SUPREME COURT OF QUEENSLAND

CITATION:	*Amos v Wiltshire* [2018] QCA 208
PARTIES:	**EDWARD AMOS** (applicant) **v** **CHRISTOPHER JAMES RAYMOND WILTSHIRE** (respondent)
FILE NO/S:	Appeal No 8129 of 2017 DC No 1527 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 209
DELIVERED ON:	4 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2018
JUDGES:	Sofronoff P and Flanagan and Brown JJ
ORDERS:	**1. Leave is refused.** **2. The applicant pay the respondent's costs of and incidental to the appeal to be assessed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – where the applicant submits that leave to appeal is not required, in reliance on amendments made to the *District Court of Queensland Act* 1967 (Qld), s 118 – where the respondent contends that leave to appeal is required – whether leave to appeal is required PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – where the respondent took out an enforcement warrant in respect of an order of the Court of Appeal that the applicant pay the respondent a judgment sum including interest on an amount – where the enforcement warrant miscalculated the rate of daily interest – where the respondent applied to have the warrant amended –

where the applicant cross-applied to have the warrant stayed or set aside – where the applicant submits that the learned primary judge had no power under the *Uniform Civil Procedure Rules* 1999 (Qld) rr 371 and 375 to amend the warrant – where the applicant submits that the learned primary judge erred in refusing to set aside or stay the warrant – where the respondent resists the appeal, including on the basis that the appeal is now moot as the result of payment by the applicant to the respondent of a sum "in full and final settlement of payment of interest" – whether the appeal is moot – whether the learned primary judge erred

District Court of Queensland Act 1967 (Qld), s 118
Supreme Court of Queensland Act 1991 (Qld), sch 5
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 371, r 375, r 817

Abrahams (by his litigation guardian The Public Trustee of Queensland) v Abrahams (2015) 13 ASTLR 406; [2015] QCA 286, cited
Carr v Finance Corporation of Australia Ltd (No 1) (1981) 147 CLR 246; [1981] HCA 20, cited
Chapmans Ltd v Yandell [1999] NSWCA 361, cited
Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd (2000) ATPR 41-733; [1999] FCA 1652, cited
Praxis Pty Ltd v Hewbridge Pty Ltd [2004] 2 Qd R 433; [2004] QCA 79, considered

COUNSEL: F L Harrison QC, with P G Jeffery, for the applicant
P O'Shea QC, with K Boulton, for the respondent

SOLICITORS: Keller Nall and Brown for the applicant
Sharma Lawyers for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Brown J and the orders her Honour proposes.

[2] **FLANAGAN J:** I agree with the orders proposed by Brown J and with her Honour's reasons.

[3] **BROWN J:** Mr Amos and Mr Wiltshire have been involved in litigation against each other for a number of years. On 28 August 2015, the Court of Appeal made a number of Orders, which included an order that Mr Amos pay Mr Wiltshire the sum of $200,288.90 together with interest on the sum of $133,390.28. Mr Amos did not pay the judgment sum at the time. Mr Wiltshire subsequently took out an enforcement warrant on 12 February 2016.

[4] The warrant miscalculated daily interest at $28.00 per day, rather than $27.40 per day. As a result, Mr Wiltshire applied to the District Court to amend the enforcement warrant. Mr Amos cross-applied to have the warrant set aside or

stayed. Jones DCJ[1] found that the irregularity identified did not justify the warrant being set aside and ordered that the warrant be amended. He refused Mr Amos' application to set aside the warrant and for a stay of the warrant. Mr Amos now seeks to appeal that decision.

[5] There is a threshold issue as to whether the present matter must fail as the appeal is moot. Mr Wiltshire contends that, in any event, leave to appeal should not be granted, (or alternatively, if leave is not required that the appeal must fail), on the basis that the appeal is now moot as the result of payment by Mr Amos of a sum of $20,299.53 "in full and final settlement of payment of interest on the sum of $133,390.28 from 28 August 2015 to 11 August 2017".[2] The calculation of the daily interest in the warrant, which was ordered to be amended, was relevant to the calculation of the interest now paid by Mr Amos and is not relevant to any further payment. It is therefore submitted by Mr Wiltshire's counsel that the subject of the defect in the warrant the subject of complaint, which was ordered to be rectified by amendment, is no longer a live issue. Mr Amos contends that that is incorrect as the irregularity caused the warrant to be defective and a nullity.

