SUPREME COURT OF QUEENSLAND

CITATION:	*Duhs v Pettett* [2009] QCA 347
PARTIES:	**TREVOR PETTETT** (first defendant/appellant) **v** **WILFRED HENRY DUHS** (plaintiff/respondent) **KEA-WATT & ASSOCIATES PTY LTD** ACN 100 005 490 (second defendant/not a party to the appeal) **RATHDOWNEY DEVELOPMENTS PTY LTD** ACN 115 908 137 (third defendant/not a party to the appeal)
FILE NO/S:	Appeal No 5885 of 2009 SC No 12147 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2009
JUDGES:	Keane, Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal and cross-appeal dismissed.** **2. Appellant to pay the respondent's costs of the appeal and the cross-appeal, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PAYMENT INTO AND OUT OF COURT – where the respondent claimed restitution for an amount he paid to the appellant in instalments – where the trial judge declined to grant summary judgment, but required the appellant to provide security for part of the respondent's claim as a condition to continuing the proceeding – where the appellant argued that this would effectively prevent him from litigating arguable defences to the claim, as he had no capacity to make the payment – where the respondent cross-appealed against the trial judge's refusal to grant summary

judgment – whether the trial judge erred by failing to take into account the financial difficulties of the appellant – whether the order that the appellant pay money into court amounted to granting summary judgment or 'stifling' the litigation

Uniform Civil Procedure Rules 1999 (Qld), r 298, r 765(1)

Brypat Pty Ltd v Endless View Holdings Pty Ltd [2005] QSC 171, cited
Commonwealth Development Bank of Australia Limited v Kerr & Ors [2001] QSC 234, cited
DMS Shipping & Trading Co Limited v Lionheart Asia Limited [1996] 2 Qd R 20; [1995] QCA 448, cited
Duhs v Pettett & Ors [2009] QSC 100, affirmed
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, cited

COUNSEL: R Almond QC, with D Gration, for the appellant
D J Cooper SC for the respondent

SOLICITORS: Lillas & Loel Lawyers for the appellant
Ferguson Cannon Lawyers for the respondent

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Fraser JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[3] **FRASER JA:** The respondent/plaintiff applied in the Trial Division for summary judgment against the appellant/first defendant for $2,700,000 plus interest. The appellant/first defendant cross-applied for orders (1) that the respondent's statement of claim be struck-out or that the respondent be given leave to re-plead that statement of claim, and (2) that an order made on 5 December 2008 (which prohibited the defendants from dealing with their Australian assets up to the unencumbered value of $2,700,000 subject to exceptions including for the payment of up to $25,000 for their legal costs) be varied by increasing the amount of legal costs payable out of the defendant's Australian assets to $50,000.

[4] On 6 May 2009 a judge of the Trial Division dismissed the respondent's application for summary judgment and ordered that the appellant pay into court or give security for the payment of $540,000 within 28 days, failing which the respondent would be at liberty to enter judgment against the appellant for the amount of the respondent's claim together with interest and costs. On the appellant's cross-application, the primary judge granted the respondent leave to deliver an amended statement of claim within 28 days and ordered that the cross-application otherwise be adjourned to a date to be fixed.

[5] The appellant did not pay or secure the payment of $540,000 in compliance with the order made on 6 May 2009. Accordingly, on 19 June 2009, the primary judge entered judgment in accordance with the respondent's claim for $2,700,000 and $152,382.32 for interest, with costs.

[6] Before that judgment was entered the appellant had appealed against the orders made on 6 May 2009 requiring him to pay into court or give security for the payment of $540,000 and that he pay the respondent's costs of the application for summary judgment. After the judgment was entered on 19 June 2009, the appellant filed an application to amend the notice of appeal by including an appeal against the orders made on 19 June 2009. At the hearing of the appeal the court granted leave for that amendment, which was unopposed. Before the hearing of the appeal the appellant withdrew a further application for a stay of execution of the orders made on 19 June 2009 pending determination of the appeal. The respondent has cross-appealed from the order made on 6 May 2009 refusing his application for summary judgment.

