

DISTRICT COURT OF QUEENSLAND

CITATION: *Thallon Mole Group Pty Ltd v Morton* [2023] QDC 2

PARTIES: **THALLON MOLE GROUP PTY LTD ACN 104 671 801**
(Plaintiff/Respondent)
v
LOUISE MORTON
(Defendant/Applicant)

FILE NO/S: BD 2695/19

DIVISION: Civil

DELIVERED ON: 12 January 2023 (*delivered ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 12 January 2023

JUDGE: Barlow KC DCJ

ORDERS:

- 1. The time for filing and service of the application and the amended application be abridged pursuant to rule 7 of the *Uniform Civil Procedure Rules* 1999(Qld).**
- 2. The defendant have leave to appeal the order as to costs made in this proceeding on 15 December 2022, on the grounds stated in the draft Notice of Appeal comprising exhibit JWH-4 to the affidavit of James William Hill sworn on 9 January 2023 and filed on 11 January 2023.**
- 3. The costs of this application be reserved to the Court of Appeal in determining the appeal.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – APPEALS AS TO COSTS – RELEVANT PRINCIPLES – GENERALLY – a decision on costs was handed down after the primary judgment – the applicant sought leave to appeal the decision on costs - the trial judge was unavailable for the hearing of the application for leave to appeal pursuant to 118B of the *District Court of Queensland Act* 1967 – final day for appeal from costs order – whether there are arguable grounds of appeal which might lead to the correction of an arguable substantial injustice

LEGISLATION: *District Court of Queensland Act 1967, s 118B*

CASES: *Emanuel Management Property Ltd (in liquidation) v Fosters Brewing Group Ltd* [2003] QSC 484
House v The King (1936) 55 CLR 499
Morrison v Hudson [2006] 2 Qd R 465
Recreational and Competitive Events Resources & Services Pty Ltd v Champion's Ride Days Pty Ltd [2020] QCA 90

COUNSEL: M. Robinson (Solicitor) for the Plaintiff
C.H. Matthews for the defendant

SOLICITORS: Robinson Locke Litigation Lawyers for the plaintiff
Thomson Geer for the defendant

- [1] The respondent to this application, who is the plaintiff in the proceeding, seeks an adjournment of the application, which was filed yesterday, although the application and supporting affidavits were provided to the plaintiff's solicitors on 9 January. The applicant seeks leave to appeal the order made by Judge Muir as to the costs of the proceeding, that order having been made on 15 December 2022. In order to bring an appeal on, if granted leave, within the time required under the rules, any notice of appeal needs to be filed by today, otherwise it would be incumbent on the proposed appellant to seek the leave of the Court of Appeal to commence the appeal out of time.
- [2] The respondent seeks an adjournment for a number of reasons. One, having been served with notice of this application, the respondent has not been able to engage counsel because counsel who were in the proceeding are not available and, given the complexity of the matter, it would not be appropriate or possible properly to brief alternative counsel to argue this application today.
- [3] Secondly, it is submitted that the proceeding and the matters raised in the principal appeal, as well as matters raised relevant to a costs appeal, are complex and so it is appropriate that this application be heard by the trial Judge, Judge Muir.
- [4] Thirdly, it is submitted that the applicant's submissions were received at 8.18 am today rather than by 4 pm yesterday, which has caused some prejudice to the respondent plaintiff.
- [5] And fourthly, it is submitted that there will be prejudice to the parties, particularly to the respondent, in not being able to have counsel appear in the matter should it proceed today, whereas there is an alternative course open to the applicant, namely, to have the matter adjourned to be heard by Judge Muir on her return to Court, and for the applicant to persuade Judge Muir to make the order *nunc pro tunc*, which then, if her Honour could be persuaded that she had power to make such an order, may require the parties to seek leave of the Court of Appeal to commence the appeal out of time or if the applicant could file a notice of appeal irregularly today, then that would be unnecessary if the order of Judge Muir would be made *nunc pro tunc*.

