SUPREME COURT OF QUEENSLAND

CITATION:	*Double Time P/L t/a GI Motors v Detective Senior Constable Ryan & Anor* [2001] QCA 57
PARTIES:	**DOUBLE TIME PTY LTD trading as GI MOTORS** (appellant/applicant) **v** **DETECTIVE SENIOR CONSTABLE PETER LLOYD RYAN** (first respondent/first respondent) **TSAO CHIWEI** (second respondent/second respondent)
FILE NO/S:	Appeal No 10320 of 2000 DC No 1976 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 *DCA* (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 February 2001
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2001
JUDGES:	de Jersey CJ, Wilson and Douglas JJ Judgment of the Court.
ORDER:	**Leave to appeal granted.** **Appeal allowed.** **Order that the matter be remitted to the District Court for the entering up of any necessary adjournments and determination of the appeal from the decision of the Magistrate in accordance with law.** **Order that the respondent Tsao Chiwei pay the appellant's costs of and incidental to the appeal, assessed on the standard basis.** **Order that that respondent be granted an indemnity certificate in respect of the appeal under s 15(1) *Appeal Costs Fund Act.***
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – APPEAL AND NEW TRIAL – applicant sought leave to appeal against District Court Judge's dismissal of appeal for want of jurisdiction – appeal dismissed where applicant failed to enter in required recognizance within time, and second respondent refused to waive consequences of non-compliance – whether

second respondent a party to appeal such that his waiver refusal could be determinative of jurisdiction – where s 222(2)(a)(i) *Justices Act* requires service of notice of appeal on 'the person concerned in upholding (the) decision'

PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – JURISDICTION – whether second respondent's view could be determinative of jurisdiction – applicability of *ex parte Allen* – effect of s 229(1) *Justices Act* – whether late compliance should instead be viewed as an irregularity enlivening a discretion in the Court whether or not to proceed

Appeal Costs Fund Act 1973 (Qld), s 15, s 15(1)
District Court Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 39, s 222, s 222(2)(a)(i), s 222(2)(a)(ii), s 222(2A), s 229(1)

Carey v Armstrong (1972) 66 QJPR 136, considered
Forsyth v O'Connor (1970) 66 QJPR 38, considered
R v the Judge of the District Court at Brisbane and Davies; ex parte Allen [1969] QdR 114, distinguished
Scottorn v Howard (1972) 66 QJPR 34, considered
Von Schulz v Durrant [2000] QCA 235, considered

COUNSEL: JD Farrell for the applicant
No appearance for the first respondent
Carey-Lin (not of counsel) appeared with leave for the second respondent

SOLICITORS: Palella, Humphries & Venardos for the applicant
No appearance for the first respondent
Carey-Lin appeared with leave for the second respondent

[1] **THE COURT:** On 7 April 2000 a Magistrate determined, on an application brought by the respondent police officer under s 39 of the *Justices Act*, that a particular Subaru motor vehicle should be delivered to the respondent Mr Tsao Chiwei, as being the person appearing to that court to be its owner. The other competing claimant was the current applicant, Doubletime Pty Ltd (trading as GI Motors).

[2] On 26 April 2000, the current applicant filed, in the District Court, a notice of appeal against the Magistrate's decision, under s 222 of the *Justices Act*. Through oversight, the applicant failed, until about five months too late, to enter into the recognizance required by s 222(2)(a)(ii). That provision obliged the applicant to enter into the recognizance within seven days of the service of the notice of appeal on the respondent. The other respondent, the police constable, may be taken to have waived any consequence of the applicant's non-compliance with that requirement. But Mr Chiwei, upon whom the applicant also served the notice of appeal, expressly refused to waive non-compliance. Following *R v the Judge of the*

District Court at Brisbane and Davies; ex parte Allen [1969] QdR 114, and consistently with a number of subsequent District Court decisions – *Forsyth v O'Connor* (1972) 66 QJPR 38, *Scottorn v Howard* (1972) 66 QJPR 34 and *Carey v Armstrong* (1972) 66 QJPR 136, the learned District Court judge therefore dismissed the appeal for want of jurisdiction.

