# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Campbell & Anor v Bleakley* [2007] QSC 351 |
| PARTIES: | **ROSS LESLIE CAMPBELL**<br>(first plaintiff)<br><br>AND<br><br>**HELEN LEANNE CAMPBELL**<br>(second plaintiff)<br><br>V<br><br>**DR DAVID BLEAKLEY**<br>(defendant) |
| FILE NO/S: | BS 10612 of 2004 |
| DIVISION: | Trial |
| PROCEEDING: | Application for extension of time |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 4 December 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 August 2007 |
| JUDGE: | Daubney J |
| ORDER: | **1. That the period of limitation for the plaintiffs' actions against the defendant for damages for personal injuries sustained as a result of surgery on or about 13 June 1999 be extended, pursuant to s 31(2) of the *Limitation of Action Act 1974* (Qld), to 3 December 2004.**<br>**2. The costs of and incidental to this application be reserved.** |
| CATCHWORDS: | LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF A DECISIVE CHARACTER - where first plaintiff suffered injury from surgery performed by defendant – whether material fact of decisive character – whether within means of knowledge of the first plaintiff - whether limitation period should be extended<br><br>*Health Rights Commission Act 1991* (Qld), s 91<br>*Limitation of Actions Act 1974* (Qld), s 30(1), s 31(2)<br>*Personal Injuries Proceedings Act 2002* (Qld), s 43(1) |

*Dick v University of Queensland* [2000] 2 Qd R 476, applied.
*Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, cited.

COUNSEL: D Reid for the plaintiffs.
G Diehm for the defendant.

SOLICITORS: Murphy Schmidt for the plaintiffs.
Blake Dawson Waldron for the defendant.

[1] **DAUBNEY J:** The plaintiffs have applied for an order that the period of limitation for their action against the defendant for damages for personal injuries sustained as a result of surgery performed by the defendant on the first plaintiff on 13 June 1999 be extended pursuant to s 31(2) of the *Limitation of Actions Act 1974* (Qld) ('LAA').

[2] On 3 December 2004, the plaintiffs filed this proceeding, by which the first plaintiff claims damages for personal injuries suffered as a result of the negligence and/or breach of contract of the defendant, and the second plaintiff claims damages for loss of consortium and loss of servitium.

[3] On the first plaintiff's evidence, in 1998 and 1999 he suffered from episodes of significant chest pain, and consulted his then general practitioner, Dr Phillips, who arranged a series of tests which indicated that there was no problem with the first plaintiff's heart. Dr Phillips then referred the first plaintiff to the defendant, who was a general surgeon. The first plaintiff saw the defendant, who recommended that the first plaintiff undergo an endoscopy and gascroscopy. The first plaintiff says that after these procedures were performed, the defendant informed him that he had a gastric ulcer, reflux and an hiatus hernia.

[4] On 25 June 1999, the first plaintiff saw Dr Phillips again, who prescribed Zoton to treat his condition.

[5] On 1 July 1999, the first plaintiff saw the defendant again. The first plaintiff says the following in relation to this consultation:

> On 1 July 1999, I returned to see Dr Bleakley. He explained to me why I had reflux and said that I required surgery known as a fundoplication because I had a flap in my stomach which was "lazy". He explained the procedure to me by saying that he would wrap a bit of muscle around the oesophagus which would have the effect of stopping food from coming back up. He did not advise me that continuing the use of Zoton, or of increasing the dosage, was a possible course of action to treat my condition. If he had done so I would have attempted to treat my condition by the use of Zoton or other drugs, rather than by undergoing surgery.

