[2013] QCA 208

COURT OF APPEAL

MUIR JA
GOTTERSON JA
P D McMURDO J

Appeal No 1777 of 2013
DC No 180 of 2012

JOSEPH MODER **Applicant**

v

KERRY ANN LACEY **Respondent**

BRISBANE

TUESDAY, 30 JULY 2013

JUDGMENT

MUIR JA: I invite Justice Gotterson to deliver his reasons first.

GOTTERSON JA: The applicant, Joseph Moder, seeks an extension of time to appeal to this Court under s 118(3) of the *District Court of Queensland Act* 1967. The appeal, for which the leave of this Court is required under that section, is against a judgment of the District Court at Cairns given on 9 January 2013. The applicant failed to file a notice of appeal within the 28 day period permitted by r 748 of the UCPR. An application for an extension of time under that rule together with a notice of appeal were filed in this Court on 25 February 2013.

The applicant, who at all times has been a litigant in person, states in his application that he submitted a timely notice of appeal to the registry on 1 February last. It may be inferred from what he there says that the notice was not in the correct form and was rejected. Although he

has not sworn to this circumstance or to reasons for delay in filing the notice of appeal thereafter, the respondent concedes that there has been no prejudice to her as a result of the overall delay. In these circumstances, an extension of time ought not be refused on account of delay.

The determinative consideration for the application to extend time here is whether there is any utility in extending it. That, in turn depends upon what prospects there are that leave to appeal would be granted. In this case, those prospects would depend upon the prospects of success that his proposed appeal, itself, has. I now turn to consider those prospects.

The orders made by the District Court dismissed with costs an application for leave to appeal to that court against a judgment of the Magistrates Court at Cairns. The applicant here was the applicant for leave in that proceeding. The Magistrates Court judgment was given on 10 August 2012 after a trial in which the respondent succeeded in a claim in negligence for property damage against the applicant. The claim arose out of a motor vehicle collision. The respondent was awarded $9,307.26 by way of claim and costs in respect of damage to her Holden Barina sedan. The applicant's counterclaim for damages to his Ford sedan in the amount of $4,579.09 failed.

It was common ground before the primary judge that both claim and counterclaim involved amounts that were not more than the minor civil dispute limit as defined in s 45 of the *Magistrates Courts Act* 1921, and that the provisions of s 45(2)(a) were applicable. Those provisions state that in such a case, an appeal shall lie to the District Court only by leave of that court or a judge thereof. Importantly, they stipulate that leave to appeal shall not be granted "unless the court or a judge is satisfied that some important principle of law or justice is involved".

The primary judge concluded that the applicant had failed to demonstrate that such a principle of law or justice was involved in his proposed appeal to that court. The task for the appellant in any appeal to this Court would be to demonstrate that his Honour erred in law in reaching that conclusion.

The path of reasoning taken by the primary judge was to identify the issues which the applicant proposed to agitate on appeal to that court. The applicant wished to challenge findings of fact made by the Magistrate from which he concluded that the applicant had contravened a transport regulation which required a driver entering a road from a road-related

area, as the appellant was, to give way. The applicant proposed that an important issue of justice arose because of what he called the "superior position" of the respondent by virtue of subrogation of her rights to her motor vehicle insurer.

The primary judge observed that the nub of the Magistrate's decision was his finding that "on the balance of probabilities therefore, … Mr Moder failed to stop or steer clear when a reasonable or prudent driver would have done so".

This, the judge noted, was a finding of fact which did not embody any principle of law, "much less an important principle of law".

With regard to the issue of a principle of justice, his Honour cited authority of this Court in *American Express International Inc v Hewitt*[1] that the frame of reference for it lies in considerations beyond the correctness or otherwise of the decision under appeal. In his Honour's view, the circumstance that the respondent may have been insured and that her rights to recover damages were subrogated to the insurer did not invoke any principle of justice or injustice for the purposes of s 45(2)(a).

The learned judge summed up his conclusions with these words:

> "Despite the applicant's assertion to the contrary, there is no important principle of justice involved in the decision of the learned Magistrate. The learned Magistrate merely preferred the evidence of the other driver, who is the respondent, to the evidence of the applicant in circumstances where a minor collision occurred".

Having reached that conclusion, he refused the application for leave to appeal.

As I have noted, the relevant question in any appeal to this Court is whether the primary judge erred in law in reaching his conclusion that the application had failed to demonstrate that some important principle of law or justice was involved. In his written submissions to this Court, the applicant has not identified any misunderstanding or misapplication of legal principle which he says infects his Honour's conclusion.

The error he does identify is put this way:

> "[The judge] erred … in failing to take regard of important issues of justice raised by the Magistrates Court ruling, namely, that of wrongful assignment of fault to an innocent party on the basis of false or unproven claims by RACQ Insurance and the plaintiff's/respondent's counsel".

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1 [1993] 2 Qd R 352 at 353.

A perusal of the record of the Magistrates Court proceeding indicates that the Magistrate gave his decision after a trial at which the drivers of both vehicles testified. He gave reasons for his decision in which he recorded the witnesses' respective versions of the accident, analysed them for their reliability, and then made the finding as to the cause of it to which I have referred. He then made the ultimate finding that the appellant, and not the driver of the other vehicle, had been negligent.

There is no basis at all for the applicant's assertion that the Magistrate simply adopted either the insurer's attribution of responsibility for the accident or counsel's submissions. The Magistrate applied an independent mind to the task of reaching a decision on the evidence.

In my view, the applicant's prospects of succeeding in an application for leave to appeal against the decision of the primary judge are negligible. That is because the appeal that he proposes would be destined to fail. To grant an extension of time for leave to appeal would be futile. I would therefore refuse the application to extend time for leave to appeal.

MUIR JA: I agree.

PHILIP McMURDO J: I agree.

MUIR JA: The order of the court is that the application to extend time for leave to appeal is refused.