SUPREME COURT OF QUEENSLAND

CITATION:	*von Risefer & Ors v Permanent Trustee Co P/L & Ors* [2005] QCA 109
PARTIES:	**EUSTACE von RISEFER** (first plaintiff/first appellant/first respondent) **ELIZABETH von RISEFER** (second plaintiff/second appellant/second respondent) **GOLD COAST BARRAMUNDI PTY LTD trading as Sator Aus Pty Ltd** ACN 080 783 071 (third plaintiff/third appellant/third respondent) v **PERMANENT TRUSTEE COMPANY LIMITED** ACN 000 000 993 (first defendant/first respondent/first applicant) **LA TROBE HOME LOANS OF AUSTRALIA PTY LIMITED** ACN 006 479 527 (second defendant/second respondent/second applicant) **MacGILLIVRAYS** (Solicitors) (third defendant/third respondent/third applicant) **ROBERT EDWART HALL** (fourth defendant/fourth respondent/fourth applicant) **ELIZABETH MARY HALL** (fifth defendant/fifth respondent/fifth applicant) **DEPARTMENT OF NATURAL RESOURCES & MINES** (sixth defendant/sixth respondent)
FILE NO/S:	Appeal No 7913 of 2004 SC No 9123 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out Miscellaneous Application - Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2005
JUDGES:	McPherson and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The notice of appeal be struck out as against the first, second, third, fourth and fifth defendants** **2. The plaintiffs and each of them, by themselves, their**

servants and their agents be restrained from making any further application in proceedings S9123/03 or taking any further steps, including the issuing of any new proceedings in any Queensland Court against the first, second, third, fourth or fifth defendants, in or arising out of or concerning the allegations made in proceedings S9123/03 without the prior leave of a judge of the Trial Division of the Supreme Court

3. The plaintiffs are to pay the first, second, third, fourth and fifth defendants' costs of this application to be assessed on the standard basis

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - POWERS OF COURT - OTHER MATTERS - where application made to strike out notice of appeal - where primary judge held that statement of claim disclosed no cause of action and was scandalous and absurd - where appeal brought against this decision - where notice of appeal and appellants' outline of argument reiterated the allegations made in the statement of claim - where allegations of bias made against primary judge - whether appeal has any merit - whether notice of appeal should be struck out as vexatious and an abuse of process

PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - JURISDICTION AND GENERALLY - GENERALLY - where certain plaintiffs have repeatedly commenced proceedings against the same defendants - where allegations in each proceeding are substantially the same - where application made by defendants seeking an order that the plaintiffs be prohibited from instituting further proceedings against them concerning those allegations without obtaining leave of Supreme Court - where reliance is placed on court's inherent jurisdiction to prevent abuse of process - whether court has power to prevent plaintiffs making same complaints in fresh proceedings - whether power should be exercised

Constitution of Queensland 2001 (Qld), s 58
Supreme Court Act 1970 (NSW), s 23
Supreme Court Act 1991 (Qld), s 43
Uniform Civil Procedure Rules 1999 (Qld), r 293, r 658
Vexatious Litigants Act 1981 (Qld)

Bhamjee v Forsdick (Practice Note) [2004] 1 WLR 88, considered
Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd (No 5) (1997) 18 WAR 334, cited
Cocker v Tempest (1841) 7 M & W 502; 151 ER 864, cited
Commonwealth Trading Bank v Inglis (1974) 131 CLR 311, considered
Grepe v Loam (1887) 37 Ch D 168, cited

Herron v McGregor (1986) 6 NSWLR 246, cited
Horvath v Pattison [1999] FCA 924, considered
Hunter v Leahy (1999) 91 FCR 214, applied
Jackson v Sterling Industries Ltd (1987) 162 CLR 612, considered
Tringali v Stewardson Stubbs & Collett Ltd [1966] 66 SR (NSW) 335, followed

COUNSEL: Second appellant/second respondent appeared on her own behalf and on behalf of the first and third appellants/first and third respondents
M J Drysdale for the first, second, third, fourth and fifth respondents/first, second, third, fourth and fifth applicants
B J Clarke for the sixth respondent

SOLICITORS: Second appellant/second respondent appeared on her own behalf and on behalf of the first and third appellants/first and third respondents
MacGillivrays for the first, second and third respondents/first, second and third applicants
MacGillivrays, as town agents for Saunders Downing Hely (Ashmore), for the fourth and fifth respondents/fourth and fifth applicants
C W Lohe, Crown Solicitor, for the sixth respondent

[1] **McPHERSON JA:** I agree with the reasons of Keane JA, which I have had the advantage of reading, and with the orders which his Honour proposes to make.