[6] The fundoplication was performed on 13 July 1999, and the first plaintiff remained in hospital for some 10 days thereafter. On 24 August 1999, the defendant then performed a gastroscopy on the first plaintiff, and is reported to have said that he saw food in the first plaintiff's stomach. Subsequently, the first plaintiff was informed by the defendant that the fact that the stomach was not completely empty indicated either that the vagus nerve was damaged during the fundoplication, or it may never have worked. The first plaintiff saw the defendant on another four occasions in late 1999 and early 2000. At a consultation on 31 July 2000, the

defendant recommended that the first plaintiff undergo a vagotomy and pyloroplasty. These procedures were performed by the defendant on 7 September 2000 and the first plaintiff was in hospital for some seven days. On 11 September 2000, the defendant performed another gastroscopy on the first plaintiff. The first plaintiff says that thereafter he became extremely ill after eating. He was diagnosed with 'Dumping Syndrome' by the defendant. This diagnosis was subsequently confirmed by a gastroenterologist to whom the plaintiff was referred by his general practitioner for a second opinion. This gastroenterologist, Dr Smithers, described Dumping Syndrome to the first plaintiff and said that it was not an uncommon outcome where the vagus nerve was cut.

[7] The first plaintiff says that, as a result of the 'severely debilitating condition' that he was in, he first consulted solicitors in August 2001 'about the possibility of an action against [the defendant] arising from his performance of the vagotomy and pyloroplasty'. The first plaintiff further deposes:

> At no stage had I ever been told by Dr Bleakley, or any other doctor, that my symptoms may be related to the initial surgery performed in 1999. I always considered the cause of my symptoms was the vagotomy and pyloroplasty performed in September 2000. At no time did I have any reason to think that the decision to operate in 1999 may not have been justified.

[8] It appears that the solicitors retained by the plaintiff at that time made a complaint on his behalf to the Health Rights Commission ('HRC') on about 31 August 2001. He retained his current solicitors in September 2002.

[9] In June 2003, the plaintiffs' solicitors sent a notice of claim in Form 2 under the *Personal Injuries Proceedings Act 2002* (Qld) ('PIPA') to the defendant (by his solicitors). The incident notified by this notice of claim was said to concern the vagotomy and pyloroplasty performed on 7 September 2000. Under paragraph 14 of the notice of claim, the plaintiff articulated the reasons why he believed that the defendant caused the accident as being that the defendant:

> 1. Failed to inform/advise me of conservative alternatives to Vagotomy and Pyloroplasty for treatment of my condition. I am not in a position to provide the specific details on alternative treatments until an expert report is obtained;
>
> 2. Failed to warn me of the risks associated with the abovementioned surgery which included but were not limited to Dumping Syndrome and other symptoms which I now suffer;
>
> 3. Failed to perform the procedure with due care and skill resulting in the condition I now suffer. I am not in a position to provide the specific details regarding the performance of the procedure until an expert report is obtained.

[10] On 28 August 2003, the plaintiffs' solicitors wrote to the defendant's solicitors saying:

> A Part 2 notice of claim for Ross Campbell is in the process of being executed and we expect to be able to forward it to you shortly, pursuant to s 9(3A) of the *Personal Injuries Proceedings Act* 2002 ('the Act').

> As our clients will not be in a position to comply with the remaining procedural requirements of Part 1 of Chapter 2 of the Act prior to the expiration of the limitation date in September 2003, we intend to file an application pursuant to s 43(1) of the Act, and would be obliged if your client would sign a consent order pursuant to Rule 666 of the *Uniform Civil Procedure Rules* 1999, so the proceedings may be instituted without incurring the costs of attending an oral hearing.
>
> We confirm our previous advice that these proceedings will be stayed until the determination of Ross Campbell's claim is made in the Health Rights Commission.

[11] Copies of the draft originating application for leave under s 43(1) of PIPA and of the affidavit in support of that application were sent to the defendant's solicitors with that letter.

[12] On 4 September 2003, the defendant's solicitors responded saying:

