IN THE SUPREME COURT OF QUEENSLAND No. 743 of 1989

No. 118 of 1989

Before Mr Justice McPherson S.P.J.

BETWEEN:

MICHAEL GRAHAM GORE (Plaintiff) Appellant

AND:

OCTAHIM WISE LIMITED (Defendant) Respondent

JUDGMENT - McPHERSON S.P.J.

Delivered the Seventh day of May, 1991

**CATCHWORDS**

**Judgments and orders - Ex parte order - Passed and entered - Order vacated - Whether power to do so.**

Counsel: P.A. Keane Q.C. with G. Newton for the Appellant Plaintiff
L. Bowden for the Respondent Defendant

Solicitors: Clarke & Kann for the Appellant Plaintiff
Feez Ruthning for the Respondent Defendant

Hearing Date: 2 May, 1991

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This is an appeal from an order made in an action in this Court in which the plaintiff claims declaratory relief against the defendant, which is a company resident in Hong Kong. The declarations claimed would, if granted, have the effect of determining that the plaintiff is not indebted to the defendant or liable on certain instruments that the defendant says are promissory notes. The defendant has counter claimed for sums alleged to be due under those instruments. It appears from the material that, in the course of proceedings in the action to date, much time and effort has been expended by the plaintiff, although without success, in attempting to bring within the jurisdiction another Hong Kong company, Cheoy Lee Shipyards Limited, and three individuals who are interested in it, who are also residents of Hong Kong.

Having been frustrated in these efforts, the plaintiff adopted a different approach. On 16 November 1990 he obtained from the Senior Master an order (the first order) that a Request be addressed to the Judges of the High Court of Hong Kong to examine the three individuals in that colony and that they produce at the examination a substantial number of identified documents supposed to be in their possession relating to matters in issue in the action in this Court.

The Request was signed by the Chief Justice and sealed on 14 December 1990, and was despatched to Hong Kong. It has been acted upon by the High Court there, and a period of some two weeks has been set aside in the sittings of that Court later in the month to enable those individuals to be examined and their evidence taken.

The plaintiff having secured this forensic advantage, the defendant offered to make the documents available in Queensland. In consequence, on 23 April 1991 the Senior Master “vacated” his earlier order made on 16 November 1990 that the Request issue for the three individuals to be

examined in Hong Kong. It is against this order (the second order) that the plaintiff now appeals.

The order of 16 November 1990 that the Request issue was made under s.4 of the Evidence on Commission Act 1988 (Qld.). It enables a court in Queensland, on the application of a party to a civil proceeding before the court, to make an order for the examination of a person at any place outside Australia. Section 6(1) of the Act provides that such an application : (a) need not be served on any person; and (b) may be heard and dealt with ex parte. By force of s.6(1) other persons are to be excluded from the court. The first order in this instance was made on application ex parte in that way.

The plaintiff in this appeal against the order (the second order) vacating the first order complains that the second order was made in circumstances in which there was no application before the Master to vacate the first order; and that the plaintiff was given no opportunity to be heard before the second order was made. It is evident that the application, if any, was made orally by the defendant on an occasion on which the Master was reviewing the progress of the action in the exercise of jurisdiction under the Commercial Cause Act 1910-1972. However, I am satisfied that the provisions of s.4 of the Act, on which reliance was placed before me, do not authorise the course adopted in the circumstances that prevailed here. It has not been contended before me that it is not competent to appeal from the second order.

The first order was, as I have said, an order obtained by the plaintiff ex parte in accordance with s.6(1) of the Evidence on Commission Act. The order was formally passed and entered preparatory to sealing and issuing the Request on 14 December 1990. The question, therefore, is whether in those circumstances such an order may be "vacated" by the person who made it and without the need for an appeal.

