SUPREME COURT OF QUEENSLAND

CITATION:	*Jessup v King's Transport & Ors* [2006] QCA 289
PARTIES:	**IAN DAVID JESSUP** (plaintiff/first respondent) **v** **KING'S TRANSPORT** (first defendant/second respondent) **AUSTRALIAN INTERNATIONAL INSURANCE LIMITED** ACN 006 544 690 (second defendant/third respondent) **LORELEI MAY KING** (third defendant/fourth respondent) **MARION JANET KING** (fourth defendant/fifth respondent) **NORMAN MAXWELL KING** (fifth defendant/sixth respondent) **OFFICIAL TRUSTEE IN BANKRUPTCY** (sixth defendant/seventh respondent) **BRUCE KAY GILLAN** (seventh defendant/applicant)
FILE NO/S:	Appeal No 4984 of 2006 DC No 253 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	8 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2006
JUDGES:	McMurdo P, Keane JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal refused** **2. Mr Gillan to pay the plaintiff's costs of the application to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE - QUEENSLAND - PARTIES - plaintiff commenced proceedings against a number of defendants and subsequently successfully sought to have seventh defendant joined - question over whether claim against seventh defendant

	fell outside limitation period - seventh defendant joined to enable court to determine limitation issue at trial - seventh defendant seeks leave to appeal - whether the order of learned primary judge caused substantial injustice to applicant and whether there are reasonable prospects of correcting that injustice on appeal
	District Court of Queensland Act 1967, s 118 *Uniform Civil Procedure Rules 1999*, r 69, r 74
	Adam P Brown Males Fashions v Philip Morris Inc (1981) 148 CLR 179, applied *Bonnici v Taylor* [2001] QCA 502; Appeal No 4758 of 2001, 12 November 2001, cited *Pickering v McArthur* [2005] QCA 249; Appeal No 4013 of 2005, 16 August 2005, cited
COUNSEL:	M A Jonsson for the applicant R J Clark for the plaintiff/respondent
SOLICITORS:	Miller Bou-Samra Lawyers for the applicant Gadens Lawyers - Cairns for the plaintiff/respondent

THE PRESIDENT: Justice Keane will deliver his reasons first.

KEANE JA: On 30 July 2003 the plaintiff commenced proceedings against a number of defendants for the recovery of moneys alleged to be owing to the plaintiff, as assignee of the sixth defendant, pursuant to indemnities given by some of those defendants to the sixth defendant relating to the cost of proceedings arising out of the bankruptcy of Kevin George Wilson.

In April 2006, the plaintiff filed an application to join the seventh defendant, Mr Gillan, as a defendant in the proceedings pursuant to r 69 of the *Uniform Civil Proceedings Rules 1999* (Qld). On 22 May 2006 the learned primary judge ordered that Mr Gillan be joined in the proceedings and gave

the plaintiff leave to make the necessary amendments to the statement of claim to plead the plaintiff's cause of action against Mr Gillan.

As a result, Mr Gillan is sued by the plaintiff for the recovery of loss suffered as a result of negligent advice given by Mr Gillan in his capacity as the plaintiff's solicitor. It is alleged that the plaintiff suffered loss as a result of acting on advice by Mr Gillan in relation to Wilson's bankruptcy.

That advice was originally alleged to have been given on "a date between 18 September 1999 and 2 February 2001." The work alleged to have been done in reliance on that advice was originally alleged to have commenced in September 1999.

At the hearing of the application before the primary judge, the plaintiff conceded that on material then before the Court, it appeared that the plaintiff's claim against Mr Gillan was out of time. The plaintiff undertook to file a reformulated pleading that would allege claims against Mr Gillan that were within time. The plaintiff now claims for work performed in a period between 25 May 2000 and 2 February 2001.

The learned primary judge decided to allow the joinder to enable it to be determined at trial whether or not the allegedly negligent advice was given within six years. Her Honour said,

> "[Mr Gillan] should be joined as a defendant and it will have to be determined on the evidence [at trial] as to whether or not the advice complained of was given within the last six years."

Mr Gillan now seeks leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld). That leave will usually be granted only where the order below has caused substantial injustice to the applicant for leave and there are reasonable prospects that the injustice will be corrected on appeal. See *Bonnici v. Taylor* [2001] QCA 502 at [3] and *Pickering v. McArthur* [2005] QCA 249 at [3].