The appeal

[7] The appellant did not contend that the primary judge made any error in entering judgment on 19 June 2009. That judgment was inevitable in circumstances in which the appellant had failed to make any payment or provide security for the payment of the $540,000 and had not applied for a stay of the order giving the respondent liberty to enter judgment in that event. Rather, the appellant contended that if this court concludes that the orders made by the primary judge on 6 May 2009 should be set aside, then that may be taken into account as a matter which occurred after the orders of 19 June 2009;[1] that although parties are usually bound by the way in which they argue cases at first instance[2] that rule should not be applied with the same rigour in interlocutory or procedural applications as it is in final determinations after trials;[3] and that the Court should therefore set aside the final judgment. The respondent contended that the appeal against the orders of 19 June 2009 must fail in the absence of any demonstration that those orders were vitiated by error.[4]

[8] It is not necessary to rule upon those competing submissions because there is no substance in the appellant's grounds of appeal against the order made on 6 May 2009. I will explain why that is so after I have summarised the dispute and the evidence in the summary judgment application.

[9] The respondent claimed restitution of $2,700,000 which he had paid to the appellant by instalments in September 2004 and January 2005. There was a dispute about the terms upon which the money was paid but the appellant admitted that he had received the money and had not repaid any of it. The evidence included reference to statements made by the appellant to the respondent and to the respondent's accountant, Mr Morris, which contained inconsistent versions about the terms upon which the respondent had paid his money to the appellant and what had become of it. One curiosity in the appellant's position concerned documents dated 7 January 2005 and apparently signed by the respondent which purported to regulate the terms of the respondent's investment: "Letter of Intent", "Non-Solicitation – Non-Disclosure Agreement", "Irrevocable Private Placement Fee Agreement", "Irrevocable Profit Sharing, "Revocable Unconditional Undertakmg [sic]", "Joint

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1 The appellant cited *UCPR* Rule 765(1) and *Coal & Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at 202 – 203 and *Scrivener v Director of Public Prosecutions* (2001) 125 A Crim R 279; [2001] QCA 454 at [10] per McPherson JA.

2 *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

3 The appellant cited *Dick v University of Queensland* [2000] 2 Qd R 476 per Thomas JA at 489-490.

4 The respondent cited *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616 at 619.

Venture Agreement", "Private Placement Agreement". The appellant pleaded and swore in an affidavit that the respondent appeared to read and understand these documents before he signed them. That seems most unlikely in light of the impenetrable, repetitive, and legalistic jargon which characterises the documents. Even more curious are the facts that the appellant did not plead and his counsel did not submit that those purported contracts constituted the charter of the parties' rights. Though that stance was odd it was understandable because, to the extent that the documents made any sense, they provided no support for the appellant's pleaded and sworn assertions that he arranged for the respondent's money to be placed in a "program" operated by one Mr Rick in association with "the Hoffman Bank".

[10] The judge gave careful and detailed reasons for concluding that, though this was not an appropriate case for summary judgment, it was appropriate to require the appellant to pay into court or provide security for the payment of part of the respondent's claim as a condition of continuing the proceeding.[5] The following passage summarised some of the more important factors in the judge's decision to impose the condition:[6]

> "[38] Pettett declines to reveal what has become of the money. He does not say that the money has been lost through misappropriation by a third party to whom it was entrusted. An uninformative reference is made by Pettett to continuing attempts to recover funds that were 'invested through Mr Jay Rick in the Hoffman Bank'. Despite being invited to verify this assertion with further evidence, and given an opportunity to do so, there is no evidence, apart from Pettett's bald assertion in paragraph 31 of his affidavit, that the moneys were so invested. Duhs has told Morris that the sums invested secured a development at Rathdowney, and he forwarded documents to Morris in which there are account transactions in 2005 and 2006 styled 'Rathdowney Development… investment income; interest'. Pettett's affidavit confirms Duhs evidence about the payment of about $70,000 in interest. However, he says nothing about the ownership or value of the Rathdowney development, and the use of Duhs funds.
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> [39] In circumstances in which Pettett declined to disclose in paragraph 3 of his December 2008 affidavit what has become of Duhs' funds and in his April 2009 affidavit has not been forthcoming with details, I am not in a position to conclude that the sum has been lost through a misguided investment, misappropriation or some other cause. Pettett has not relied on any material to say that the sum invested cannot be recovered in whole or in part. Pettett describes the funds that were invested as Duhs' funds, rather than his own.
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> [40] In circumstances in which Pettett does not swear or submit that an order of the kind sought would frustrate the

