SUPREME COURT OF QUEENSLAND

CITATION:	*LeMass v DeVere & Anor (No 3)* [2010] QSC 268
PARTIES:	**WILLIAM LeMASS as trustee of THE LeMASS LEGAL TRUST** (plaintiff) **v** **MICHAEL ROBERT DeVERE** (first defendant) and **DeVERE LEGAL PTY LTD trading as DeVERE LAWYERS QLD, BN20381992 (in liquidation)** (second defendant)
FILE NO:	BS 4005 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2010
JUDGE:	Daubney J

ORDERS:

1. **Pursuant to *UCPR* r 7, the time for compliance by the first defendant with the order of 12 January 2010 be extended to 16 March 2010.**

2. **The first defendant pay the plaintiff's costs of and incidental to the application for extension of time, such costs to be assessed on the indemnity basis.**

3. **The plaintiff's application for interlocutory judgment filed 25 March 2010 is dismissed, with each party to bear its own costs.**

4. **The plaintiff's application for the first defendant to be punished for contempt filed 25 March 2010 is dismissed, with each party to bear its own costs.**

CATCHWORDS:	PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where first defendant failed to comply with an order of the Court – where first defendant brought an application for extension of time for compliance with Court order – where application granted – where plaintiff seeks costs on the indemnity basis – whether costs should be ordered on the indemnity basis
	PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – GENERALLY - where first defendant failed to comply with an order of the Court – where plaintiff brought an application for interlocutory judgment and an application for punishment for contempt – where first defendant submitted these steps were unreasonable – where plaintiff granted extension of time making applications moot – where both parties seek their costs of the applications on an indemnity basis – whether each party should have the costs of the applications – whether costs should be ordered on the indemnity basis
	Uniform Civil Procedure Rules 1999 (Qld), r 7
	LeMass v DeVere & Anor (No. 2) [2010] QSC 140, cited
COUNSEL:	A Morris QC with V G Brennan for the plaintiff G Newton SC with M Trim for the first defendant
SOLICITORS:	Carter Capner Lawyers for the plaintiff Stockwin deVere Lawyers for the first defendant

[1] On 6 May 2010, I delivered judgment[1] on the first defendant's application for an extension of time to comply with the order made by me on 12 January 2010. I indicated that I intended making an order extending time for compliance, subject to hearing further from the parties on the question of costs of this and other applications brought by the plaintiff as a consequence of the first defendant's non-compliance.

[2] At the first defendant's request, that costs argument was adjourned, and was heard by me on 14 May 2010. At the conclusion of that argument, it was indicated that the parties would be seeking to mediate at least the remaining costs dispute, if not the whole dispute between them. I have now been informed, however, that such mediation was unsuccessful, and accordingly it is necessary for me to adjudicate on the costs arguments.

[3] The relevant background to the matter is set out in my previous judgment.[2] As is noted in that judgment, the interlocutory applications which had been filed were:

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1 [2010] QSC 140.
2 Ibid.

(a) An application by the plaintiff for interlocutory judgment against the first defendant, with damages to be assessed or an account of profits taken, this application being premised on the first defendant's failure to comply with the order of 12 January 2010;

(b) An application by the plaintiff for the first defendant to be punished for contempt for his alleged failure to comply with the order of 12 January 2010;

(c) An application by the first defendant for an extension of time for compliance with the order of 12 January 2010.

[4] In view of my express intimation of my intention to order an extension of time for compliance by the first defendant with the order of 12 January 2010, the other two applications have become redundant.

[5] The plaintiff has sought his costs of and incidental to each of those applications, and in each case has sought such costs on an indemnity basis.

[6] The first defendant not only resists those applications by the plaintiff, but, for his part, seeks his costs of each of those applications, also on an indemnity basis.

The first defendant's application for an extension of time

[7] It is simply unarguable that the first defendant failed to comply with the order of 12 January 2010. Much material was adverted to concerning the work undertaken by the first defendant's solicitor, both before and after the due date for compliance with the terms of that order. I do not need to record again the considerations which persuaded me to exercise my discretion in favour of granting the extension sought, but will repeat the following passage from the judgment I gave on 6 May 2010:

> "[29] If the first defendant had on (or, preferably, prior to) 26 February 2010 applied to me for an extension of time, and provided a good explanation for the necessity for the extension, I would almost certainly have granted it (assuming no insuperable prejudice to the plaintiff). The present circumstances arise, regrettably, because of a failure to appreciate the necessity for these formalities to be attended to, not merely as matters of form but by reason, quite simply, of the fact that non-compliance with a Court order is a serious matter."

[8] Given that the application with which I was dealing was one by the first defendant for relief in circumstances of his own non-compliance with a court order, it is, in my view, clear that it is also appropriate for the first defendant to pay the costs associated with the obtaining of such an extension of time. This is also, in my opinion, a case in which it is appropriate for those costs to be ordered to be paid on the indemnity basis. I highlighted in my previous judgment, including in the passage just quoted, the seriousness of, and consequences which flow from, non-compliance with court orders, particularly those directed to efficient case management. The necessity to bring the application for an extension of time arose

out of circumstances entirely of the first defendant's own making, and included the failure to meet the plaintiff's effective agreement to extend the time for compliance with the order to 26 February 2010 (being the extension requested by the first defendant's solicitor in the letter quoted at length at para [11] of my previous judgment).