> We are unable to recommend to our client that they consent to any order until such time as your client particularizes more fully the medical treatment which they allege resulted in personal injuries for which they intend to bring a claim against Dr Bleakley.
>
> The description of incident contained in the notice of claim for damages issued on behalf of your clients, which is annexed to the affidavit of your Mr Chambers, refers to an alleged incident involving the performance of a vagotomy and pyloroplasty which was performed on the 7 December 2000 by Dr Bleakley.
>
> However, two other procedures performed by Dr Bleakley on your client as well as several consultations which took place between Dr Bleakley and your client, all of which occurred prior to 7 September 2000, are also referred to in the notice of claim.
>
> Neither your proposed application, proposed affidavit nor the proposed draft orders definitively state what aspects of the medical treatment provided by Dr Bleakley to your client are likely to form the basis of the proceedings your client intend to file in the court. Whilst it may be that any cause of action your clients may have against Dr Bleakley arising out of the procedure which was performed on 7 September 2000 is not statute barred. We are not prepared to recommend to our client that they consent to any order which may have the effect of waiving any limitation defence that our client could raise in the defence of any other cause of action your clients may have against Dr Bleakley.
>
> You have not annexed to your affidavit the proposed pleading you intend to file if leave, as you seek it, is granted. Provision of the proposed pleading would be appropriate and would enable us to properly advise our client as to whether it should consent to the orders that you seek. Alternatively, if your client was to confirm that any proceeding that it intends to bring against Dr Bleakley would be limited to a claim for damages for personal injuries arising out of a procedure which was performed on 7 September 2000 then we would be willing to recommend to our client that it would be appropriate that you have leave to issue that proceeding. However, as we

> have already stated we cannot obtain our client's instructions until your clients' position is clarified.

[13] The plaintiff's solicitors responded by a facsimile dated 4 September 2003, in which they said:

> We are firmly of the view that it could not possibly be the case that being granted leave to proceed pursuant to s 43(1) of the *Personal Injuries Proceedings Act* 2002 would result in your client waiving a limitation defence. We consider that if your client wishes to rely on a limitation date, they are entitled to plead so in their defence.
>
> In any event, we cannot limit our clients' potential actions for procedures carried out prior to 7 September 2000, primarily because the medical evidence has not yet been obtained.
>
> However, if your client is genuinely of the view that there is some risk of him being seen to waive his rights pursuant to the *Limitation of Actions Act* 1974, we suggest a further order be included in the draft as follows:
>
> *2. The defendant has liberty to plead such defences as may be available to him pursuant to the Limitation of Actions Act 1974.*
>
> We enclose a copy of the statement of claim we intend to file.
>
> As you are quite well aware from the correspondence between our office and the Health Rights Commission, the expert report is still yet to be obtained. We are therefore not in a position to particularize the allegations of negligence in the pleading, and it would be inappropriate of us to do so.

[14] By a letter dated 4 September 2003 but sent the following day, the defendant's solicitors replied, saying:

> Your clients' notice of claim for damages says the incident which is alleged to have caused the personal injuries about which your client complains occurred on 7 September 2000. You have provided some particulars of negligence in the answer to question 11 of the notice of claim for that incident. However, the notice of claim for damages also refers to a number of other procedures and a number of other consultations which took place between Dr Bleakley and your client. Whilst your client has identified those prior procedures and consultations as being circumstances pre-dating the incident, you state in your letter of 4 September 2003 that you cannot exclude the possibility that your client has potential actions for procedures performed prior to September 2000. You have not provided any particulars whatsoever of how you say any procedure or consultation which occurred prior to September 2000 gives rise to any cause of action against our client.
> …
> From the information that is available to you, you should be able to make a reasonable assessment as to whether your client has a cause of action in respect of any incident occurring on any date other than 7 September 2000. We would be willing to recommended to our client that they consent to the orders that you seek if, in addition to the draft orders currently proposed by you (including the order with respect to limitation defences as included in your facsimile of 4 September 2003), the first order is amended as follows:

> The first and second applicant be granted leave to bring proceedings against the respondent pursuant to s 43(1) of the *Personal Injuries Proceedings Act* 2002 (the Act) in respect of injuries sustained as a result of medical treatment provided by the respondent to the plaintiff on or about 13 July 1999, 24 August 1999, 3 August 2000 and 7 September 2000, despite non-compliance with the requirements of Part 1 of Chapter 2 of the Act.
>
> We also require your clients to give notices of claim in respect of any cause of action they propose to pursue for damages arising out of treatment provided on the dates specified above.

[15] The parties then entered a consent order for the granting of leave to bring proceedings pursuant to s 43(1) of PIPA on 8 September 2003.