[2] **KEANE JA:** On 16 August 2004, the learned primary judge ordered, pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR"), that there be judgment for the first to fifth defendants in the proceedings commenced by the plaintiffs. Her Honour also ordered the removal of the caveat lodged by the plaintiffs over land of which the fourth and fifth defendants are registered proprietors and that the plaintiffs compensate the fourth and fifth defendants in respect of expenses incurred by them in relation to that caveat. The plaintiffs were restrained from lodging any further dealings with the land without first obtaining the leave of the Supreme Court. Finally, her Honour ordered that the plaintiffs pay the first to fifth defendants' costs of the application to be assessed on the standard basis.

[3] From this judgment the plaintiffs have appealed by notice of appeal dated 10 September 2004. The plaintiffs provided an outline of argument in support of their appeal dated 14 October 2004. The first, second and third defendants responded with an outline dated 22 November 2004. The burden of that response is that the allegations and arguments in the plaintiffs' outline of argument are so incoherent, embarrassing, vexatious and irrelevant that it is difficult to make a proper response to them.

[4] By application filed on 22 December 2004, the first, second and third defendants sought to have the notice of appeal struck out, as well as an order prohibiting the plaintiffs from commencing any further proceedings against the first, second and third defendants without first obtaining the leave of a judge of the Supreme Court of Queensland. It was also submitted, in the alternative, that if the notice of appeal

was not to be struck out then the defendants should receive security for their costs. The fourth and fifth defendants filed an application in similar terms on 17 March 2005. The sixth defendant is not a party to this application.

[5] This litigation has a long history. It began with the institution of proceedings by the first defendant against the first and second plaintiffs for the recovery of possession of property at Helensvale of which the first defendant was the mortgagee. This action was commenced because the first and second plaintiffs had defaulted on repayments of the loan secured by the mortgage. The action resulted on 9 June 2000 in judgment for the first defendant, prompting an unsuccessful appeal to this Court and four applications for a stay of the judgment. The appeal was unsuccessful, as were subsequent applications to the High Court and Federal Court arising out of the same subject matter. The plaintiffs' application to the High Court for special leave to appeal was refused on 12 September 2003. Between 16 September 2000 and 28 April 2004 the plaintiffs have also lodged eight caveats over the property.

The judgment below

[6] The defendants' application which led to the judgment the subject of this appeal was filed on 19 January 2004. It was adjourned on three occasions. The plaintiffs were afforded several opportunities to replead and formulate a recognizable cause of action. They took advantage of these opportunities delivering two amended statements of claim, the last on 6 May 2004.

[7] The case which the plaintiffs sought to make against the defendants seemed to be that the sale of the land by auction to the fourth and fifth defendants, which occurred when the first defendant finally recovered possession of the land, did not take place, that no money was paid and that the transaction was a fraud. This startling and unlikely assertion was pleaded in an incoherent fashion and was not supported by any evidence.

[8] The learned primary judge addressed the allegations in the plaintiffs' statement of claim in detail. She held that they did not disclose a cause of action known to the law, were an attempt to reopen concluded litigation and that they were, in some respects, scandalous or absurd. Nothing is to be gained by an unnecessary repetition of her Honour's analysis of the plaintiffs' pleading or her conclusions in relation thereto. In my view, her Honour's criticisms of the statement of claim were amply justified. There is no reason shown to doubt her Honour's conclusions that the plaintiffs failed to articulate a case capable of proceeding to trial and that there is not "a scintilla of evidence that those who sold the land, those who purchased the land or those who registered the transfer did anything other than comply with whatever legal and ethical duties applied to them … ".[1]

The defendants' applications

[9] The notice of appeal and the plaintiffs' outline of argument are significantly marred by the same deficiencies as the statement of claim. The appeal is without discernible merit of any kind. It is bound to fail. In addition, the plaintiffs now seek to mount an allegation of bias against her Honour.

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1 *von Risefer & Ors v Permanent Trustee Company Ltd & Ors* [2004] QSC 248; SC No 9123 of 2003, 16 August 2004 at [41].