[9] There will, therefore, be an order that the first defendant pay the plaintiff's costs of and incidental to the first defendant's application for an extension of time for compliance with the order of 12 January 2010, such costs to be assessed on the indemnity basis.

Application for interlocutory judgment and application for contempt

[10] The plaintiff's response to the first defendant's failure to comply (even by the extended date) with the order of 12 January 2010 was to file an application for interlocutory judgment against the first defendant and to apply for the first defendant to be punished for contempt.

[11] The first defendant submitted that the application to punish for contempt and the application for interlocutory judgment were "a wholly disproportionate and unreasonable response", submitting that these applications "have resulted in the parties, and the Court, spending an unreasonably large amount of time and money on what was effectively a request for an extension of time for several weeks to complete disclosure of many thousands of documents".

[12] In fact, however, the first defendant's application for an extension of time was itself only responsive (and belatedly so) to the plaintiff's applications which arose from the first defendant's failure to comply with the order of 12 January 2010. The plaintiff's applications were filed on 25 March 2010, and were returnable before the Court on 9 April 2010. The first defendant's application for an extension of time was filed by leave when the matter came before the Court on 9 April 2010 (although it would seem that the plaintiff was given some prior notice of the first defendant's intention to formally make that application). The position sensibly adopted by counsel for both parties was that determination of the extension of time application should logically precede any hearing of the other two applications. That is how matters unfolded.

[13] The only impediment to the plaintiff's application for interlocutory judgment proceeding is my determination that the first defendant should have an extension of time for compliance with the order of 12 January 2010. That does not mean, however, that the plaintiff's application for interlocutory judgment was inappropriate; on the contrary, it seems to me that that was a completely appropriate application for the plaintiff to make in view of the first defendant's then extant non-compliance with the order of 12 January 2010 and the absence of any application by the first defendant at that time for an extension of time for compliance with that order. Counsel for the first defendant submitted that "a reasonable and proportional response" would have been for the plaintiff to "consent

to the extension on the papers prior to 4 March 2010". That argument, however, overlooks two matters:

(a) The fact that, even on her own material, the first defendant's solicitor had failed to meet the tacit extension to 26 February 2010. One can readily understand the further request then being treated with some scepticism by the plaintiff; and

(b) It fails to take account of the fact that, in the context of this particular litigation, the Court, exercising its case management powers, was also an interested party in any proposed variation to the timetable set by the Court order.

[14] I do not accept, therefore, the first defendant's categorization of the plaintiff's application for interlocutory judgment. As that application has now effectively become moot as a consequence of the extension of time being granted, it is clear that the appropriate order would be that the plaintiff should have the costs of and incidental to that application. I would not, however, order costs in respect of that application on an indemnity basis. That application, provided for as it is under the *UCPR*, is not an extraordinary application brought in extraordinary circumstances, and accordingly the usual rule as to the recovery of standard costs would be appropriate.

[15] The plaintiff's separate application for the first defendant to be punished for contempt, however, is different. This litigation has become marked by acrimony and frank animosity between the individual parties. That is regrettable. I have already expressed the view that a motion by the plaintiff for interlocutory judgment was an appropriate step in light of the first defendant's non-compliance with the order of 12 January 2010. The filing of an application for the first defendant to be punished by imprisonment for contempt was, however, unnecessary in the circumstances. Perhaps it was provoked by a sense of frustration, but it was nevertheless an extreme response to the circumstance of the first defendant's failure to comply with a Court-ordered timetable. The appropriate order would be that the plaintiff pay the first defendant's costs of and incidental to the contempt application.

[16] As matters have transpired, neither of these applications now need to be argued. I have indicated the costs orders which I would have been inclined to make in respect of those applications. Adopting a pragmatic approach, however, these two costs orders would, in practical terms, largely have the effect of cancelling one another out. The principle beneficiaries of any further dispute about costs on these two applications would likely be the lawyers and costs assessors involved in the costs assessment process (and any challenges in that process). It seems to me, therefore, that the appropriate thing to do is simply to order in respect of each of these applications that each party will bear its own costs.

[17] In terms of further case management, each of the parties have provided me with a case management plan. The plan proposed by the plaintiff, including as it does matters such as self-executing orders and the appointment of Court appointed experts is not appropriate in the circumstances. The case management plan

proposed by the first defendant allows for the timely delivery of further amended pleadings, any disputes about disclosure to be methodically addressed between the parties, including by the bringing of any necessary applications, and for further review. I would intimate that I would be prepared to make further directions in line with the sort of case management plan which has been proposed by the first defendant's counsel, noting that counsel for the parties need to liaise to settle the necessary dates within the case management plan for completion of the steps to which it refers. I would, therefore, ask counsel to bring in a settled form of order embodying the steps proposed in the first defendant's case management plan.

[18] Otherwise, there will be the following orders:

1. Pursuant to *UCPR* r 7, the time for compliance by the first defendant with the order of 12 January 2010 be extended to 16 March 2010.

2. The first defendant pay the plaintiff's costs of and incidental to the application for extension of time, such costs to be assessed on the indemnity basis.

3. The plaintiff's application for interlocutory judgment filed 25 March 2010 is dismissed, with each party to bear its own costs.

4. The plaintiff's application for the first defendant to be punished for contempt filed 25 March 2010 is dismissed, with each party to bear its own costs.