SUPREME COURT OF QUEENSLAND

CITATION:	*Amos v Wiltshire* [2014] QCA 218
PARTIES:	**EDWARD AMOS** (applicant) **v** **CHRISTOPHER WILTSHIRE** (respondent)
FILE NO/S:	Appeal No 17 of 2014 DC No 1527 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2014
JUDGES:	Muir JA and North and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The order made herein on 12 August 2014 be set aside.** **2. The applicant pay the respondent's costs thrown away by the applicant's failure to appear on 12 August 2014 on the indemnity basis.** **3. The applicant pay the respondent's costs of and incidental to this application on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the applicant appealed against part of the orders of the primary judge – where the applicant contended that the primary judge erred in refusing to recuse herself and that the primary judge's decision was affected by apprehended bias – where, when the appeal came on for hearing, there was no appearance by or on behalf of the applicant – where the Court ordered that the appeal be dismissed – where the applicant seeks an order to set aside the order dismissing the appeal – where the applicant had the carriage of his own appeal – whether evidence established the existence of an error or omission on the part of the solicitor to which the applicant had not contributed – whether the applicant has raised triable

	issues – whether the order dismissing the appeal should be set aside
	Supreme Court Act 1995 (Qld), s 253 *Supreme Court of Queensland Act* 1991 (Qld), s 64 *Uniform Civil Procedure Rules* 1999 (Qld), r 667
	Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited *ASIC v Jorgensen & Ors* [2009] QCA 20, considered *Burgoine v Taylor* (1878) 9 Ch D 1, considered *Concrete Pty Limited v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA 55, considered *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63, considered *Lessbrook Pty Ltd (in liq) v Whap; Stephen; Bowie; Kepa & Kepa* [2014] QCA 63, followed *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513; [1987] HCA 48, cited *Taylor v Taylor* (1979) 143 CLR 1; [1979] HCA 38, considered
COUNSEL:	B Kidston for the applicant K F Boulton for the respondent
SOLICITORS:	Keller Nall & Brown for the applicant Sharma Lawyers for the respondent

[1] **MUIR JA:** The applicant appealed against that part of orders of the primary judge made on 4 December 2013 by which her Honour ordered that the applicant pay the respondent's costs of the application before her on an indemnity basis fixed in the sum of $6,127. There were a number of grounds and sub-grounds in the notice of appeal but the central contentions were that the primary judge erred in refusing to recuse herself when asked to do so by the applicant's solicitor and that the primary judge's decision was affected by apprehended bias.

[2] In an email of 13 June 2014 sent to the email addresses provided by the parties, the Court of Appeal registrar advised that the Court proposed to hear the appeal during the period 8–22 August 2014. On 20 June 2014, the registrar emailed the parties concerning the index to the appeal record. On 27 June 2014, the parties' solicitors were advised by email from the registrar that the appeal had been listed for hearing on 12 August 2014. The email advised that each party was to lodge copies of his list of authorities with the registry no later than two clear court days prior to the hearing. The respondent's solicitors emailed the respondent's list of authorities to the applicant's solicitors on 7 August 2014.

[3] When the matter came on for hearing on 12 August 2014, there was no appearance by or on behalf of the applicant. The matter was stood down briefly to verify with the registry that the applicant had been served. Whilst the matter was stood down, enquiries were made of the applicant's solicitors by the respondent's solicitors. The Court was informed by counsel for the respondent that he or his instructing solicitor had spoken to the applicant's solicitor who said that he was endeavouring to find out why he was unaware of the hearing. There was no suggestion that the applicant's solicitor intended to appear by telephone or to have anyone else appear. The Court ordered that the appeal be dismissed.

[4] On 15 August 2014, the applicant filed the subject application seeking an order that the orders made on 12 August 2014 be set aside pursuant to r 667 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR). The application was supported by an affidavit sworn by Mr Collinson, the applicant's solicitor, and an affidavit sworn by the applicant. Another affidavit of Mr Collinson was filed on 22 August.