It is well settled that once a judgment or order is formally passed under O.88, r.12, it may as a general rule

not be set aside or amended except on appeal : see Bailey v. Marinoff (1971) 125 C.L.R. 529; see also Re Harrison's Settled Share [1955] Ch. 260, 276-277; Carroll v. Price [1960] V.R. 651, 657-658. As those decisions show, a different state of affairs prevails before the judgment is passed and entered. In addition, there are various specific exceptions to the general rule as I have stated it. Judgments in default of appearance are one instance. The powers conferred by O.32, r.12 to correct clerical mistakes and omissions afford another exception. The ambit of this "slip" rule is quite narrowly circumscribed : see Arnett v. Holloway [1960] V.R. 22, and it plainly has no application in a case like this where the whole order has been vacated. Another instance, peculiar to Queensland practice, is provided by O.45, r.1, which enables an order to be altered or replaced when facts arise afterwards that entitle the party against whom the order was made to be relieved from it : see K.G.K. Constructions Pty. Ltd. v. East Coast Earthmoving Pty. Ltd. [1985] 2 Qd.R. 13. The provisions of this rule could not have been invoked here because the form of relief envisaged by O.45, r.1 is available only to the person "against whom the order is given or made". The persons answering that description were the three individuals ordered to be examined in Hong Kong; and they did not apply to vacate the order, or for relief from it.

There are decisions that suggest the existence of other possible exceptions to the settled rule. The only one relevant here is that the order in question (the first order) was made ex parte. In Owners of S.S. Kalibia v. Wilson (1910) 11 C.L.R. 689, 694, Griffith C.J. accepted that an order made ex parte could be set aside on the application of a party affected by it. His Honour's remarks were considered by the Full Court in Farrell v. Delaney (1952) 52 S.R. (N.S.W.) 236, 237-238, where Street C.J. was disposed to regard the power to set aside as confined to circumstances in which additional matters are presented showing that the order ought not to have been made in the first place or that it should now be discharged; or that there had been suppression or misstatement of facts on the

hearing of the ex parte application. His Honour pointed out that, apart from circumstances like those, there is no power in one judge to entertain an appeal from the order of another.

A fortiori there is no power in a judge to entertain an appeal from his own order. The extensive power formerly exercised in Chancery of rehearing proceedings de novo after a decree was made but before it was enrolled was one of the abuses that was held not to have survived the Judicature Act : see Re St. Nazaire Co. (1879) 12 Ch.D. 88. By s.12 of The Supreme Court Act of 1874 a single Judge of the Supreme Court sitting alone was invested with power to hear and dispose of any unopposed or ex parte motions; but that power refers only to motions that may in the first instance properly be made ex parte, or that are not opposed after proper notice has been given, and not motions to set aside orders so made. Except where statute or rules of practice otherwise provide, a party to proceedings in the Supreme Court is no more entitled to apply ex parte and so circumvent the rules of natural justice than is a party to proceedings in any other court or tribunal : cf. Commercial Banking Company of Sydney Pty. Ltd. v. George Hudson Pty. Ltd. (1973) 131 C.L.R. 605, 618. In any event, ever since the enactment of The Supreme Court Act of 1892, a Judge in Queensland has been precluded from sitting upon the hearing of an appeal from a judgment or order made by himself : see s.4 of that Act. The expression "appeal from a Judge" is defined in s.2 to include "a motion or application to set aside or vary any order made or judgment pronounced by himself" : cf. Re Will of Adams (1893) 5 Q.L.J. 1.

Order 45, r.1 represents a particular exception to the prohibition imposed by s.4, read with s.2, of the Act of 1892. So does the case of an order that has not yet been passed and entered. For reasons I have given, the present case does not fall within either of those exceptions. Purely procedural directions may fairly be considered another form of exception : cf. Wilkshire v. Commonwealth (1976) 79 A.L.R. 325. The first order with which we are

concerned here is, however, plainly not of that character. It involved much more than a mere direction as to practice or pleading; and having been formally drawn and entered, and extensively acted upon as it was in this case, it was not capable of being recalled without affording the plaintiff a proper opportunity of opposing that course. It was not an order that expressly or by its terms contemplated that it might be set aside by either party, or that reserved the right to apply in that behalf; and it was not the party or any of the parties against whom it was made, or who was affected by it, that sought to have it set aside.

In these circumstances, the second order made on 23 April 1991 vacating the first order made on 16 November 1990 cannot stand. The appeal should be allowed with costs and the order made on 23 April 1991 should be set aside.