[6] The question of whether Mr Amos requires leave to appeal is also in issue before this Court. Notwithstanding that an application for leave to appeal was filed on 5 September 2017 by Mr Amos, on the day of hearing Mr Amos' counsel contended that, as a result of amendments made to section 118 of the *District Court of Queensland Act* 1967 (Qld), leave is not in fact required. That is disputed by Mr Wiltshire, on the basis that Mr Amos is misconstruing the effect of the amendments.

[7] In terms of the substantive complaints in respect of the decision of the primary judge, Mr Amos contends that the primary judge had no power to order that the warrant be amended. In particular he contends that rule 371 and rule 375 of the *Uniform Civil Procedure Rules* 1999 (Qld) (***UCPR***) have no application to a warrant. Mr Wiltshire submits that rule 371 grants a broad supervisory power to the Court and that there is no reason for it to be limited in the way contended. He further contends that his Honour erred in considering that the irregularity in the warrant did not justify it being set it aside and in failing to order the amendment of the amount for which the warrant was issued. Mr Amos also contends that his Honour erred in not staying the enforcement of warrant and in ordering costs against Mr Amos. All of these matters are refuted by Mr Wiltshire. In relation to costs, Mr Wiltshire's counsel contends that Mr Amos is precluded from raising it, as he did not seek leave to appeal that aspect of the judgment.

[8] As one of his grounds of his appeal, Mr Amos complains that his Honour erred in taking into account the history of the litigation as it was an irrelevant consideration. The history of the litigation was largely a matter placed before his Honour by an affidavit of Mr Amos.[3] There is no complaint that it was not set out accurately.

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1 [2017] QDC 209.

2 AB 194.

3 AB 32 to 33, although his Honour referred to the history set out by the Court of Appeal: reasons at [2] to [4].

The history has some relevance to the question of a stay, even though it did not play a significant part in his Honour's determination. It is not a matter upon which this Court would find error and will not be considered further.

[9] As a result, the issues for this Court to determine are:

(a) Whether the appeal is moot due to the payment that was made by Mr Amos to Mr Wiltshire;

(b) Whether Mr Amos requires leave to appeal and if so should it be granted;

(c) In determining the question of leave or the substantive appeal:

(i) Whether the Court has power pursuant to the *UCPR* to amend an enforcement warrant or whether the effect of the defect in the warrant was such that it should have been set aside;

(ii) Whether the defects in the enforcement warrant were not cured by the amendments ordered and were not verified by a statutory declaration;

(iii) Whether his Honour erred in not granting a stay of the warrant; and

(iv) Whether Mr Amos is precluded from pursuing an appeal from the order for costs.

Is the appeal moot and/or should leave be refused?

[10] By paragraph 4 of the Order of the Court of Appeal dated 28 August 2015,[4] Mr Amos was ordered to pay Mr Wiltshire in the following terms:

> "The applicant is to pay to the respondent the sum of $200,288.90, being for claim, costs and interest to today, together with interest on the sum of $133,390.28 pursuant to s59(3) of the Civil Proceedings Act 2011 (Qld), such interest to be calculated from 28 August 2015 until the date of payment."

[11] Mr Amos contends that the warrant is invalid because it overstated the daily amount of interest payable after the issue of the enforcement warrant. In the course of argument, he also questioned the accuracy of the amount of $12,096.00, stated in the warrant to be the interest owing from the date of the Court of Appeal Order to and including the date of filing of the application for the enforcement warrant, although no error was identified on behalf of Mr Amos, save as a matter of inference.[5] While it is unclear whether that was raised by Mr Amos before the primary judge,[6] it is unnecessary for me to consider further for the reasons set out below, because the amount of interest has been paid and accepted by the respondent.

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4 AB 104.