[5] Mr Collinson swore to the following effect in his first affidavit. He was at his Beaudesert office on 12 August when he took a telephone call from counsel for the respondent. He immediately telephoned the applicant and asked him to contact the applicant's counsel. He also then telephoned the Court of Appeal registrar, who informed him that he had advised of the listing of the appeal for hearing on 12 August by email. He searched his emails and located the registrar's email of 30 June. He explained that had he not been in Beaudesert, he would have gone immediately to the Court of Appeal.

[6] He stated that he could not "explain as to why the email from [the registrar] was missed by [him] or [his] office other than to say that the vast majority of emails sent and received in [his] office in this appeal from the court show a different sender, that being 'Court of Appeal Registry'".

[7] Mr Collinson swore in his second affidavit that he did not know that the appeal had been listed for hearing on 12 August 2014 until he received the telephone call from the respondent's counsel.

[8] The applicant swore that he was unaware that the appeal had been set down for hearing on 12 August. He said that after receiving a telephone call from Mr Collinson at about 10.00 am on 12 August 2014 he attempted unsuccessfully to contact his counsel. He telephoned the registrar and informed him that neither he nor his solicitor knew that the appeal had been set down for hearing and was told by the registrar that he would convey that to the Court.

[9] The applicant relied on r 667(2)(a) of the UCPR. It entitles a court to "set aside an order at any time if … the order was made in the absence of a party". It was not disputed, properly, by counsel for the respondent that r 667(2) was applicable and that whether the order of this Court should be set aside was a matter for this Court's discretionary determination.

[10] Counsel for the applicant relied heavily on *Taylor v Taylor*.[1] In that case the appellant was served with a petition under the *Matrimonial Causes Act* 1959 (Cth) by his wife, the respondent, who sought dissolution of their marriage and other relief. The appellant instructed his solicitors to defend the petition. Through the solicitors neglect, the appellant was not informed of the date for the hearing of the petition. The solicitors neglected to file an answer to the petition or any other document indicating that the respondent's claim was disputed. The hearing proceeded *ex parte*. Woodward J pronounced a *decree nisi* for the dissolution of the marriage and made orders for custody and maintenance of the parties' children. An order for the transfer to the respondent of the appellant's interest in the matrimonial home was also made. At a later date the appellant applied to the Family Court of Australia for the variation of the orders for the transfer of the matrimonial home and for custody.

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1 (1979) 143 CLR 1.

[11] Because of a misunderstanding on the part of the respondent's solicitors, the respondent did not appear when the appellant's application came before Hogan J in the Family Court. His Honour proceeded *ex parte* and made the orders the appellant sought. The respondent appealed to the Full Court of the Family Court which allowed the appeal and set aside Hogan J's orders. It does not emerge clearly from the reasons of Gibbs J, as his Honour then was, whether the appellant's solicitors had notice of the date of hearing of the petition. Nor is it clear whether the respondent's solicitors were aware of the date of hearing.

[12] In the course of his reasons, Gibbs J referred to *Burgoine v Taylor*,[2] in which Fry J refused to set aside a judgment against a defendant who was unrepresented at trial because his solicitor was ignorant of the fact that the action had been transferred from one judge of the Chancery Division to another and had only watched the list before the former judge. Gibbs J said:[3]

> "Fry J. said that the defendant would have a remedy against his solicitor for negligence, and he refused to set the judgment aside. The Court of Appeal had no difficulty in reversing his decision; indeed Jessel M.R. expressed surprise that the application to set aside the judgment had been opposed. The application there was made under the specific provisions of a rule of court, and the decision thus throws no light on the question of power, but it supports the conclusion, which I should in any case have reached, that it is no answer to a party who asks the court to set aside an order made against him in his absence at a hearing of which he had no notice to tell him that he has a remedy against his solicitor. In such a case, assuming that there is a real question to be tried, justice requires that the order, having been made in breach of a fundamental principle of natural justice, should be set aside, and that the matter should be reconsidered on its merits." (citations omitted)

[13] Stephen J agreed with Gibbs J's reasons.

