# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Recreation and Competitive Events Resources & Services Pty Ltd & Anor v Champion's Ride Days Pty Ltd* [2020] QCA 90 |
| PARTIES: | **RECREATION AND COMPETITIVE EVENTS RESOURCES & SERVICES PTY LTD**<br>**ACN 098 088 610**<br>**(first applicant)**<br>**JOSHUA PAUL McFARLANE**<br>**(second applicant)**<br>**v**<br>**CHAMPION'S RIDE DAYS PTY LTD**<br>**ACN 106 662 462**<br>(respondent) |
| FILE NOS: | Appeal No 14241 of 2019<br>DC No 27 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Civil) |
| ORIGINATING COURT: | District Court at Brisbane – [2019] QDC 236; Unreported, DC No 27 of 2018, 13 December 2019 (Barlow QC DCJ) |
| DELIVERED EX TEMPORE ON: | 5 May 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 5 May 2020 |
| JUDGES: | Sofronoff P |
| ORDER: | **Refuse application for leave with costs.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the applicants were ordered after a trial to pay the respondent $4,300 as compensation for breach of the duty of confidentiality – where the applicants at trial were ordered to pay the respondent $752.50 made up of $100 for each of the seven breaches of contract with interest – where the applicants seek leave to appeal the decision on the basis that the appeal raises important questions of law about equitable compensation for breach of confidence – where the applicants do not challenge the trial judge's findings that the defendants owed duties of confidence to the respondent, or that they breached those duties in the way that has been found – where the applicants do not address the criteria for granting leave – where the respondent submits that in the context of an appeal about $4,300, and in which the findings of wrongdoing by the |

applicant are unchallenged, the applicant can hardly make out a plausible case that it has suffered such an injustice as would justify the grant of leave – whether the applicants have suffered any substantial injustice by reason of the orders – whether the case is hopeless – whether leave ought to be granted to appeal

*District Court of Queensland Act* 1967 (Qld), s 118, s 118B

*Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; [2003] NSWCA 10, cited
*Kogarah Council v Maas* [2003] NSWCA 334, cited
*Pickering v McArthur* [2005] QCA 294, applied
*Schweppes Inc v FBI Foods Inc* (1999) 167 DLR (4th) 577, cited
*Tsigounis v Medical Board of Queensland* [2006] QCA 295, cited

COUNSEL: A J Greinke for the first and second applicants
S Forrest for the respondent

SOLICITORS: Cranston McEachern for the first and second applicants
McMillan Criminal Law for the respondent

[1] **SOFRONOFF P:** This is an application for leave to appeal a judgment of the District Court pursuant to which the applicant was ordered to pay the respondent the sum of $4,300. This is also an application in relation to the orders for costs that were made consequential upon the order for compensation. The plaintiffs had sued the defendants for compensation, and for other remedies, arising out of the first defendant's breach of his duty of confidentiality owed to the plaintiff, and arising from the second defendant's use of the plaintiff's confidential information.

[2] The action started in the District Court on 20 July 2018. By its statement of claim the plaintiff claimed damages in the sum of $750,000. The defendants sought security for costs and security was, in due course, provided for the costs of the trial.

[3] In November of the same year the second defendant, who is the first applicant in this application, offered to settle on terms that each party bear its own costs and that it would destroy the emails that contained the contested information. That offer was conditional and the condition was not satisfied, so could not be accepted and was not accepted.

[4] There was a mediation which failed in November of the following year. The defendants offered to settle on terms that they would destroy the emails containing the information, and upon the plaintiff agreeing to pay 60 per cent of their costs. That offer was also not accepted. The plaintiff offered to settle on the basis of the destruction of the material with each party paying its own costs. Like the other offers, this offer was not accepted.

[5] After a trial that lasted three days, and at which everyone was represented by counsel, Judge Barlow QC delivered judgment promptly two weeks later. His Honour found that each of the defendants owed contractual or equitable obligations

of confidence to the plaintiff and that each of the defendants had breached these obligations.

[6] The plaintiff failed to establish its major claimed loss against both defendants. However, Judge Barlow QC found that the first defendant had breached its contractual obligations on seven occasions, and his Honour awarded the plaintiff nominal damages in the sum of $100 for each breach, together with interest that amounted to $52.50.

[7] His Honour assessed equitable damages for the second defendant's breach, that is, the first applicant's breach, by reference to the cost to the plaintiff to produce the confidential information. Upon that footing his Honour assessed compensation upon the basis that the use that the second defendant had made of the information for its own commercial advantage justified an order that the first applicant pay the respondent 10 per cent of the costs that the plaintiff had incurred in creating the information.

[8] His Honour, therefore, assessed compensation at $4,000 and allowed interest in the sum of $300. By order 2, made on 29 November 2019, Judge Barlow QC ordered the second defendant, that is the first applicant, pay the plaintiff, that is the respondent, $4,300. His Honour also made ancillary and consequential orders to effectuate the destruction of the material in the defendants' hands.

[9] Costs orders were disputed by all parties. On 13 December 2019, that is, two weeks after giving his principal judgment and making his orders about compensation, and after considering the exchange of offers that had been made and that I have referred to, Judge Barlow QC ordered that the defendants pay 60 per cent of the plaintiff's costs of the proceeding, other than reserve costs, from the date of the proceeding's commencement until 5 November 2019 on a standard basis. His Honour ordered that the defendants pay 50 per cent of the plaintiff's costs thereafter on an indemnity basis. His Honour made other orders dealing with reserve costs.