5 AB 154; T1-40/5-31.

6 T1-41/6-24.

[12] The decision of the primary judge was given on 12 July 2017.[7] By a letter dated 10 August 2017, Mr Amos paid part of the money required to be paid under the Order of the Court of Appeal dated 28 August 2015, which was also the subject of the warrant.[8] Relevantly that letter stated:

> "We enclose herewith a bank cheque for $133,390.28 in full and final settlement of the repayment of the moneys paid by your client to our client pursuant to the Orders of Samios DCJ being for claim $119,387.52 and costs $14,002.76.
>
> We also enclose herewith a bank cheque for $20,299.53 in full and final settlement of payment of interest on the sum of $133,390.28 from 28 August 2015 to 11 August 2017.
>
> We also enclose a copy of the Courts interest calculator showing how the sum of $20,299.53 is calculated."

[13] The amount of $20,299.53 was accepted by Mr Wiltshire as paid in full satisfaction of post-judgment interest on the sum of $133,390.28, payable pursuant to that Order of the Court of Appeal, as was the amount of $133,390.28.[9]

[14] The balance of the amount of $200,288.90 which is in the order of $67,000 plus costs and expenses of enforcement is the amount which remains outstanding by Mr Amos in respect of the warrant. Daily interest is not accruing on that amount under paragraph 4 of the Court Order.

[15] On the basis of the amount paid by Mr Amos on 10 July 2017 in respect of interest, Mr Wiltshire contends that the appeal is now moot and that the Court is not required to consider the significance of the mistake in relation to interest because the interest to which the mistake is relevant has been paid. There is, according to Mr Wiltshire, now no dispute as to the amount of interest that is payable on the amount which remains owing under the warrant and the defect has nothing to do with any further enforcement of the warrant.

[16] To the extent that the warrant is still sought to be enforced, it will only be enforced in respect of the balance owing. That balance does not attract or accrue interest. If the warrant was set aside any new warrant would only be for the balance owing which will not change.[10] The error in the daily interest rate therefore has no consequence in relation to that amount.

[17] Notwithstanding the payment of the interest which was the subject of the defect in the warrant and the order of the District Court, Mr Amos contends that the error in the interest was a defect that could not be cured and it still has the effect that the

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7 AB 185.

8 AB 194.

9 AB 197.

10 T1-29/1-19; T1-42/1-6.

warrant should have been set aside. His Counsel contends that Mr Amos was not arguing over the amount but the validity of the warrant and therefore there is a controversy to be determined.[11]

[18] It is true that in terms of the warrant itself, there is no longer any live issue to be resolved between the parties. In relation to the alleged defect in respect of interest which resulted in the warrant being amended, the balance which is now owing, and in respect of which the warrant may be enforced, remains owing regardless of the outcome of this appeal. The setting aside of the warrant will only result in a fresh warrant having to be issued for the balance and result in further time and costs being incurred to do so.

[19] In *Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd*,[12] the Full Federal Court stated that:[13]

> "There is ample authority for the existence of a discretion in this Court to stay an appeal in circumstances where there is nothing to be gained by the appeal proceeding: see *Mayne Nickless Limited v Transport Workers Union of Australia* (Black CJ, von Doussa and Carr JJ, 16 July 1998, unreported), *Leibler v Air New Zealand Ltd* [1998] 2 VR 525 (Victorian Court of Appeal) and *R v Secretary of State for the Home Department ex parte Salem* [1999] 2 All ER 42 (House of Lords)."

[20] The payment by Mr Amos of the amount of interest outstanding post judgment, which was continuing to accrue, that no doubt being one of the motivating factors for payment, is in my view a change of circumstances which has a direct effect on the utility of this appeal. The payment was made the day after the Notice of Appeal in this matter was filed.[14] Even if the warrant was to be set aside, any new warrant would issue for the balance presently owing on the present warrant. The Orders made by Jones DCJ now have no real consequence.

[21] However, given Mr Amos' argument that the error of the primary judge should have resulted in the warrant being set aside *in toto*, as the defect in respect of interest resulted in it being invalid such that the warrant is a nullity, the present appeal, while of little practical utility, is not rendered moot by the payment made by Mr Amos. There remains an issue to be determined in terms of the validity of the

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11 T1-41/38-39.

