SUPREME COURT OF QUEENSLAND

CITATION:	*FX v PAI* [2008] QCA 345
PARTIES:	**FX** (applicant/respondent) **v** **PAI** (respondent/appellant)
FILE NO/S:	Appeal No 4001 of 2008 SC No 5993 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2008
JUDGES:	Keane and Holmes JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Order of Chesterman J of 7 April 2008 set aside** **3. The application to set aside White J's orders made on 12 November 2007 allowed only to the extent of setting aside order 12, that the respondent pay the applicant's costs of the application before White J** **4. The application to set aside White J's orders otherwise be dismissed.**
CATCHWORDS:	PROCEDURE – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT – EX PARTE ORDERS AND JUDGMENTS – where respondent obtained, in applying for a property adjustment order, orders for the appointment of a single expert accountant to value certain assets pertaining to the appellant – where orders made in the absence of the appellant, due to the appellant's error as to the date of hearing – where appellant's application to have the orders set aside under r 667(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) was unsuccessful – whether the application under r 667(2) should have been granted PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – POWERS OF COURT – where costs

order made against the appellant in relation to a property adjustment order – where s 341 of the *Property Law Act* 1974 (Qld) provides that parties are to bear their own costs – where the appellant was unsuccessful in applying to have the order of the primary judge set aside under r 667(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the circumstances justified departure from the general rule

Property Law Act 1974 (Qld), Part 19, s 341
Uniform Civil Procedure Rules 1999 (Qld), r 429I, r 667

COUNSEL: The appellant appeared on his own behalf
G K Waterman for the respondent

SOLICITORS: The appellant appeared on his own behalf
McAlister & Cartmill for the respondent

[1] **KEANE JA:** I have had the advantage of reading the reasons for judgment prepared by Holmes JA. I agree with her Honour's reasons and the orders proposed by her Honour.

[2] **HOLMES JA**: The parties to this appeal were formerly in a de facto relationship, and the respondent (to whom I shall refer as Ms F), has applied for a property adjustment order under Part 19 of the *Property Law Act* 1974 (Qld). On 12 November 2007, Ms F obtained orders from White J for the appointment of a single expert accountant from a named panel to value a number of entities associated with the appellant, whom I shall identify as Mr P. The orders were made in Mr P's absence, because of some confusion as to the hearing date.

[3] Rule 667(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) permits the Court to set aside an order at any time if it was made in the absence of a party. Mr P applied, under the Rule, to have White J's orders set aside and replaced by a different set of orders. On the hearing of that application, Chesterman J accepted that the orders were made in Mr P's absence, through his genuine mistake as to the hearing date, but declined in the exercise of his discretion to set them aside. Mr P appeals that decision, arguing that Chesterman J mistook facts, failed to take into account material considerations, and was plainly wrong in the exercise of his discretion.

Mr P's application to set aside White J's order

[4] Under White J's order, the entities to be valued were Boatcraft Pacific Pty Ltd, the [P] Family Trust, Sabtorch Superannuation Fund, "[s]hareholding in Legalco Ltd and/or Espreon Ltd" [*sic*], and Sabtorch Pty Ltd. Each was to be valued as at the commencement of co-habitation of the parties in December 2001; at the different dates alleged by each as the separation date; and as at the date of valuation. Both parties were required to provide the expert with any document he required within seven days of a written request. The expert's costs were to be paid equally by the parties. Mr P was ordered to pay Ms F's costs of the application.

[5] In his application, Mr P sought that those orders be set aside and, in substitution, the following orders made:

"2. That pursuant to UCPR 429I a Single Expert Accountant may be appointed from the following panel at the discretion of [Ms F]:

a. Joseph Box C/- Grant Thornton, Chartered Accountants, Level 3, Grant Thornton House, King George Square, 102 Adelaide Street, Brisbane.

b. Steven D. Ponsonby C/- Moore Stephens, Accountants, Level 25, Riparian Plaza, 71 Eagle Street, Brisbane.

c. Peter Haley C/- Vincents Accountants, P O Box 13004, George Street, Brisbane.