[3] The applicant now seeks leave to appeal to the Court of Appeal, under s 118 of the *District Court Act*. It seeks to raise two issues: first, whether Mr Chiwei was a "party" to the appeal to the District Court, such that his attitude to the non-compliance could be determinative of jurisdiction; and second, assuming him to be a party, whether his view could in that way be determinative – thereby querying the current applicability to such proceedings of *ex parte Allen*.

[4] Mr Chiwei was not present or represented at the hearing of the application. He had in advance of the hearing date notified the court of his inability to be present, and asked that his cousin, Mr Carey-Lin be permitted to speak on his behalf. Mr Chiwei informed the court in his written notification that he could not be present because the illness of his father and the imminent expiry of his student visa necessitated his leaving Australia prior to the hearing, returning to Taiwan. We agreed to hear from Mr Carey-Lin, but it is right to observe, without being critical, that we have not had the advantage of submissions from an active contradictor. In the circumstances of the case, it did however seem unlikely that that deficiency would have been overcome were the case, say, adjourned. We therefore proceeded with the hearing, receiving submissions going not only to the question of whether leave should be granted, but also as to the merits of the points raised. That course followed from our preliminary inclination, as the application proceeded, to grant leave, although we did at the conclusion of the hearing reserve our decision on that aspect.

[5] The case raises a significant question as to the current applicability of the approach in *ex parte Allen*. There is sufficient potential utility in resolving that point to warrant granting leave to appeal.

[6] As to the question which logically first arises, whether Mr Chiwei was properly considered a "party" to the appeal to the District Court - and the learned judge appears to have assumed that Mr Chiwei fell into that category - one notes that s 222(2)(a)(i) of the *Justices Act* requires service of a notice of appeal on "the person concerned in upholding (the) decision". The provision thereby itself delineates who should be considered respondents, and therefore "parties" to the appeal. As the beneficiary of the decision, the person directly prejudiced were it to be overturned, Mr Chiwei was on any reasonable view "concerned in upholding" the decision, and that of course explains why the applicant served him with the notice of appeal. Mr Chiwei must be regarded as a party to the appeal to the District Court.

[7] As to the second issue, whether, in the absence of waiver of non-compliance with an apparently mandatory procedural requirement, the appeal fell to be dismissed for want of jurisdiction, one may usefully begin by repeating some recent questioning in the Court of Appeal of the current applicability of *ex parte Allen*. The doubts were expressed in *Von Schulz v Durrant* [2000] QCA 235, where, having referred to those District Court decisions, the court said, from para 14:

> "Those decisions pose significant theoretical problems – it is not easy to see how a party can confer jurisdiction on the District Court by waiver. It may be that such an argument could be advanced successfully only in this Court, since the decisions are based on a case in the Full Court, *Reg v The Judge of the District Court at Brisbane and Davies; ex parte Allen.* That case should be considered in its historical context. For nearly 40 years up to 1959, appeals under s 222 were brought to a Supreme Court judge. When District Courts were re-established in that year, this jurisdiction was transferred to that Court. *Ex parte Allen* is the first reported instance of an attempt in this Court to challenge a decision of the new court under s 222 (other than by way of case stated under s 227). At that time, s 222(1) provided that the determination of the judge "shall be final between the parties to the appeal". On long-standing authority, "final" in that section meant that the judgment was (subject to s 227) the final and unalterable judgment of State courts on the matter, and was unappealable even by leave. This meant that the only manner in which the decision could be challenged in the Supreme Court was by way of prerogative writ. In these circumstances, it is not surprising that the Court held that the factors referred to in s 222(2) were relevant to jurisdiction.
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> In 1997, s 222 was amended to delete the provision that the determination of the judge should be final. At the same time, a restriction on the grant of leave to appeal from the District Court was deleted. As a result of these changes, it is now arguable that noncompliance with the requirements of s 222(2) within the time allowed for compliance does not, even if the noncompliance is not waived, deprive the District Court of power to hear the matter. It is also worth nothing that the theoretical problems referred to above were not considered by the Court in *Ex parte Allen*.
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> It would be premature to decide this question in the present application. There are several reasons why this is so. First, it may be unnecessary, particularly if the applicant provides that the respondent waived his noncompliance. Second, the applicant has not to date entered into the recognizance which the section requires. It is by no means clear that he is willing to do so. He sought to explain his failure to enter into a recognizance prior to his appeal coming on for hearing in the District Court by asserting ignorance of the requirement. At a proper hearing, he may or may not be believed. Also, he may prove unwilling to enter into a recognizance. Third, the point was not properly argued before us."