12 (2000) ATPR 41-733 at [13]; see also Phillips JA (with whom Winneke P and Kenny JA agreed) in *Leibler & Ors v Air New Zealand Ltd & Anor* [1998] 2 VR 525 at 529-532; *Hunter Development Corporation v Save Our Rail NSW Incorporated & Ors (No 2)* (2016) 93 NSWLR 704 at [40] to [43] per Beazley P (with whom Macfarlan and Meagher JJA agreed).

13 At [13].

14 AB 186.

warrant. That issue may have an effect on the costs ordered below. It cannot be concluded there is no live issue on foot.[15]

[22] The fact of the payment being made is, of course, relevant to the question of whether there is any substantial injustice that may be said to be suffered by Mr Amos in the event that leave to appeal is required and was to be refused.

Whether leave to appeal is required

[23] Section 118(2) and (3) of the *District Court of Queensland Act* 1967 (Qld) provides:

> "(2) A party who is dissatisfied with a final or interlocutory judgment of the District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—
>
> (a) is given for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
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> (b) relates to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit.
>
> (3) Subject to sections 118A and 118B, a party who is dissatisfied with any other judgment of the District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court."

[24] Section 118 was amended in 2010. Sections 54 and 55 of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld) **(the Amending Act)** provided that:

> "**54 Amendment of s 118 (Appeal to the Court of Appeal in certain cases)**
>
> Section 118(2), after 'final'—
>
> *insert—*
>
> 'or interlocutory'.
>
> **55 Insertion of new ss 145 and 146**
>
> After section 144—
>
> *insert—*
>
> **'145 Transitional provision for Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 – civil jurisdiction**

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15 *Leibler v Air New Zealand* [1998] 2 VR 525 at 529 per Phillips JA; Beazley JA in *Hunter Developments* at [45].

> 'Sections 68, 75 and 118, as amended by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*, apply only to actions, matters or proceedings commenced after the commencement of this section…"

[25] It is submitted on behalf of Mr Amos that the present matter falls within s 118(2)(b) of the *District Court of Queensland Act* 1967 (Qld). He contends that the Amending Act applies because the proceedings to set aside the warrant or amend the warrant was a separate proceeding which falls within the expression "actions, matters or proceedings" and that proceeding was commenced after the commencement of the section. He contends that the appeal therefore relates to a separate proceeding which commenced after the 2010 amendments and is therefore governed by the Act in its current form.

[26] Even if the Amending Act did not apply, Mr Amos further contends that the order of Jones DCJ is a final order because it finally disposed of rights of the parties in respect of the warrant and the property over which the warrant would be enforced is of greater value than the Magistrates Court jurisdictional limit of $150,000.00. Mr Amos particularly placed reliance on the case of *Abrahams (by his litigation guardian The Public Trustee of Queensland) v Abrahams.*[16]

[27] Mr Wiltshire contends that "actions, matters or proceedings" referred to in s 55 of the 2010 Amending Act relates to what is generically called proceedings and includes the original District Court proceeding commenced in 2009. It is submitted on behalf of Mr Wiltshire that Mr Amos does require leave to appeal, as the decision of Jones DCJ only determined the fate of the particular application and further applications could be made to set the warrant aside, thus putting it squarely within what is characterised as an "interlocutory decision" in *Carr v Finance Corporation of Australia Ltd (No 1)*.[17] Finally in relation to the issue of leave to appeal, Mr Wiltshire submits that s 118(2)(b) relates to the claim in the principal proceeding relating to property and not money claims, which was the subject of the claim in the present matter, the principal proceeding being a claim for damages arising from negligence.

[28] An application for an enforcement warrant under r 817 is a mechanism by which the order in the principal proceeding can be enforced.[18] It is an incidental proceeding to the principal proceeding and not separate to it. This accords with the definition of "proceeding" in the *Civil Proceedings Act* 2011 (Qld) where proceeding means:[19]

> "a proceeding in a court (whether or not between parties), and includes—

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16 (2015) 13 ASTLR 406 at [17] to [21].

17 (1981) 147 CLR 246 at 248 per Gibbs CJ and 255 per Mason J.

18 See also s 90 *Civil Proceedings Act* 2011.

19 Schedule 1; R 4 of the *UCPR* provides that "Words and expressions used in the *Civil Proceedings Act* 2011 have the same meaning in these rules as they have in that Act. See also Sched 5 of the *Supreme Court Act* 1991.