[10] On 20 December 2019 the second defendant sought leave to appeal against the order that it pay the plaintiff $4300, and also sought leave to appeal against the costs orders made against it on 13 December 2019. Section 118(3) of the *District Court of Queensland Act* 1967 (Qld) requires that the applicant obtain the leave of the Court of Appeal against the compensation order because the sum at issue is less than the Magistrates Court jurisdictional limit. Section 118B(1) of the Act provides that an appeal against a costs order made in the District Court can only be made by leave of the judge who made the costs order, or if that judge is unavailable, then leave of another judge of the District Court. No leave has been obtained to appeal against the costs order.

[11] Section 118B(2) provides that if, after an appeal to the Court of Appeal is properly started, the appeal becomes an appeal only in relation to the costs of the original proceeding, then s 118B(2), which requires leave of a District Court judge before an appeal is brought does not apply, and the appeal may be heard and determined only by leave of the Court of Appeal. Dr Greinke, who appeared for the applicants in this application, submits that s 118B(2) would apply to the present proceeding, and I am content, without deciding the matter, to proceed upon the basis that that is correct without deciding it.

[12] Dr Greinke submitted that leave should be granted because the appeal involves important questions of law about equitable compensation for breach of confidence. At issue, he submits, is whether Judge Barlow QC was wrong to rely upon a certain Canadian authority, *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577, rather than a case decided by the New South Wales Court of Appeal, *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298. Also, he submits, the appeal would raise:

> "Consideration of the proper approach to be adopted in respect of the award of equitable compensation within *Seager v Copydex* line of authorities."

[13] The draft notice of appeal addresses these matters in the stated grounds. The grounds show that no challenge is proposed to be made against his Honour's findings that the defendants owed duties of confidence to the respondent, or that they breached those duties in the way that has been found. The grounds also seek to challenge his Honour's exercise of discretion in ordering costs.

[14] Dr Greinke also submits that his Honour's path to the assessment of damages was not one that was open on the pleadings. He submits that this error on his Honour's part rendered the trial unfair. He relies upon a New South Wales decision concerning leave to appeal small judgments, namely, *Kogarah Council v Maas* [2003] NSWCA 334. In that case Justice Giles remarked that:

> "Refusing leave to appeal in small appeals not involving any question of principle [would be] one thing. [But refusing] leave to appeal against a decision reached contrary to principles of procedural fairness is very different."

[15] Dr Greinke submits that his Honour's approach to awarding damages in a way not justified by the pleading constitutes a breach of the rules of procedural fairness.

[16] Understandably, Mr Forrest of counsel, who appears for the respondent, has submitted that, in accordance with settled authority, leave will usually be granted only if an appeal is necessary to correct a substantial injustice, and that the mere fact that error may be detected in a judgment below is ordinarily not sufficient to justify the granting of leave. He cites the dicta of Justice Keane in *Pickering v McArthur* [2005] QCA 294 at [3]. See also *Tsigounis v Medical Board of Queensland* [2006] QCA 295 at [15]. The correction of the error of law must result in the correction of a substantial injustice.

[17] Mr Forrest submits that in the context of an appeal about $4300, and in which the findings of wrongdoing by the applicant are unchallenged, the applicant can hardly make out a plausible case that it has suffered such an injustice as would justify the grant of leave, assuming that the learned judge erred in his application of law. To these submissions can be added the observation that there has been no evidence led to suggest that the judgment itself has led to any effect at all upon the position of the applicant except for the fact that it must pay the plaintiff a small sum of money.

[18] The propositions of law advanced by Dr Greinke may be important and interesting. I am prepared to assume for the purposes of this proceeding that he has demonstrated an arguable error of law in the way that he has laid out in his written outline. However, it is not necessary to stop to consider whether or not the

approach of Judge Barlow QC was right or wrong. If he was wrong, this is not the vehicle in which it would be just for the Court of Appeal to consider these matters.

[19] In my respectful opinion this is a hopeless application. The applicant simply failed to deal at all with the essential criteria for the granting of leave. There is no evidence and no grounds upon which I can infer that the applicant has suffered any injustice by reason of the orders sought to be appealed, much less a substantial injustice. The written outlines of argument submitted for the applicant makes no submission about that crucial issue. The fact that this relatively minor sum of money must be paid pursuant to the terms of a judgment that was arrived at in error is, obviously, insufficient, in terms of the authorities that I have referred to, to constitute either an injustice or a substantial injustice.

[20] Apart from the application of settled and elementary legal principles to a consideration about an application for leave to appeal, one has to approach an application such as this with a certain minimum standard of common sense. Because there is no certainty in life, it cannot be said that a case cannot arise in which an erroneous order requiring a litigant to pay a sum of $4,300 will cause substantial injustice.

[21] However, no attempt has been made in this case to consider the consequences of applying for leave to appeal such a judgment, in circumstances in which it is plain that the very cost of this application itself will probably substantially exceed that sum, assuming the lawyers involved are charging their respective clients, and that the full engagement of the Court of Appeal upon the thorny issues identified by and raised by Dr Greinke will result in much more expense than that.

[22] In my respectful opinion, the sheer injustice of this application should be remarked upon. It cannot be right to expose a successful plaintiff, who has succeeded in proving that the applicant has breached contractual and other obligations, findings that have not been disputed, to the cost of conducting a very costly application for leave to appeal in the hope of running a very costly appeal, which if successful will settle some legal theories, but which will expose the plaintiff, who is the respondent, to a massive burden of costs, and will also expose the applicants themselves to a large cost burden in respect of irrecoverable components of costs, assuming again that the lawyers involved for the parties are charging and are not running the matter for free.

[23] It is impossible for me to understand how the applicant can benefit from the proposed and desired expansion of legal knowledge that such an appeal might or might not bring. The applicant has failed to demonstrate grounds to justify leave to appeal any of the orders that have been made. I refuse the application for leave with costs.