[14] Mason J, as he then was, with whose reasons Aickin J agreed, did not advert directly to the possible impact of the parties' respective solicitors' negligence or error in determining the parties' entitlement to relief. His Honour said:[4]

> "The Full Court had the advantage of knowing that the appellant's failure to appear before Woodward J. was due to no fault on his part and likewise that the respondent's failure to appear before Hogan J. was due to no fault on her part. The Full Court should then have approached the case on the footing that it was prima facie the right of each party to have the proceedings heard in his or her presence and that justice to both parties required that each party should be entitled to present his or her case. As Jenkins L.J. said in *Grimshaw v. Dunbar*:
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> > '... a party to an action is prima facie entitled to have it heard in his presence: he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and

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2 (1878) 9 Ch D 1.

3 *Taylor v Taylor* (1979) 143 CLR 1 at 9.

4 *Taylor v Taylor* (1979) 143 CLR 1 at 15–16.

> give his own evidence before the court. Prima facie that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case-no doubt on suitable terms as to costs, as was recognized in *Dick v. Piller* .'" (citations omitted)

[15] Counsel for the respondent submitted that the explanation given by Mr Collinson as to how the email of 27 June 2014 was missed was inadequate. He was given leave to cross-examine Mr Collinson. The applicant was not available for cross-examination, seemingly because the respondent's solicitors had failed to give appropriate notice.

[16] Mr Collinson's cross-examination revealed that the deponents had not attempted to give a full and frank account of the circumstances in which the applicant had failed to appear. It emerged that the applicant, who was a long standing friend of Mr Collinson and who had done work for him as a law clerk for many years, had the carriage of his own appeal. Mr Collinson's role was essentially that of a post box. The applicant, who generally worked from his home in Clayfield, did not have a computer. Consequently, any electronic communications with the Court or the respondent's solicitors concerning the appeal were with Mr Collinson who transmitted them by fax or post to the applicant.

[17] The explanation concerning the 27 June email is certainly inadequate in the sense that it reveals unsatisfactory practices or procedures in the solicitor's office. Ultimately, however, the evidence establishes the existence of an error or omission on the part of the solicitor to which the applicant was not shown to have contributed, directly at least.

[18] As the respondent did not allege irretrievable prejudice resulting from the applicant's failure to appear, provided he was protected by an appropriate costs order, it seems to me that, subject to the respondent's other arguments, the applicant should have the opportunity of having the matter determined on the merits.

[19] I would not wish, however, to encourage the view that incompetence, inefficiency or neglect must be endured by the innocent party and comes without sanction. There will be many cases in which delay alone, with or without the added burden of costs, may be a decisive factor against relieving a party from the consequences of its own error. Courts are increasingly conscious of the financial and emotional impact on parties of the avoidable prolongation of litigation and are thus more ready than in the past to infer prejudice for which costs cannot provide full compensation.[5]

[20] Counsel for the respondent argued that the appeal was not properly constituted as it was an appeal "only in relation to costs" and, as such, the appeal lay only by leave of a judge.

[21] Section 64(1) of the *Supreme Court of Queensland Act* 1991 (Qld) (the 1991 Act) provides:

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[5] See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, particularly at 213–214.

> "An appeal only in relation to costs lies to the Court of Appeal from a judgment or order of the court in the Trial Division only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another judge of the court in the Trial Division."

[22] Referring to s 253 of the *Supreme Court Act* 1995 (Qld) (the 1995 Act), the predecessor of s 64, Keane JA observed in *ASIC v Jorgensen*:[6]

> "The evident purpose of s 253 of the *Supreme Court Act* is to impose a filter upon appeals about the exercise of the discretion to award costs where the disposition of the costs is left by law in the discretion of the judge. The evident intent of the provision is to ensure that the primary judge's balancing of discretionary considerations should not be reconsidered on appeal save in cases where the primary judge has first addressed the question whether there is good reason to allow his or her exercise of the discretion to be reviewed."

[23] In *Lessbrook Pty Ltd (in liq) v Whap; Stephen; Bowie; Kepa & Kepa*,[7] I observed, with the concurrence of Gotterson JA and Daubney J, that there was no reason to suppose that the purpose of s 64 was in any way different from the purpose of s 253 of the 1995 Act as explained by Keane JA in *Jorgensen*.

