations defence. In those circumstances, more subtle arguments based on waiver, election or estoppel might possibly avail the applicant.

Disposition

[24] In *Ford v La Forrest*[17] this Court refused a grant of leave to appeal where there was no basis on which the proposed appeal, if brought, could succeed. Thomas JA with

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14 Paragraph G.

15 *Limitation of Actions Act* 1974 s 10(1)(a). The limitation under this provision is six years from the date that the debt became due for repayment.

16 AB 4 Tr1-4 LL10-30; AB 64 Tr1-64 LL10-30; AB 80 Tr1-80 L48 – AB 81 Tr1-81 L11.

17 [2002] 2 Qd R 44.

whom McMurdo P and Cullinane J agreed, observed that a grant of leave would really protract and substantially add to the cost of its inevitable dismissal.[18] The present application is highly comparable to that in *Ford*. The absence of any measurable prospects of success bespeaks refusal of a grant of leave to appeal.

Orders

[25] I would propose the following orders:

1. Application for leave to appeal refused.
2. Applicant to pay respondent's costs of the application.

[26] **MULLINS J**: I agree with Gotterson JA.

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[18] At [42].