(a) an incidental proceeding in the course of, or in connection with, a proceeding; and

(b) an appeal or stated case."

[29] No support for Mr Amos' contention is found in the legislation. The clear purpose of s 55 of the 2010 Amending Act was to avoid the general effect of the law where amendments are made to procedural laws.[20] If the Amending Act did not provide that it was only to apply to actions, matters or proceedings commenced after the commencement of this section, it would have applied to all proceedings regardless of when they were commenced. Section 55 of the 2010 Amending Act makes it clear that it only has effect in relation to future proceedings.

[30] On the correct construction of the Amending Act, the principal proceedings in respect of which the 2015 Orders were made by the Court of Appeal and the warrant was obtained commenced in 2009. The Amending Act therefore does not apply in respect of this appeal.

[31] In relation to these proceedings, Mr Amos does not have the benefit of the Amending Act and therefore s 118(3) only applied to final orders and not interlocutory orders.

[32] While the applicant submitted that the Order of Jones DCJ is a final order, that cannot be accepted. It is properly characterised as an interlocutory one, consistent with the reasoning in *Carr v Finance Corporation of Australia Ltd*.[21] Mr Amos may apply to set aside the warrant again, even though the practical effect of the primary judge's orders are that the further application will inevitably fail. An order is characterised as an interlocutory order where there is a right to make another application and it does not conclude the rights of the parties. That is the case in relation to an enforcement warrant.

[33] Finally s 118(3)(b) does not apply, because the judgment does not relate to a claim for or relating to property. This Court in *Praxis Pty Ltd v Hewbridge Pty Ltd*,[22] made it clear that the proceeding to which s 118(2)(b) applies is not a mere money claim:

> "[8] The criterion adopted in s 118(2)(b) is concerned not with simple money claims in personal actions like the present, which can be measured by the amount recovered by the judgment; but primarily with claims for the recovery of land or other things *in specie* or their value in actions for detinue and the like. The legislative history of s 118 and its predecessor s 92 of the Act bears this out. It is true that s 118(2)(b) includes not only a claim "for" property having the value

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20 Pearce and Geddes, *Statutory Interpretation in Australia*, (7th ed, LexisNexis) at [10.21].

21 (1981) 147 CLR 246 at 248, 255.

22 [2004] 2 Qd R 433.

> specified but also to a claim "relating to" property of that value. But the words "relating to", although susceptible on occasions of a wide interpretation, take their meaning and colour from the context in which they appear. An action under s 82 of the *Trade Practices Act* to recover the amount of the loss or damage caused by a contravention of s 53A of that Act is not, within the meaning of s 118(2)(b) of the *District Court of Queensland Act*, a claim relating to property even if the representation constituting the contravening conduct concerned property valued at more than $50,000. If that were not so, a claim for damages itself insignificant in amount for a temporary or casual trespass to land worth millions of dollars would be appealable as of right under s 118(2)(b). The same would apply, for instance, to slight damage inflicted on an unusually expensive motor car or other valuable property."

[34] The decision of *Abrahams* relies upon the decision in *Praxis*. In *Abrahams*, the property which was the subject of the proceedings was the estate of the applicant's father which was valued at approximately $412,000.00. The claim was made pursuant to s 41 of the *Succession Act* 1981 (Qld) in respect of the estate. It clearly related to property which exceeded the Magistrates Court jurisdictional limit.

[35] The principal proceeding sought to recover damages for negligence. It is not relevantly distinguishable from an action under s 82 of the *Trade Practices Act* claiming damages discussed in *Praxis*. The claim is not for nor does it relate to property within the meaning of s 118(2)(b) of the *District Court of Queensland Act* 1967 (Qld). The fact that the warrant may be enforced against Mr Amos' property is not relevant to whether s 118(2)(b) is satisfied. It is the principal proceedings which must be characterised as relating to property.

[36] As the preconditions in s 118(2) have not been satisfied in the present case, leave to appeal is required by Mr Amos. In order to obtain leave, a party must be able to demonstrate a reasonably arguable case of error on the part of the Court below, and that some substantial injustice or prejudice will be suffered by the applicant if that error is not corrected.[23] For the purposes of determining whether it is appropriate to grant leave, it is relevant to consider the grounds of appeal that would be raised if leave was granted. In the present case, for the reasons outlined below, Mr Amos has not established either of those matters.