3. To value Boatcraft Pacific Pty Ltd as at June 2006.

4. That [Mr P] will provide such assistance as he reasonably is able to the single expert accountant at the cost of [Ms F].

5. That the costs of the expert shall be paid by [Ms F].

6. That no costs be awarded to either party pursuant to Section 341 of the Property Law Act."

[6] At first instance, Mr P provided an outline of argument in which he set out the reasons for granting a re-hearing and made a number of complaints of the respondent's application: that it sought valuations of entities which had already been valued or whose value was demonstrably zero; that current date valuation was an unnecessary expense and would not assist in determining the parties' entitlements; that the respondent's proposed experts would prove unnecessarily expensive; that the respondent had poor prospects in her application for a property division so that it would be a waste "to expend vast amounts of money" on the valuation exercise; that any expert associated with the respondent's solicitor was unacceptable to him; and that the respondent's solicitor had already wasted opportunities to obtain material from him. He pointed out that the Court was not obliged under r 429I of the *Uniform Civil Procedure Rules* 1999 (Qld) to appoint an expert, and said that while he would co-operate with the respondent's expert, his resources were limited. He concluded the outline by making the point that s 341 of the *Property Law Act* (which provides for parties to bear their own costs, unless the Court considers that the circumstances warrant a different order) applied; there were no circumstances justifying an award of costs against him.

[7] Mr P supported his application with an affidavit in which he deposed that Boatcraft Pacific Pty Ltd had a currently operating business; it had been purchased on 1 December 2003. The [P] Family Trust had been "moribund" since a divorce settlement. Sabtorch Pty Ltd had never traded and had no assets or liabilities; it was formerly the trustee of the [P] Family Trust. The Sabtorch Superannuation Fund had its accounts audited every year as required under the superannuation industry legislation, making further investigation unnecessary. Legalco was a listed company, so that the valuation of his shareholding was simply a matter of looking at the share price.

[8] In oral submissions before Chesterman J, Mr P contended that there was no point in undertaking valuations of any of the named entities except for Boatcraft Pacific Pty Ltd; he was concerned as to the cost of the exercise. As to the dates for the prospective valuations, as at December 2001 he and his former wife had owned various assets, including some which she had concealed from him. Those assets had been the subject of a property order in the Family Court in 2003; as he described it, "the Court lumped them together and drew a line down the middle". Consequently, they should all, he considered, be regarded as joint assets as at 2001, since he was still married then. Expert valuations had been prepared in the context of the Family Court property dispute.

[9] The learned primary judge took the last point up with counsel for Ms F, asking why she could not rely on the Family Court material:

> "MR WATERMAN: Well, we may be - we may be able to do that. We may be able to do that, your Honour, I would have to concede that, but my - I don't know what the position is in relation to what my - what Mr McAllister has seen in relation to that material relative to making a concession in relation to that. It's in relation to a property adjustment under part 9 A of the Property Law Act. There is some relevance in ascertaining what the parties had at the time of the commencement of the relationship even if - even if one party or the other had an interest with another party.
>
> HIS HONOUR: He would have had to swear on oath what his position was and his wife would have had a look at that and if she thought there was anything wrong with it she would have said so. All I'm asking is whether the results of the forensic examination in the Family Court mightn't be all you need for the commencement date.
>
> MR WATERMAN: They may be, they may not be, your Honour. There's a lag there of something - up to two years between the commencement date and the determination in the Family Court. As to what happened in that intervening period so far as his asset - his assets in the context of a contested Family Court case I can't comment at this stage."

[10] Mr P conceded at first instance that he did not require a valuation as at 10 April 2005 (the separation date on his version of events), because he did not consider it would be different from that as at 21 March 2006 (the separation date nominated by the respondent). He argued that there was no benefit to valuation as at the date of valuation, because both parties had disposed of assets since separating and Boatcraft Pacific Pty Ltd had not in any event changed in any significant way since 2006.