[10] The basis for this assertion of bias is not made clear, but it seems to be the plaintiffs' contention that her Honour should have recused herself because her Honour was a member of the Court of Appeal on 30 August 2000 which refused the plaintiffs' application for a stay of the original judgment in favour of the first defendant. Her Honour was also a member of the Court of Appeal on 23 November 2001 when the plaintiffs' appeal from the original judgment was dismissed. The learned primary judge was further involved in these proceedings in that she allowed the plaintiffs' application for an adjournment of the first, second and third defendants' application for judgment in these proceedings. These circumstances would not suffice to show either actual or apprehended bias on her Honour's part. No "fair-minded, lay observer" with knowledge of these "material objective facts" might reasonably apprehend that her Honour might not bring "an impartial and unprejudiced mind" to her consideration of the defendants' application for summary judgment.[2] The learned primary judge was right not to disqualify herself.

[11] The notice of appeal and the plaintiffs' outline of argument in support of their appeal disclose no arguable error on the part of the learned primary judge. Both are vexatious and an abuse of the process of the Court. This Court has the power to bring this abuse to an end in the exercise of its inherent jurisdiction to prevent its processes being used as a means of vexation.[3] While this power should only be exercised with caution, I am of the opinion that it should be exercised in this case to minimize the extent to which the defendants may be put to expense to respond to the vexatious and, indeed, oppressive conduct of the plaintiffs.

[12] The notice of appeal should, in my view, be struck out as against the first, second, third, fourth and fifth defendants. This makes it unnecessary to deal with the application for security for costs of the appeal.

[13] As to the first, second, third, fourth and fifth defendants' applications for an order prohibiting the plaintiffs from taking further proceedings against them without the leave first obtained of a judge of the Supreme Court, the defendants rely on r 658(1) of the UCPR and s 43(1)(b) and (d) of the *Supreme Court of Queensland Act* 1991 (Qld). These defendants also rely on the inherent jurisdiction of the Court to prevent abuse of its process. This jurisdiction seems to me more likely to afford a basis for the relief they seek than the provisions of the UCPR and the *Supreme Court of Queensland Act* 1991 (Qld). This jurisdiction was affirmed in *Grepe v Loam*.[4]

[14] It has long been established that a court has the power to ensure that its own processes are not abused. The basic justification for this aspect of a court's inherent jurisdiction was explained by Baron Alderson in *Cocker v Tempest*[5] where his Lordship said:

> "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process

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2 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 - 345; *Trustees of the Christian Brothers v Cardone* (1995) 57 FCR 327 at 333 - 334; *Mazukov v University of Tasmania* [2004] FCAFC 159; No T1 of 2003, 17 June 2004 at [16] - [18]; *Dudzinski v Centrelink* [2003] FCA 308; No Q15 of 2003, 4 April 2003 at [4] - [5].

3 *Burgess v Stafford Hotel Ltd* [1990] 3 All ER 222 esp at 225 - 228.

4 (1887) 37 Ch D 168.

5 (1841) 7 M & W 502 at 503 - 504; 151 ER 864 at 865.

> abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion."

This principle continues to be recognised and applied by courts in both Australia[6] and the United Kingdom.[7] The result is, as Wallace P, Jacobs and Asprey JJ noted in the context of the Supreme Court of New South Wales, in words that are equally applicable to the Supreme Court of Queensland, that:

> "… there can be no doubt that this Court has an inherent jurisdiction to endeavour to ensure that the pursuit of its ordinary procedures by litigants does not lead to injustice and for this purpose to grant in the exercise of its discretion a stay of proceedings, whether permanent or temporary, upon such conditions or terms (if any) as may seem appropriate in the particular circumstances and that this is a jurisdiction which may be exercised at any stage of the proceedings where it appears to be demanded by the justice of the case."[8]

[15] In *Commonwealth Trading Bank v Inglis*[9] Barwick CJ and McTiernan J said:

> "… the making of unwarranted and vexatious applications in an action which is pending in the court is, in our opinion, a matter over which there is an inherent power in the court to exercise control. There is an essential difference, in our opinion, between regulating the conduct of such an action so as to prevent the court's process from being abused, on the one hand, and impeding a particular person in the exercise of a right of access to the court, on the other hand. In *Cox v Journeaux* [No 2] ((1935) 52 CLR at p 720) it was stated that there is inherent power to stay an action as vexatious and in that case that power was exercised. In *Lord Kinnaird v Field* ([1905] 2 Ch 306), to which we have referred, a defendant in an action, who had put on a counterclaim, had made twenty-nine interlocutory applications and had failed to pay costs which he had been ordered in many of those applications to pay. The plaintiffs sought an order that the defendant should not be allowed to make any further applications in the action without leave of the Court. Warrington J considered that the cases of *Grepe v Loam* ((1887) 37 Ch D 168) and *Suir v Newton* ((1886) 37 Ch D 169n), were sufficient as precedents for such an application. He made an order that the defendant was not to be allowed without leave to make any application under the summons for directions, or to issue any summons on matters of procedure, or to serve any notice of motion to discharge any order made in chambers on any such application as aforesaid, without such leave. The Court of Appeal entertained no doubt that Warrington J had power to make the order and it dismissed an appeal. As we have said earlier, the order related to the proceedings in an existing action before the Court. The case of *Grepe v Loam* ((1887) 37 Ch D 168), mentioned by Warrington J, was one in which, after judgment had been given in two actions, repeated applications were made to have the judgments set aside or