Was there an error in granting leave to amend the warrant?

[37] Grounds 1 and 2 of the matters which Mr Amos seeks to raise on appeal contend that the primary judge had no power to order the amendment and in any event the amendment still did not result in the warrant complying with r 817 of the *UCPR*. He further contends that the warrant should have been set aside because it was irregular and did not follow the judgment.

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23 *Chapmans Ltd v Yandell* [1999] NSWCA 361.

[38] The principal complaint of Mr Amos in ground 1 is that the primary judge erred in determining that r 371 of the *UCPR* permitted him to order that the rate of interest be corrected by amending the enforcement warrant.[24] He submits that there is no hidden power of amendment in rule 371 or r 375 in respect of a warrant. He further complains that while the rate of interest was ordered to be corrected from $28.00 to $27.40, his Honour did not order that the actual amount due on the date of the issue of the warrant be corrected, with the result that the order did not comply strictly with the terms of the judgment and the warrant remained irregular. Mr Amos further contends that once amended, the warrant was not verified by statutory declaration, because the order did not rectify the sworn statement and that therefore a breach of the mandatory requirements of r 817 of the *UCPR* persisted. That was not, his counsel contends, a matter which could be done by amending an affidavit, and his Honour therefore erred in failing to set the warrant aside.

[39] Mr Amos submits that the structure of the *UCPR* is such that there is a clear distinction between rules which lead to obtaining a judgment, of which r 371 is one, and rules which relate to subsequent proceedings after judgment, of which r 817 is one. He contends that the rules which apply to the former to do not apply to the latter. Mr Amos in particular places reliance on the fact that r 817 of the *UCPR* uses the term "must", which should be construed as providing that the requirements of the rule are mandatory. His counsel submits that this is consistent with authorities which characterise an enforcement warrant as penal in nature.[25]

[40] Mr Wiltshire submits that there is no support for limiting part 10 (containing r 371) of the *UCPR* in the way contended for by Mr Amos. The language of the rule shows that it is intended to be of general application. Nor is there any reason why in his submission, such a distinction would be drawn and the Court would not supervise an order made under part 19 of the *UCPR*, which contains the provisions with respect to an enforcement warrant.

[41] Rule 371 of the *UCPR* provides that:

> "(1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity.
>
> (2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may—
>
> (a) set aside all or part of the proceeding; or
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> (b) set aside a step taken in the proceeding or order made in the proceeding; or
>
> (c) declare a document or step taken to be ineffectual; or

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24 See the reasons of Jones DCJ at [15] to [16], AB 182; and Order dated 12 July 2017, AB 185.

25 E.g. *O'Neil v Hart (No 2)* [1905] VLR 259; *Pippett v Liu* [2016] VSC 402, although the Court recognised in this case that an enforcement warrant could be set aside if it does not accord with a judgment or amended as irregular: see [24].

(d) declare a document or step taken to be effectual; or

(e) make another order that could be made under these rules (including an order dealing with the proceeding generally as the court considers appropriate); or

(f) make such other order dealing with the proceeding generally as the court considers appropriate." (emphasis added)

[42] Rule 375 provides, *inter alia*, that:

"(1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate…"

[43] Rule 817 provides, *inter alia*:

"(1) A person applying for an enforcement warrant must file—

(a) an application attaching the enforcement warrant the person wants the court to issue; and

(b) if the person is an enforcement creditor, a statement in the approved form sworn by the enforcement creditor, or the enforcement creditor's agent or solicitor, not earlier than 2 business days before the date of the application disclosing the following—

(i) the date the money order was made;

(ii) the amount for which the order was made;

(iii) the date and amount of any payment made under the order;

(iv) the costs incurred in previous enforcement proceedings in relation to the order debt;

(v) any interest due at the date the statement is sworn;

(vi) any other details necessary to calculate the amount payable under the order at the date the statement is sworn and how the amount is calculated;

(vii) the daily amount of any interest that, subject to any future payment under the order, will accrue after the date the statement is sworn;