[8] *Ex parte Allen* concerned the requirement under s 222(2)(iii) of the *Justices Act* (as the section was then cast), that the registrar give a respondent ten days' notice of the hearing date. That was not done and, in the absence of the respondent, a fine of $15 imposed upon him in the Magistrates Court was replaced, on appeal in the District Court, with three months' imprisonment. The factual circumstances of that case may therefore be considered rather extreme.

[9] WB Campbell J, as he then was, described the requirement for the giving of notice as "a condition of the appeal … an essential preliminary proceeding", although in the absence of notification, the otherwise "null" proceeding could be saved were the respondent to waive the non-compliance. In *ex parte Allen* there was no waiver, and the "error of procedure (was) so grave as to mean that the learned judge acted without jurisdiction" (p 127).

[10] Not unreasonably, subsequent decisions in the District Court proceeded on the basis that the various procedural requirements specified in s 222 should be approached similarly. It is however difficult, adopting current approaches to statutory interpretation, to see why any failure to meet the procedural requirements of s 222 should necessarily deny the District Court jurisdiction to entertain such an appeal.

[11] Take, for example, an intending appellant's failure to serve a notice of appeal within time, thereby not complying with s 222(2)(a)(i). Because especially of the power of the District Court to extend time for service (s 222(2A)), such non-compliance would better be regarded as an irregularity, and one which could be waived. Of course absent service, and absent waiver, the appeal would not however proceed.

[12] Similarly, the requirement that an appellant enter into a recognizance committing himself to appear, abide by the judge's decision and meet any costs order, is of an essentially procedural character, and it would be an unusual result were any non-compliance, in the absence of waiver, to mean that the court had no jurisdiction. Significantly, s 229(1) of the *Justices Act* provides that if an appellant defaults "in taking any necessary step in the presentation" of an appeal, any other party may apply for an order discharging the notice of appeal, and the court "shall make such order as shall be just with regard to the subject matter of the application". That would appear to give a court a discretion, apart from terminating proceedings, to regularise them. The existence of such a discretion is inconsistent with a conclusion that in the absence of waiver of such non-compliance, the court ipso facto loses (or fails to gain) jurisdiction.

[13] It would seem odd that where procedural steps have not properly been carried through, the question whether the court has jurisdiction may be left to be determined by one of the parties, albeit that that party might take an otherwise completely unreasonable attitude. The better view is that the court in such cases retains its jurisdiction, with the issue whether and how the proceedings are to be progressed depending on the exercise of judicial discretion.

[14] The trend of modern authority would be to regard this applicant's late compliance with s 222(2)(a)(ii) as an irregularity enlivening such a discretion in the court whether or not to proceed, and not such as to deny the court jurisdiction. In the present circumstances where the delay, albeit substantial, occasioned no whit of prejudice to any other party, the appeal should plainly have proceeded. Entering into the recognizance was not determinative of the court's jurisdiction, in the sense that delay in doing so could not be excused, or the question whether the appeal was well founded left to be determined by the attitude of one or other of the respondents to the non-compliance.

[15] We grant leave to appeal, allow the appeal, and order that the matter be remitted to

the District Court for the entering up of any necessary adjournments and determination of the appeal from the decision of the Magistrate in accordance with law.

[16] As to costs, the appeal succeeds "on a question of law" (s 15 *Appeal Costs Fund Act* 1973). There will be an order that the respondent Tsao Chiwei pay the appellant's costs of and incidental to the appeal, assessed on the standard basis, and that respondent be granted an indemnity certificate in respect of the appeal, under s 15(1) of the *Appeal Costs Fund Act*.