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6 *CC v Department of Human Services* [2003] VSC 134; No 5049 of 2003, 2 May 2003 at [31]; *Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd (No 5)* (1997) 18 WAR 334 at 343.

7 *Bhamjee v Forsdick & Ors (Practice Note)* [2004] 1 WLR 88 at 92 - 93.

8 *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 344.

9 (1974) 131 CLR 311 at 319 - 320.

> for orders inconsistent with them. An order was made prohibiting the making of any further applications in these actions without leave. The applications were regarded as being made 'in the actions', although they were after judgment. The case of *Suir v Newton* ((1886) 37 Ch D 169n) is reported very briefly, but it appears that non-compliance with an order for costs was the ground upon which it was ordered that no notice of motion was to be given without leave.
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> In our opinion, the cases to which we have referred provide authority for the proposition that there is an inherent power in the court to control the bringing of applications in the course of an action of which the court is seized for the purpose of preventing a party abusing the process of the court. When positive provisions directed to the same end have been made by statute or by rules of court, it may be necessary to consider whether the inherent power has been wholly or partly superseded. But, in our opinion, the power by virtue of which the applicant seeks to obtain an order that no applications in existing proceedings should be made without leave has not been abrogated by the rules of court."

[16] Having regard to what was said in the passage cited above from *Commonwealth Trading Bank v Inglis*, as to the possible effect of legislation on the inherent jurisdiction, I should observe that I am not aware of any Queensland legislation which has cut down the power of the courts to prevent abuse of the processes of the court. In this regard, the *Vexatious Litigants Act* 1981 (Qld) is concerned with the creation of the status of a vexatious litigant and the restriction of that person's ability to institute any proceedings, save by leave of the Supreme Court, while that status subsists. The inherent jurisdiction caters specifically for the protection of identified parties to existing litigation.

[17] One piece of legislation that may be relevant is s 58 of the *Constitution of Queensland* 2001 (Qld) which provides that:

> "(1) The Supreme Court has all jurisdiction necessary for the administration of justice in Queensland.
>
> (2) Without limiting subsection (1), the court—
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> (a) is the superior court of record in Queensland and the supreme court of general jurisdiction in and for the State; and
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> (b) has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise."

[18] The first subsection of s 58 is in similar terms to s 23 of the *Supreme Court Act* 1970 (NSW). In discussing this section in *Herron v McGregor*,[10] McHugh JA commented that:

> "The jurisdiction conferred by s 23 is in my opinion wide enough to enable this Court to make orders protecting inferior courts and tribunals against any abuse of their processes …"[11]

[19] These comments were approved of in *Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd (No 5)*[12] by the Full Court of the Supreme Court of Western

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10 (1986) 6 NSWLR 246.

11 *Herron v McGregor* (1986) 6 NSWLR 246 at 252.

12 (1997) 18 WAR 334 at 342.

Australia, consisting of Franklyn, Owen and Parker JJ, with their Honours going on to add that:

> "We can see no reason why [this jurisdiction] should not extend to protect the processes of the court within which the impugned decision has been made."

[20] Further support for this approach may be drawn from the case of *Jackson v Sterling Industries Ltd*[13] where Wilson and Dawson JJ appear to suggest that a section in the nature of s 23 of the New South Wales Act or s 58 of the Queensland Act does provide the foundation for a statutory jurisdiction for the Supreme Court that mirrors the court's inherent jurisdiction. Their Honours noted, when discussing s 23 of the New South Wales Act, that:

> "Section 23 provides that the 'Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales'. No relevant distinction is to be drawn between the inherent power of the Court and that bestowed by the section although, as the Court of Appeal pointed out, the section confirms the inherent power without increasing it."[14]

[21] These decisions suggest that, given the terms of s 58 of the *Constitution of Queensland* 2001 (Qld), it is at least arguable that the Supreme Court of Queensland need not make separate resort to the inherent jurisdiction to find a power to prevent abuse of its processes. In any event, it is clear that the jurisdiction of the Supreme Court confirmed in *Commonwealth Trading Bank v Inglis* has not been diminished by s 58 of the *Constitution of Queensland* 2001 (Qld).