(viii) any other information necessary for the warrant being sought…"

[44] There is no constraint in the language of r 371 of the *UCPR* which supports limiting its application to proceedings up until judgment is obtained. As discussed above, an application for an enforcement warrant is incidental to the proceedings and falls within the definition of proceeding.[26] Rule 371(1) therefore applies to provide that any non- compliance with the rules is an irregularity. On its face, r 371 applies to compliance with any of the rules in the *UCPR*. Further, the interpretation propounded by Mr Amos would be inconsistent with the purpose of the *UCPR*, particularly as set out in r 5, by causing the incurring of costs and delay and adopting an technical approach to compliance with the rules by requiring a fresh application for an enforcement warrant to be issued, rather than making an order, if appropriate, to rectify an irregularity.

[45] Mr Amos also contends that the use of the word "must" in r 817 precludes any power to rectify non-compliance with the rule and signifies a departure from the philosophy in r 5 of the *UCPR*. There is no sound basis for such a contention. While the word "must" generally means that all requirements of a rule must be complied with, its use does not in the context of the *UCPR* support the proposition that the requirements in r 817 are absolute,[27] and any defect such as was considered by the primary judge cannot be treated as an irregularity under r 371 and cured by an order for amendment. The term "must" is used in a number of rules in the *UCPR*,[28] not just in relation to r 817, and there is no sound basis supporting the fact that r 817 should be treated as an exception and any error should result in a warrant being treated as a nullity. The fact that r 817 is contained in the rules which apply post-judgment does not of itself support any reason for a distinction being made in respect of the use of "must" in the rules which apply post judgment such that any non-compliance would not be subject to the supervision of the Court to determine the effect of such non-compliance.

[46] While the reasons of the primary judge referred to the error with respect to "interest" as a "minor departure from the judgment", the proper characterisation of the error as to the overstatement of interest was not a failure to comply with or follow the judgment but rather a failure to comply with the rules. The order of the Court provided for interest to be paid in accordance with s 59(3) of the *Civil Proceedings Act* 2011 (Qld). Rule 817 of the *UCPR* provides for the amount of interest to be calculated and stated as a daily rate. The error in that calculation was a failure to comply with the rules, not a failure to follow the judgment.

[47] Authorities relied upon by Mr Amos[29] with respect to enforcement warrants being penal and where a warrant has been set aside for failing to follow the judgment or

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26 Schedule 1; R 4 of the *UCPR* provides that "Words and expressions used in the *Civil Proceedings Act* 2011 have the same meaning in these rules as they have in that Act. See also Sched 5 of the *Supreme Court Act* 1991 (Qld).

27 Whether the use of "must" is a word of absolute obligation depends on its context: see for example the discussion in *Director of Prosecutions v George* (2008) 102 SASR 246.

28 For example, rr 22, 26, 157, 216 and 415 of the *UCPR*.

29 *Pippett v Liu* [2016] VSC 402; *Hancock v Barry* (1881) 1 QLJ 55; *Cobbold v Chilver* (1842) 134 ER 26.

show the reason for the variance are of limited assistance in the present case, as they do not consider rules in a similar form to those now contained in the *UCPR*. In any event, the authorities relied upon by Mr Amos do not support a general principle that an enforcement warrant cannot be amended in a case such as the present. In the most recent of those decisions, *Pippett v Liu*,[30] no order had been made as to the payment of the costs that had been taxed, yet provision for such payment was set out in the warrant. The setting aside of the warrant in those circumstances bears no similarity to the present case. There was no order to support that aspect of the warrant at all. It was not a matter of an error in calculation. In any event, Associate Justice Derham did consider that it was open to amend a warrant of execution in the case of an irregularity.[31]

[48] There is no error identified in terms of the exercise of his Honour's discretion to permit the amendment. The amendment favoured Mr Amos insofar as it reduced the amount of the daily interest. No prejudice was suffered by him by allowing the amendment.