In the application to this Court on Mr Gillan's behalf, it is urged that the primary judge misapprehended the proper operation of r 69 of the UCPR and, as a result of that error, exercised a discretion that had not been enlivened. The basis on which it is said that the primary judge's error has caused a substantial injustice to Mr Gillan, is that r 74(5) of the UCPR deems the plaintiff's proceedings to have been commenced at the time of the commencement of the action, so that Mr Gillan is thus precluded from having his limitation defence determined on the merits.

It is also said that Mr Gillan's involvement in the action involves more general prejudice to him, but it does appear that the substantial prejudice on which he relies, relates to the loss of his limitation defence. It should be said immediately that Mr Gillan's argument is heavily dependent on the assumption that the plaintiff was unable to foreshadow, in any meaningful or effective way, an alteration to his

pleadings by way of an answer to the argument which Mr Gillan advanced, based on the construction of r 69 for which he contends.

Whatever the ultimate merits of this assumption, or the argument based upon it, there is not good reason to conclude that Mr Gillan has sustained such a substantial injustice as would warrant this Court's intervention on appeal. Rule 74(5) of the UCPR provides,

> "However, for a limitation period, a proceeding by or against a new party is taken to have started when the original proceeding started, unless the court orders otherwise."

The learned primary judge made no order "otherwise", but that is no doubt because no application was made to her in that regard. Her Honour was plainly of the view that Mr Gillan should not be prejudiced in the way now apprehended. That this is so is apparent from the passage from her Honour's reasons cited above. An application to her Honour for an order for the limitation period against Mr Gillan, that the proceeding against him should be taken to have commenced on 22 May 2006, would clearly be likely to succeed.

In my opinion, Mr Gillan would not be able to demonstrate that he has suffered any substantial prejudice by the order in question, unless and until an application for an order otherwise has been refused. In any event the plaintiff has made clear by a letter dated 3 August 2006, its willingness to consent to an order otherwise under r 74(5) of the UCPR.

This matter concerns a matter of practice and procedure. In *Adam P Brown Male Fashions Pty Ltd* v *Philip Morris Inc* (1981) 148 CLR 170 at 177, Gibbs CJ, Aickin, Wilson and Brennan JJ said,

> "Nor is there any serious dispute between the parties that Appellate Courts exercise particular caution in reviewing decisions pertaining to practice and procedure.
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> Counsel for Brown urged that specific cumulative bars operate to guide appellate courts in the discharge of that task. Not only must there be error of principle but the decision appealed from must work a substantial injustice to one of the parties. The opposing view is that such criteria are to be expressed disjunctively. Cases can be cited in support of both views: for example, on the one hand, *Niemann v Electronic Industries Ltd* ([1978] VR 431 at 440); on the other hand, De Mestra v A D Hunter Pty Ltd ((1952) 77 WN (NSW) 143 at 146).
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> For ourselves, we believe it to be unnecessary and indeed unwise to lay down rigid and exhaustive criteria. The circumstances of different cases are infinitely various. We would merely repeat, with approval, the often cited statement of Sir Frederick Jordan in *In Re the Will of F B Gilbert (Dec)* ((1946) 46 SR (NSW) 318 at 323): 'I am of opinion that...there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal.'
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> See also, *Brambles Holdings Ltd v Trade Practices Commission* ((1979) 40 FLR 364 at 365); *Dougherty v Chandler* ((1946) 46 SR (NSW) 370 at 374). It is safe to say that the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration."

The considerations referred to in this passage explain and support the well established approach of this Court, whereby this Court will usually decline to entertain interlocutory appeals pursuant to s 118(3) of the *District Court of Queensland Act* which are not apt to achieve the correction of substantial prejudice to the applicant.

Because the order of the learned primary judge has not been shown to have resulted in substantial prejudice to the applicant which can be remedied only by this Court, the application for leave to appeal should be refused. In my view Mr Gillan should pay the plaintiff's costs of the application to be assessed on the standard basis.

THE PRESIDENT: The applicant has not demonstrated any proper reason for the granting of leave to appeal for the reasons given by Justice Keane. I agree with him that the application for leave should be refused with costs to be assessed on the standard basis.

DUTNEY J: I agree that the order should be as proposed by Justice Keane for the reasons which he has given.

THE PRESIDENT: That is the order of the Court. Thank you.