[24] The words "in relation to" have been described as wide words.[8] There can be little doubt that the subject appeal is an appeal "in relation to costs". It is doubtful, however, that it is an appeal "only in relation to costs". That is because of the nature of the bias, actual or apprehended, and its impact on proceedings. In *Ebner v Official Trustee in Bankruptcy*,[9] Gleeson CJ, McHugh, Gummow and Hayne JJ observed:

> "Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta (with its declaration that right and justice shall not be sold) and the *Act of Settlement* 1700 (UK) (with its provisions for the better securing in England of judicial independence)." (citations omitted)

[25] The fundamental nature of the right to a fair trial untainted by bias is further illustrated in the following passage from the reasons of Kirby and Crennan JJ in *Concrete Pty Limited v Parramatta Design & Developments Pty Ltd*:[10]

> "An intermediate appellate court dealing with allegations of apprehended bias, coupled with other discrete grounds of appeal must deal with the issue of bias first. It must do this because, logically, it comes first. Actual or apprehended bias strike at the validity and acceptability of the trial and its outcome. It is for that reason that such questions should be dealt with before other, substantive, issues are decided. It should put the party making such an allegation to an election on the basis that if the allegation of apprehended bias is made out, a retrial will be ordered irrespective of possible findings on other issues."

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6 [2009] QCA 20 at [29].
7 [2014] QCA 63.
8 *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513 at 533.
9 (2000) 205 CLR 337 at 343.
10 (2006) 229 CLR 577 at 611.

[26] There is thus considerable difficulty in concluding that an appeal which is concerned, at least in part, with whether the prerequisites of trial have been met, can be regarded as "an appeal only in relation to costs".

[27] As for the merits of the appeal, the respondent's counsel submits that it is doomed to fail. I accept that the applicant's arguments face some hurdles. One of these is the absence of the evidence of the circumstances in which the primary judge made the observation that provides the foundation for the allegation of bias. Also, she was given no opportunity to consider the circumstances in which her observation was made, if it was in fact made. Another possible problem may arise from the "rule of necessity".[11] The primary judge attempted to have another judge hear the matter but was unsuccessful. I conclude, however, that the applicant has raised triable issues.

[28] Unfortunately, because of the unavailability of members of this quorum, it was not possible to hear the appeal on the hearing of this application. The merits of the points raised by the applicant must therefore be determined on a later occasion.

[29] Counsel for the applicant submitted that if the applicant succeed on this application the respondent should pay the costs, as the applicant had offered to pay the costs thrown away by the hearing on 12 August and of this application in exchange for his consent to the setting aside of the orders made on 12 August.

[30] In my view, the applicant should pay the respondent's costs thrown away by the applicant's failure to appear on 12 August on the indemnity basis. Such an order is necessary to protect the respondent from the prejudice necessarily flowing from the costs unnecessarily incurred. The respondent will still suffer prejudice. The hearing of the appeal has been substantially delayed and the amount involved is particularly small when regard is had to the costs likely to be incurred in conducting the appeal. Were it not for the allegations of apprehended bias, this disproportionality would have provided a substantial reason for not acceding to this application. Now the respondent is faced with further disputation over costs when, if there is no agreement, they are assessed.

[31] I would order that the applicant pay the respondents costs of and incidental to this application on the standard basis. The respondent was entitled to be sceptical about the evidence put forward by the applicant. It would have been apparent to the respondent that the applicant had failed to disclose all the circumstances relevant to the exercise of this Court's discretion. The respondent's conduct in not accepting the applicant's costs offer was thus reasonable.

[32] For the above reasons I would order that:

1. The order made herein on 12 August 2014 be set aside.

2. The applicant pay the respondent's costs thrown away by the applicant's failure to appear on 12 August 2014 on the indemnity basis.

3. The applicant pay the respondent's costs of and incidental to this application on the standard basis.

[33] **NORTH J:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[34] **FLANAGAN J:** I agree with the reasons of Muir JA and the orders he proposes.

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[11] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344.