The judgment

[11] Chesterman J took the view that there was not a great deal of difference between the existing orders and those sought by Mr P. There was no dispute that Boatcraft Pacific Pty Ltd should be valued. His Honour referred to a letter of 11 December 2007, from Mr P's then solicitor, in which it was proposed that there be valuations of the [P] Family Trust and the Sabtorch Superannuation Fund as well as Boatcraft Pacific Pty Ltd. He went on to say –

> "I understand Mr [P's] concern that valuation expenses and the cost in litigation be kept to a minimum, but it seems to me that if he is right in what he says about the [P] Family trust, Legalco Limited and Sabtorch Pty Ltd, it would be a fairly easy matter to persuade the valuer of the fact and that no examination and no extensive valuation should be undertaken or is necessary. If, on the other hand, the facts are not as Mr [P] described them to me, then it is appropriate that those entities be valued."

[12] Chesterman J noted some acceptance by the respondent that the material filed at the time of the Family Court dispute might be sufficient for ascertaining Mr P's asset position as at December 2001; in which event that valuation would be unnecessary. It was also unnecessary, given Mr P's concession, to undertake a valuation as at December 2005. There could be no objection, his Honour said, to a valuation as at the date of valuation, so that the Court knew, in making an order, what assets it was dealing with. He went on to say that if the Superannuation Fund produced audited annual accounts, its valuation should be an easy matter, as would the valuation of the shares of Legalco. Thus, he concluded, the appellant's concerns "can really be met within the framework of the present order".

The grounds of appeal

[13] Mr P's grounds of appeal, as set out in his notice of appeal, were that it was unjust and oppressive to fail to grant a re-hearing of the application when the respondent was absent from the original hearing because he was notified of an incorrect hearing date; that it was unjust and oppressive to deny him as a party the opportunity to be heard on the scope of the appointment of a joint expert when the original orders were unreasonable, ineffectual and oppressive; that Chesterman J erred in regarding the orders sought by the appellant as similar to those already made; and that his Honour erred in not considering the inconsistency of the costs order made at the original application with s 341 of the *Property Law Act*.

Failure to grant a re-hearing and denial of opportunity to be heard on orders

[14] In his outline of argument in this Court, Mr P asserts that the matter was "in the first instance an application for a re-hearing". If it had been granted, the orders sought by the respondent and those sought by him would have been considered in full. But he did not make a submission that the differences between them should be examined in detail, because he understood that the question at issue was whether there was to be a re-hearing.

[15] That argument and the first two appeal grounds depend on Mr P's characterisation of the decision complained of as the refusal of an application for a re-hearing. I do not think that is correct. Mr P's application below was that the orders made by White J be set aside and that the orders proposed by him be made in substitution for them. He had every opportunity to make submissions, written and oral, and to file affidavit material in support of that application. Chesterman J accepted that the orders had been made in the appellant's absence, enlivening the discretion, and accordingly embarked on a consideration of whether the orders of White J should be set aside, and whether Mr P's proposed orders should be substituted. There was no denial of any opportunity to be heard, nor any failure to consider whether the orders should be set aside and replaced by others.

Failure to appreciate the difference between the orders made and the orders sought

[16] Mr P contended that the learned primary judge had made a fundamental mistake as to the difference between the orders made by White J and those he sought. The most significant difference was this: his position was that no joint expert should be appointed at all, although he was prepared to co-operate with an expert appointed by Ms F. Consequently, he had envisaged in the orders he sought that Ms F could appoint an expert at her discretion and at her cost.