[16] On 19 May 2004, the plaintiffs' solicitors received a copy of a report which had been provided to the HRC by Professor Hunt (the reference in Ms Boal's affidavit to the HRC having obtained that report in 1994 is clearly a typographical error). By reason of the operation of s 91 of the *Health Rights Commission Act 1991* (Qld), Professor Hunt's report was and is privileged and not able to be admitted in evidence in any application to the court. It is clear, however, that this report was the first information received by the plaintiffs about the prospect of the defendant having acted negligently in 1999 by not advising the first plaintiff about ongoing treatment by medication rather than the surgical intervention which was performed. Ms Boal of the plaintiffs' solicitors says that as a result of that report, her firm 'caused a claim and a statement of claim to be filed in these proceedings relating to the treatment provided by the defendant in July 1999'. In the statement of claim, which was filed on 3 December 2004, the operation performed on 13 July 1999 is called 'the first procedure'. The negligence alleged in connection with the first procedure is pleaded in the following terms:

> 16. The cause of the injury was the negligence of the Defendant, and/or the Defendant's breach of the implied terms of the contract with the First Plaintiff.
>
> ***Particulars***
>
> (a) Failed to advise of conservative alternatives for treatment of the First Plaintiff's condition, including but not limited to treatment with proton pump inhibitors for a period of at least one to two months or in the alternative, a long term aggressive trial with tablets or other forms of conservative therapy prior to the performance of the first procedure.
>
> (b) Failed to treat the First Plaintiff in accordance with these conservative alternatives prior to the first procedure;
>
> (c) Failed to perform the first procedure with due care and skill resulting in the First Plaintiff suffering from complications requiring further surgery and ultimately "Dumping Syndrome";
>
> (d) Failed to warn of the risks associated with the first procedure which included but were not limited to risks associated with surgery and possible side effects, risks associated with

> permanent vagal nerve damage, or in the alternative risks associated with partial vegal nerve damage;
>
> (e) Failed to warn of the significant risk that, as a result of the first procedure, the First Plaintiff's condition might worsen, and of the possible extent thereof, including but not limited to the risk that further surgery may be required;

[17] After service of the claim and statement of claim, the defendant's solicitors took the point that the plaintiffs' claims in relation to the first proceeding were outside the time limits imposed by PIPA and the LAA.

[18] The plaintiffs have since obtained a report dated 30 August 2006 for the purposes of these proceedings from Dr Kevin Hourigan, gastroenterologist, which includes the following:

> 2. Trial of this medication regimen for two and a half weeks was too brief a period of time to be regarded as "adequate" and there is no record that an account was taken of dietary restriction, reduction in alcohol intake known to be heavy, exposure to ulcerogenic drugs such as Voltaren which had been prescribed in the past, a doubling of the dose of Zoton if necessary, and the fundamentals of nocturnal anti-reflux regimen of fasting for three hours before retiring at night to sleep on the left-hand side propped up on pillows. A trial period should be over three months as a minimum.
>
> …
>
> 5. Medical management of gastroparesis in this case in 1999 should have included consideration of low-residue diet, reduction in alcohol intake, simple tests to exclude diabetes or tendency to diabetes, increase in dosage of Prepulsid (which was still available at that time) and trials of other pro-kinetics. On the evidence available in this case, surgical remedy would be low priority and last resort.

[19] The present application is made pursuant to s 31(2) of the LAA, which provides:

> Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court –
>
> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
>
> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;
>
> the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly.

[20] The plaintiffs submit that it was only during 2004, within the 12 months prior to the filing of this proceeding, that they first became aware of the fact that the defendant may have been negligent in relation to advising on and performing the fundoplication in July 1999, and that before becoming so aware in 2004, and in

circumstances where neither the defendant nor any other doctor had raised the possibility that the defendant had been negligent in recommending and performing that surgery, the plaintiffs had no reason to believe the respondent was so negligent.

[21] In considering an application under s 31(2), a step by step approach to the legislation is required:[1]

(a) to enquire whether the facts of which the plaintiffs were unaware were material facts;

(b) if so to ascertain whether they were material facts of a decisive character; and

(c) if so to ascertain whether those facts were within the means of knowledge of the plaintiffs before the specified date.