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5 [2009] QSC 100 at [3] – [42].

6 [2009] QSC 100 at [38] – [40].

> litigation, I am disposed to make an order under *UCPR* 298. The position might have been different if Pettett had provided evidence that the investment, or a substantial part of it, had been lost and that there was no prospect of recovering it."

[11] Rule 298 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that where an application for summary judgment is dismissed the court may give directions or impose conditions about the future conduct of the proceeding. In this appeal the appellant did not challenge the primary judge's conclusion[7] that this rule authorised an order that the appellant pay money into court as a condition of continuing a proceeding. The appellant also accepted that the discretion to make such an order may be exercised when, as the primary judge concluded,[8] the defence to a plaintiff's claim is "shadowy".[9] The appellant did not challenge that conclusion or any aspect of the primary judge's careful and detailed reasons for it.[10]

[12] The appellant's counsel confined the appellant's challenge to a contention that the order should not have been made because it would prevent the appellant from litigating what the primary judge found to be arguable defences. The appellant argued that the primary judge's conclusion that a trial was necessary required that particular care should be exercised to ensure that an order of this character did not amount in effect to giving summary judgment. The appellant contended that this was the predictable result of the order because the evidence demonstrated that the appellant had no capacity to make or provide security for the payment.

[13] The appellant contended for a principle that an order for payment into court should not be made if it would have the effect of stifling the litigation. This has been a significant discretionary consideration in some cases,[11] but that is not to say that it must be decisive in all cases. In *DMS Shipping & Trading Co Ltd v Lionheart Asia Ltd*, McPherson JA rejected the proposition that once a triable issue was raised a defendant had the right to unqualified leave to defend. As McPherson JA observed, there is "a single discretion, or perhaps one may be permitted to use the expression 'global' to describe it, which is a discretion to give leave to defend with or without such conditions as the Court sees fit to impose." In a case such as this it remains necessary for the appellant to demonstrate that the primary judge committed some error of law in the course of exercising that "global" discretion, or failed to take account of relevant matters, or left some such matter out of account.

[14] The only error for which the appellant contended was in the primary judge's remark that, "[the appellant] did not submit that such an order would frustrate the action, and the material read before me does not make me reach this conclusion."[12] The first part of the statement was correct, but the appellant argues that the second part

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7 *Duhs v Pettett & Ors* [2009] QSC 100 at [37], citing *Brypat Pty Ltd v Endless View Holdings Pty Ltd* [2005] QSC 171, *MPM Civil Pty Ltd v Ammbar Pty Ltd* [2004] QSC 079 and *Beynon v Aikman Stoddart Accountants Pty Ltd* [2004] QSC 387.

8 [2009] QSC 100 at [43].

9 *DMS Shipping & Trading Co Ltd v Lionheart Asia Ltd* [1996] 2 Qd R 20 at 22-23: "'shadowy", "insubstantial", "tricky", "suspicious" or "almost one in which summary judgment should be ordered"".

10 [2009] QSC 100 at [3]-[42].

11 *DMS Shipping & Trading Co Ltd v Lionheart Asia Ltd* [1996] 2 Qd R 20 per McPherson JA at 22; *Commonwealth Development Bank of Australia Limited v Kerr & Ors* [2001] QSC 234 at [23]; *Brypat Pty Ltd v Endless View Holdings Pty Ltd* [2005] QSC 171 per Philippides J at [40].