[17] The difficulty with that argument, however, is that nothing in Mr P's application under *UCPR* r 667 or in his submissions below, oral or written, would have been apt to convey that position to the learned primary judge. His application was for the appointment of "a Single Expert Accountant". The reference in the application to appointment at Ms F's discretion suggested that he was washing his hands of the appointment process, but not that he was resisting it. While Mr P said in his outline that he would not be prepared to accept a valuer associated with the respondent's solicitor, he said also that he would co-operate with an expert appointed by the respondent. The net effect of those assertions was far from clear, but it did not seem to be that no appointment should be made at all. Mr P did in his outline say that the Court was not obliged under *UCPR* r 429I to appoint a single expert, and in that context referred to two cases (decided before the insertion of Division 3, Part 5 of Chapter 11 of the *Uniform Civil Procedure Rules*, providing for Court appointed experts) in which comments were made as to the desirability of parties choosing their own expert witnesses. But that, too, hardly amounted to an unequivocal statement of opposition to the appointment of a single expert; particularly in light of the application which on its face asked for the appointment.

[18] Mr P did not expand on the matter in his oral submissions to the primary judge; here he complained that he had been "cut off" when he sought to do so. The transcript shows that the judge asked whether all that was in dispute was whether only one company should be valued. The appellant responded:

> "APPLICANT: In substance that's one point. The second point is the dates upon which they be valued. And I think the third point is –".

His Honour did interrupt at that stage, in order to explore with Mr P the reasons for argument about the entities to be valued and the valuation dates. But there followed a series of dialogues between the learned judge and counsel and between the judge and Mr P, in which the judge returned a number of times to Mr P to give him an opportunity to make his points. During that process his Honour observed that Mr P was not objecting to the appointment of the single expert, but rather to the cost and number of the valuations. Notwithstanding that clear indication of the judge's perception, Mr P still did not say that he opposed the appointment of a single expert.

[19] In the circumstances, Chesterman J was entitled to proceed on the premise that the argument was not about the appointment of a single expert but about the valuations to be performed by him or her. His view that there was not such a great degree of difference between Mr P's position and the orders as they stood seems, reasonably, to have been reinforced by the earlier proposal by Mr P's solicitor for valuations of not only Boatcraft Pacific Pty Ltd but the [P] Family Trust and the Sabtorch Superannuation Fund. I do not think, on the material before him, that his Honour's

observation in that regard reflected any misapprehension of the differences between the existing orders and those sought.

Mistake as to assets

[20] Mr P complained that Chesterman J had misunderstood the nature of the assets he owned as at 2001. All of the property owned by him and his former wife, which included the [P] Family Trust, his joint matrimonial home and some other assets in his then wife's name, constituted, in his view, joint assets. The order for valuation did not recognise that the [P] Family Trust was an asset both of him and of his ex-wife, and made no provision for valuation of the house or any other matrimonial asset.

[21] Mr P does seem to be labouring under a misconception that the 2003 Family Court order had some retrospective effect on his asset ownership as at 2001. But quite apart from that problem, there was nothing in the material before Chesterman J to indicate the nature of his interest in the [P] Family Trust or that there existed any other relevant asset. Even if his Honour had had such material, the valuation of the [P] Family Trust remained relevant whatever the extent of Mr P's interest in it, and the existence of other assets would not have made it inappropriate for Ms F to obtain orders enabling valuation of the assets of which she was aware. Those orders did not preclude Mr P's proving the existence or value of assets other than those nominated in them.

Misapprehension as to respondent's concession

[22] Mr P complained that Chesterman J had mistakenly regarded counsel for the respondent as agreeing to compromise by accepting valuations made in the Family Court proceedings, when no such undertaking was given and from subsequent correspondence it was clear that none was intended.

[23] In fact, when one examines his Honour's comments they were considerably more qualified than Mr P suggests:

> "Mr Waterman, who appears for Ms [F], accepts that, depending upon their contents, the Family Court documents which Mr [P] described may well be sufficient for his client's purposes in ascertaining Mr [P's] asset position at the date of the commencement of co-habitation so it may not in fact be necessary that that valuation be undertaken."