[22] The following matters are not in issue:

(a) that the fact on which the plaintiffs rely is a 'material fact' within the inclusive definition of that term in s 30(1)(a);

(b) that it was a 'material fact of a decisive character' within the meaning of that term provided for in s 30(1)(b); and

(c) that there is evidence to establish that the right of action in relation to the alleged negligence in 1999 apart from the defence founded on the expiration of the period of limitation, namely the report of Dr Harrigan, thus satisfying the requirement of s 31(2)(b).

[23] The only issue between the parties on this application was whether this material fact of a decisive character was not within the means of knowledge of these plaintiffs until a date after the commencement of the year last preceding the expiration of the period of limitation for the action.

[24] Section 30(1)(c) provides that:

> A fact is not within the means of knowledge of a person at a particular time if, but only if –
>
> (i) The person does not know the fact at that time; and
>
> (ii) As far as the fact is able to be found out by the person – the person has taken all reasonable steps to find out the fact before that time.

[25] The relevant material fact in the present case is clearly not that the male plaintiff was feeling ill or suffering symptoms after the operation in 1999; rather, the relevant material facts are those which (it will be alleged) give rise to a conclusion that the suffering after the operation in 1999 was caused by the negligence of the defendant. In this case, that negligence is said to have been constituted, in essence, by the failure to advise of the desirability of continuing on medication for an extended period, or increasing the dosage of medication, and instead recommending and performing the fundoplication surgery. These material facts first came to the

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1 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 256 (Dawson J).

knowledge of the male applicant when his solicitors received, in May 2004, the expert report prepared for the HRC by Professor Hunt.

[26] The defendant contends that these material facts were within the means of knowledge of the plaintiffs on a date more than one year prior to the commencement of proceedings in December 2004.

[27] In terms of s 30(1)(c), it is clear on the material before me that the particular material facts were not known to the plaintiffs prior to the receipt of Professor Hunt's report. As I have already mentioned, it is not to the point that he knew that he was 'crook'[2] after the operation. The requirement in s 30(1)(c) is therefore satisfied in the present case.

[28] The central question, therefore, is whether the requirement of s 30(1)(c)(ii) is satisfied, namely 'as far as the fact is able to be found out by [the applicant] – [the applicant] has taken all reasonable steps to find out the fact before that time'.

[29] In *Dick v University of Queensland*,[3] Thomas JA said (at 486-487):

> [30] As to the third step, the question was whether the existence of an alternative safe system of work was "within the means of knowledge" of the plaintiff during the relevant period. His Honour observed that it is not enough that the plaintiff did not know; it is a question of his means of knowledge. His Honour then emphasised that it is the means of knowledge *of the plaintiff* which are relevant and not the means of knowledge of a hypothetical reasonable man, citing the remarks of Lord Reid in *Smith v Central Asbestos Co*. such as "the plaintiff must have taken all such action as it was reasonable *for him* to take to find out" and "… this test is subjective. We are not concerned with 'the reasonable man'". Dawson J. observed that s. 58(2) [Qld s.30(1)(c)] unlike s. 57(1)(c) [Qld s. 3091)9b)] "makes no assumption that appropriate advice was received when it was sought. What is important is the means of knowledge which were reasonably available to the appellant. And that must mean available in a practical and not a theoretical sense.

[30] His Honour said further:

> [34] In making a finding of fact on this important question, the reasonableness of the steps taken by the claimant needs to be considered, and of course a claimant will not succeed if he or she has unreasonably delayed in obtaining the necessary advice or information. However, it seems to me, with respect, that the approach of Dawson J. with whom Brennan J. agreed, represents the correct method. I note that Murphy A.C.J.'s judgment is at least consistent with that of Dawson J. (with whom Brennan J. agreed) and is inconsistent with the approach taken by Wilson and Deane JJ. The gathering of the necessary information and awareness which will make it reasonable for a claimant to bring an action may well involve progressive stages of awareness. Such situations were considered by the Full Court in *Neilson v. Peters*

[2] As the first plaintiff described his condition under cross-examination.
[3] [2000] 2 Qd R 476.