12 [2009] QSC 100 at [37].

was falsified by the primary judge's acceptance of a submission for the respondent to the effect that the appellant did not have access to any money.

[15] There is no such finding in the reasons for judgment. The remarks by the primary judge upon which the appellant relied concerned the appellant's cross-application to increase the amount of his Australian assets which he could spend on legal fees. The respondent's counsel opposed the application on the basis of an affidavit sworn by the appellant himself. Late on the first day on which the matter was heard the respondent's counsel submitted:

> "Mr Pettett swore an affidavit deposing to assets and liabilities in respect of the Mareva relief, and he only has in his company three and a half thousand dollars in the bank, as I recall. So he's got no capacity. His debts are over four million dollars. They well and truly surpass his assets. There's no fund that he can have access to."

[16] After some further debate the primary judge remarked:

> "Well, the cupboard is bare, so it doesn't matter whether he is entitled to $25,000 or more, does it?"

[17] The primary judge then referred the appellant's counsel to a letter attached to the appellant's affidavit which listed the assets of the appellant and the other defendants. The appellant's counsel had not previously seen that document. The primary judge did not rule upon the cross-application or express any concluded view about it. The matter was then adjourned to the following day. Such an adjournment had earlier been foreshadowed to allow the appellant time to verify his claim that the respondent's money had been placed in a "program" operated by "Mr Rick" in association with "the Hoffman Bank". No such evidence was adduced. On the following day the primary judge asked the appellant's counsel if he wished to make a submission about the authorities relied upon by the respondent to support an order requiring payment into court. The appellant's counsel agreed that the authorities allowed for such an order. He did not submit that such an order should not be made because the appellant might not be able to comply with it.

[18] The primary judge can hardly be criticised for not taking the appellant's supposed financial difficulties into account in formulating the order for payment into court when the appellant, who was represented by counsel and solicitors, did not argue that the order should not be made for any such reason. It is also plain from the primary judge's reasons for judgment that he was not prepared to accept the appellant's sworn assertions at face value. That view was open to the judge in light of the evidence summarised earlier. The judge was entitled to harbour very considerable scepticism about any assertion by the appellant concerning his assets.

[19] In any case, even if the appellant's affidavit about his assets was taken at face value it did not justify a conclusion that the appellant could not comply with the condition requiring payment into court. That affidavit related only to the appellant's assets in Australia. The Mareva order did not prevent the appellant from dealing with his assets, if any, outside Australia. In another affidavit the appellant swore that he was experienced in setting up companies in foreign jurisdictions for use by Australian residents for taxation and investment purposes, that he was able to "undertake currency conversions offshore", that he was familiar with certain high-yield investments in America, and that he had both organised a $2.7 million investment for the respondent and made his own investment through the same "Mr Jay Rick in

the Hoffman Bank". In the absence of any submission or evidence that the appellant did not have access to assets out of Australia, there was no basis for thinking that the appellant would not be able to comply with the condition imposed by the primary judge.

[20] The primary judge did not make the error for which the appellant contended. It follows that the appeal must be dismissed. Costs should follow the event.

Cross-Appeal

[21] The respondent's cross-appeal against the primary judge's refusal to enter summary judgment invoked a detailed analysis of the evidence and of the pleadings in support of the proposition that the primary judge should have found that the defences raised by the appellant lacked any arguable substance. In view of my rejection of the appellant's appeal, there is no utility in embarking upon this analysis, the only result of which would be to determine whether the judgment pronounced on 19 June 2009 ought instead to have been pronounced on 6 May 2009. The respondent's senior counsel acknowledged that if the appeal was dismissed there would be no utility in ruling upon the cross-appeal. The cross-appeal should therefore be dismissed. Because the cross-appeal would not have significantly increased the costs of the proceedings and it was provoked only by the appellant's unmeritorious appeal, the appropriate order is that the appellant should also pay the costs of the cross-appeal.

Proposed orders

[22] The appeal and the cross-appeal should be dismissed. The appellant should be ordered to pay the respondent's costs of the appeal and the cross-appeal to be assessed on the standard basis.