[49] Mr Amos also complains that the precise provision in r 371(2) to amend the warrant was not identified by the primary judge. While that is so, r 371 does provide the power to order the amendment of a warrant. Amending the warrant pursuant to r 375 is an order which could be made within the rules as contemplated by r 371(2)(e) of the *UCPR*. The reference to "document" in r 375 is of broad meaning. An enforcement warrant is a document within the meaning of r 375. Alternatively, r 371(2)(f) of the *UCPR*, which provides the Court with the power to deal with the proceedings generally, is a broad power which permits an order to be made amending a warrant to rectify non-compliance if appropriate. The irregularity in the warrant was a defect to which r 371 applied and that rule empowered the primary judge to make the order amending the enforcement warrant.

[50] The complaint that the amended warrant was unsupported by the statutory declaration is without substance. An affidavit setting out the error was provided supporting the application to amend the warrant. The fact that it was not in the same form as the statutory declaration supporting the application for the warrant is of no moment. In the context of an enforcement warrant, the importance of a statutory declaration is to ensure it is supported by a sworn statement. The correction by way of affidavit was supported by a sworn document.

[51] There is no reasonably arguable error in the primary judge determining that the enforcement warrant be amended under r 371 and in determining that the defect was not such that he should set aside the warrant.

[52] As to the further complaints made, the total amount of interest did not need to be ordered to be amended. The daily interest payable after the filing of the application is a provisional sum which continues to accrue until payment is made and

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30 [2016] VSC 402.

31 At [24]. See also *Hancock v Barry* (1881) QLJ 55 where Pring J stated: "In consequence of the insolvency of the defendant I am unable to make any amendment."

constantly changes. That is, in the present case, until the sum of $133,390.28 was paid. His Honour did not err in failing to make an order amending the total amount of interest payable. The total amount owing in the warrant of $212,658.10 was correct.

Refusal to grant a stay

[53] There is no error identified in respect of his Honour's refusal to stay the warrant pending an appeal in CA No 408 of 2017. The respondent, Mr Wiltshire, paid money pursuant to the original judgment of Samios DCJ, which was subsequently set aside in 2010 by the Court of Appeal and a retrial ordered. In August 2015, the Court of Appeal ordered repayment of the monies paid by Mr Wiltshire to Mr Amos.

[54] The primary judge found that there was no obligation upon Mr Wiltshire to provide an assurance that he would be able to repay the amount of money. It was, as his Honour described, money to which Mr Wiltshire was entitled by the orders of the Court which was still outstanding after two years, notwithstanding the determination by the Court of Appeal. The onus was on Mr Amos to satisfy the primary judge that a stay should be granted. His Honour was not satisfied of any of the matters raised by Mr Amos, relied upon to suggest that Mr Wiltshire would be unable to repay the money, as establishing a basis upon which a stay should be granted and Mr Wiltshire deprived of the benefit of the orders of the Court.[32] In the circumstances, no onus fell on Mr Wiltshire to produce evidence that he could repay the monies.

[55] The above reasons address the grounds of appeal, save as to costs which is addressed below.

Costs

[56] Mr Amos sought to appeal the order made as to costs by the primary judge. No leave was obtained to appeal against costs as required by s 118B of the *District Court of Queensland Act* 1967 (Qld). Given that Mr Amos seeks to contend that the primary judge was in error in respect of his order made as to costs, regardless of the outcome of the principal appeal, leave is required. No proper basis has been submitted upon which the Court could consider now granting leave. Leave not having been obtained, I do not consider that matter further.

Conclusion

[57] For the reasons set out above, I have determined that there is no reasonably arguable ground of appeal raised on behalf of Mr Amos and that any appeal on the grounds raised would fail.

[58] In light of the payments made by Mr Amos in August 2017, particularly in respect of interest which was the subject of the primary judge's orders and the defect relied

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[32] AB 183 to 184: reasons at [23] to [26].

upon by Mr Amos in this appeal, and the fact that there was no stay in relation to the decision of the Court of Appeal in 2015 ordering Mr Amos to pay the monies in question, no substantial injustice is suffered by Mr Amos in refusing leave to appeal.

[59] Further, there is no prejudice in leave not being granted. A fresh warrant could be issued by Mr Wiltshire for the amount of the balance owing in relation to which interest does not accrue.

[60] I would order that leave to appeal be refused.

[61] There is no reason that costs of the appeal should not follow the event and I would order that Mr Amos pay Mr Wiltshire's costs of and incidental to the appeal to be assessed.