> *Ship Repair Pty Ltd* and *Randel v Brisbane City Council*. As those cases indicate, the question whether a fact is not within the means of knowledge of a person at a particular time is still a question of fact. In *Neilson* I observed "it may be said of s. 30(d)(ii) that not many 'steps to ascertain the fact' can reasonably be expected of a client when he is in ignorance of the need to ascertain it".

[31] The final observation by Thomas JA is, I think, apposite to the present case. To adapt a phrase which has been added to popular culture in another context, the material facts now relied on by the plaintiffs were 'unknown unknowns' until the report from Professor Hunt was received, in the context of the HRC proceedings, in May 2004.

[32] As is clear from the authorities already cited, the enquiry for present purposes is into the means of knowledge of the plaintiffs (especially the male plaintiff himself), not the means of knowledge of a hypothetical reasonable person.

[33] True it is that in correspondence between the parties' solicitors in September 2003, the plaintiffs' solicitors had adverted to the possibility of the male plaintiff having a claim arising out of 'medical treatment provided by the respondent to the first applicant on or about 13 July 1999 …' (that being one of the orders sought for leave to bring proceedings pursuant to s 43(1) of PIPA). It is not suggested, however, that the plaintiffs' solicitors were doing anything other than seeking to protect their clients' interests in relation to the possibility of a claim arising out of the 1999 procedure, being a claim which could not be then articulated because, as the applicants' solicitors properly conceded in the letter referred to in para [13] above, the medical evidence had not yet been obtained.

[34] Ultimately, the question for determination is one as to the reasonableness of the steps taken by the plaintiffs, noting that they will not succeed if they have unreasonably delayed in obtaining the necessary advice or information. The steps taken by them in this case comprised putting the issue of potential claims against the defendant in the hands of their solicitors and, through those solicitors, the making of a complaint to the HRC in September 2002.

[35] In oral submissions, counsel for the defendant focused particularly on a failure on the part of the plaintiffs (or those acting for them) to obtain the records of treating practitioners, and a failure to obtain expert evidence prior to the receipt of the report of Professor Hunt from the HRC in 2004.

[36] I am not persuaded, however, that, on the facts of this case, the applicants failed to take all reasonable steps to find out the relevant material facts before the copy of Professor Hunt's report was received in May 2004. It is not at all clear on the material before me that access to treating doctors' records would have illuminated the material facts now relied on, and I think it was reasonable, in all the circumstances, for the plaintiffs to ventilate their concerns initially by complaint to the HRC.

[37] In *Dick v University of Queensland*,[4] Thomas JA said:

> [36] In cases where a potential claimant lacks a material fact, and reasonably needs the help of a solicitor or someone else to obtain it, some further time may reasonably elapse before it should be held that such facts are within the claimant's means of knowledge. Such time will include the time which would reasonably lapse if the claimant, taking all reasonable steps to do so, consults solicitors or other persons, and those solicitors or those other persons undertake the necessary enquiries to ascertain the necessary additional facts to show whether or not there is a worthwhile cause of action.

[38] *A fortiori* in the present case in which, as I have said, the material fact which emerged from Professor Hunt's report in May 2004 was an 'unknown unknown' so far as the male plaintiff himself was concerned. I consider that the conduct of the plaintiffs in retaining solicitors and pursuing complaints through the HRC was, in the circumstances of this case, appropriate and reasonable.

[39] Accordingly, I am satisfied that the material facts now relied on to found the allegations of negligence against the defendant were not within the means of knowledge of the plaintiffs until a date after the commencement of the year last preceding the year of expiration of the period of limitation for the action arising from the 1999 treatment, and therefore order:

(a) That the period of limitation for the plaintiffs' actions against the defendant for damages for personal injuries sustained as a result of surgery on or about 13 June 1999 be extended, pursuant to s 31(2) of the *Limitation of Action Act 1974* (Qld), to 3 December 2004; and

(b) The costs of and incidental to this application be reserved.

[4] [2000] 2 Qd R 476.