That comment fairly reflects the relatively guarded acknowledgement by counsel of the possibility that the Family Court valuations might be acceptable; guarded, because as counsel made clear, he did not know if his instructing solicitor had yet seen them.

No error in exercising the discretion against setting aside the substantive orders

[24] For the reasons given, I do not consider that Mr P has shown any factual error made by Chesterman J on the material he had before him. And it is from the limitations of that material that a good deal of the appellant's difficulty in making his argument here springs, although one can have considerable sympathy for him in attempting, unassisted, to present his case. Since the application was clearly for the setting aside of White J's orders and the substitution of others, it was incumbent on Mr P, if he wished to say that the original orders were not appropriate, to file material

enabling Chesterman J to reach some clear views on their effect. Mr P might, for example, have had some justification in saying that the orders made were oppressive in requiring the production of a large amount of material; the expert's request for material in what appears to be a standard form document requires an array of information for each of the entities over a decade. But he failed to explain clearly what would actually be entailed in producing the material required for the various entities involved. Nor did he provide any documentation to support his assertions that the valuations were unnecessary because of the entities' status.

[25] Chesterman J observed, as was clearly the case, that the degree of examination needed by the expert would depend on whether what the appellant said about the various entities was accurate. In particular, the valuation of the superannuation fund and the shareholding were unlikely to be onerous if what Mr P said was correct, and the Family Court material might prove sufficient in relation to the [P] Family Trust. But it would have been difficult indeed for his Honour, in the absence of clear explanation and supporting documentation, to regard as conclusive Mr P's claims that the valuations were unreasonable and unnecessary. It is not surprising then that he was unprepared to alter the orders. In short, I do not think that Mr P has any basis for complaint in Chesterman J's reaching the conclusions he did on the limited material before him.

[26] However, in my view, Mr P is entitled to succeed in respect of White J's order that he pay the respondent's costs of the application before her. Section 341 provides:

> "Party bears own costs
>
> (1) A party to a proceeding under this part bears the party's own costs.
>
> (2) However, if the court is satisfied there are circumstances justifying it making an order, it may make any order for costs or security for costs it considers appropriate.
>
> (3) The court may make an order at any stage of the proceeding or after the proceeding ends.
>
> (4) In considering whether there are circumstances justifying it making an order, the court must consider the following matters—
>
> a) the income, property and financial resources of each of the parties;
>
> b) whether any party has legal aid and the terms of the legal aid;
>
> c) the conduct of each of the parties in relation to the proceeding, including, for example, conduct about pleadings, particulars, disclosure, inspection, interrogatories, admissions of facts and production of documents;
>
> d) whether the proceeding results from a party's failure to comply with a previous order made under this part;

e) whether any party has been wholly unsuccessful in the proceeding;

f) whether any party made an offer to settle under the *Uniform Civil Procedure Rules* 1999 and the terms of the offer;

g) any fact or circumstance the court considers the justice of the case requires to be taken into account."

[27] Mr P clearly sought in his application to set aside White J's order that he pay costs, and raised in his outline of argument the lack of any justification for such an order. That aspect of Mr P's application does not seem to have been addressed in Chesterman J's judgment, but his Honour would have found nothing in the respondent's material to support the costs order. The respondent did not depose to what, if any, submissions had been made to White J on costs: the basis on which she was asked to make the order under s 341 was not identified; nor, indeed, was it even said that the section was brought to her attention. Certainly, Chesterman J did not make any comment or finding which would justify a costs order against Mr P contrary to the *prima facie* position in s 341. Consequently, I consider that that order alone should be set aside. Given the appellant's partial success, no order should be made as to the costs of this appeal.

[28] I would order:

1. that the appeal be allowed;

2. that the order of Chesterman J made on 7 April 2008 be set aside;

3. that the application to set aside White J's orders made on 12 November 2007 be allowed only to the extent of setting aside order 12, that the respondent pay the applicant's costs of that application;

4. that the application to set aside White J's orders otherwise be dismissed.

[29] **DOUGLAS J:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.