[22] The history of these proceedings has been briefly summarized above. In my view, that history provides ample justification for imposing on the plaintiffs the restraint sought by the first, second and third defendants. If there were any doubt that such protection is warranted, it would be dispelled by the rising level of irrationality and incoherence which characterizes the plaintiffs' most recent arguments, and a consideration of the rationale for making protective orders of this kind given by Lord Phillips MR in *Bhamjee v Forsdick (Practice Note)*[15] where his Lordship said:

> "The court, therefore, has power to take appropriate action whenever it sees that its functions as a court of justice are being abused … A court's overriding objective is to deal with cases justly. This means, among other things, dealing with cases expeditiously and allotting to them an appropriate share of its resources (while taking into account the need to allot resources to other cases). This objective is thwarted and the process of the court abused if litigants bombard the court with hopeless applications. They thereby divert the court's resources from dealing with meritorious disputes, delay the handling of those disputes, and waste skilled and scarce resources on matters totally devoid of any merit".

[23] The defendants seek orders to protect them against further proceedings by the plaintiffs in addition to protection against further applications being made in the

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13 (1987) 162 CLR 612.

14 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 617.

15 [2004] 1 WLR 88 at 93.

proceedings which are already pending. In *Horvath v Pattison*[16] Finkelstein J noted that:

> "In *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311, the High Court held that a court has no inherent jurisdiction to restrain a person from commencing a new proceeding without the leave of the court. It could only do so if there were appropriate legislation or rules of court permitting such an order to be made. Of course, it was accepted by the High Court that a court does have inherent power to prevent an abuse of process in pending proceedings. There are a number of examples where that power has been exercised by the making of an order preventing a party instituting an interlocutory application of one type or another without the leave of the court."[17]

[24] In *Hunter v Leahy*[18] French J stressed that it was the substance and not the form of the proceedings that was of most importance. An order could still be made to restrain the institution of new proceedings so long as it could be determined that those proceedings constituted an attempt to relitigate a dispute that had already been concluded. As French J said:

> "I do not regard the decision in *Commonwealth Trading Bank v Inglis* as so constraining the inherent jurisdiction or the implied incidental power of this Court or the application of s 23, that it can prevent this Court from restraining the institution of proceedings which, in effect, seek to relitigate the substance of matters already determined in proceedings which have been disposed of in the Court."[19]

[25] I respectfully agree with these observations of French J. In my view, this Court has the power to protect the defendants against any further attempt by the plaintiffs to relitigate the same complaints in fresh proceedings as an aspect of the inherent jurisdiction to which I have referred or, possibly, in reliance on s 58 of the *Constitution of Queensland* 2001 (Qld). It is, no doubt, a power to be exercised with the utmost caution; but this case affords a clear example of the kind of case in which it should be exercised to protect parties against whom baseless allegations of unlawful conduct have repeatedly been made from the expense, inconvenience and hurt involved in the further repetition of those allegations.

[26] The first to fifth defendants ask that any restraint upon the plaintiffs be imposed so as to ensure that they will not be able to commence proceedings in any Queensland court without first obtaining the leave of the court. The English Court of Appeal in *Ebert v Venvil*[20] recognized that it was consistent with the principle which underlies *Grepe v Loam* orders to restrain "anticipated but unidentified proceedings" in other courts which would otherwise cause serious loss to the defendants in those proceedings.

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16 [1999] FCA 924.
17 *Horvath v Pattison* [1999] FCA 924 at [15].
18 (1999) 91 FCR 214.
19 *Hunter v Leahy* (1999) 91 FCR 214 at 221.
20 [2000] Ch 484 esp at 497 - 498.

Conclusion

[27] In my opinion the following orders should be made:

(a) the notice of appeal be struck out as against the first, second, third, fourth and fifth defendants;

(b) the plaintiffs and each of them, by themselves, their servants and their agents be restrained from making any further application in proceedings S9123/03 or taking any further steps, including the issuing of any new proceedings in any Queensland court against the first, second, third, fourth or fifth defendants, in or arising out of or concerning the allegations made in proceedings S9123/03 without the prior leave of a judge of the Trial Division of the Supreme Court;

(c) the plaintiffs are to pay the first, second, third, fourth and fifth defendants' costs of this application to be assessed on the standard basis.

[28] **PHILIPPIDES J:** I agree with the reasons for judgment of Keane JA and with the orders proposed.