- [6] It is not clear that her Honour would have that power and nor it is clear that any attempt to file a notice of appeal today without the leave of this Court would be permitted by the registry of the Court of Appeal.
- [7] It does not seem to me that the issues arising on an application for leave to appeal from a costs order alone are that complicated, even though the proceeding in respect of which the costs order was made was very complicated. It does not seem to me that the absence of counsel, particularly where the solicitor who was engaged by the plaintiff for the proceeding and is fully familiar with the issues in the proceeding, is a sufficient ground to adjourn the application, particularly when the application is urgently required to be made so that, if leave is granted, the appeal can be commenced within time. That would save all parties considerable further expense in having to come back before this Court or the Court of Appeal or both before an appeal could even be commenced.
- [8] There is no particular prejudice, it seems to me, to the plaintiff in having the submissions served this morning rather than yesterday evening. The plaintiff's solicitors have themselves filed an outline of submissions which, to my mind, adequately deals with the issues on this application, and it does not seem to me that there is sufficient prejudice to the plaintiff that would offset the prejudice to the defendant if this application were not heard and determined today. I therefore refuse the application for an adjournment, so we will proceed with the principal application.
- ...
- [9] On 7 October 2022, her Honour Judge Muir delivered reasons on the substantive matters in this proceeding following 19 days of hearing. Her Honour sought submissions as to the costs of the proceeding having regard to her Honour's reasons and gave the parties time to make those submissions. Those submissions were made in October and November and culminated in an oral hearing before her Honour on 6 December 2022.
- [10] Her Honour made final orders on 28 October 2022 in respect of the issues in the principal proceeding, and she gave reasons and judgment on the question of costs on 15 December 2022, ordering that each party bear its own costs of the proceeding. Each party has since appealed her Honour's decision on the principal proceeding and the defendant now seeks leave to appeal from her Honour's order as to costs. Leave is required to appeal that decision because of section 118B of the *District Court of Queensland Act* 1967, which relevantly provides that an appeal only in relation to costs lies to Court of Appeal from a judgment or order of the District Court only by leave of the judge who gave the judgment or made the order, or if that judge is not available, another District Court judge.
- [11] This application was brought on before me today because today is the last day on which any appeal from her Honour's order as to costs may be brought. Her Honour is not available, being away on leave, and I am the judge hearing applications this week and therefore the matter has come on before me.
- [12] In an affidavit by the solicitor for the defendant applicant, a draft notice of appeal is exhibited. In essence, there are two issues which the defendant wishes to appeal. First is the order made by her Honour that each party bear their own costs in circumstances where the defendant submitted to her Honour that the plaintiff should pay 50 per cent of her costs of the proceeding, up to 23 December 2020. And secondly, the defendant seeks to appeal her Honour's declining to order that the plaintiff pay her costs on the indemnity

basis from 23 December 2020 as a result of the failure of the plaintiff to accept an offer of settlement that had been made by the defendant and expired on that day. That offer, in broad terms, was that the defendant pay to the plaintiff the whole of the retention moneys then held by the defendant and that the parties bear their own costs of the proceeding and the proceeding - effectively both the claim and counterclaim - be dismissed by consent.

- [13] The net result of her Honour's orders on the principal proceeding was that the plaintiff was ordered to pay the defendants approximately \$12,000. The defendant was ordered to pay to the plaintiff the retention moneys less that sum. I hope I have accurately summarised the net result of the proceeding.
- [14] In respect of each of those proposed bases of appeal, the notice of appeal sets out the grounds upon which the appeal is proposed to be brought. Each party's counsel or solicitor, respectively, today has taken me through each of those proposed grounds, the intention of the defendant being to demonstrate that she has good arguable grounds of appeal and that of the plaintiff to demonstrate the contrary.
- [15] The principles guiding a Court such as this, in determining an application for leave to appeal on costs, are not generally in dispute between the parties, although the plaintiff's solicitor, Mr Robinson, submitted that one additional principle is that leave will only be granted if an appeal is necessary to correct a substantial injustice. Mr Robinson relied in that regard upon the decision of the Court of Appeal in *Recreational and Competitive Events Resources & Services Pty Ltd v Champion's Ride Days Pty Ltd* [2020] QCA 90 at paragraphs [16] and [19].

The applicable principles were, with respect, very helpfully set out by Judge Sheridan in paragraphs [8] to [17] of her Honour's reason for decision in *Lemin v Cooper (No.2)* [2019] QDC 163. Most relevantly, perhaps, taken from those paragraphs, are the principles that a trial judge or the judge hearing the application, who is asked for leave to appeal, should not be defensive about the orders made or overly reluctant to give leave. Nevertheless, leave should not be given unless there is an arguable case that, applying the principles of *House v The King*, the discretion will be overturned on appeal. As his Honour Justice Chesterman said in the case referred to by Judge Sheridan, that is, *Emanuel Management Property Ltd (in liquidation) v Fosters Brewing Group Ltd* [2003] QSC 484, there must be an arguable case that the judge committed an error of law or misapprehended the facts or the result is inexplicably inconsistent with the facts. In addition, as Judge Sheridan set out, in *Morrison v Hudson* [2006] 2 Qd R 465 at paragraph [24], Justice Keane noted that whether leave to appeal should be granted will usually depend on the primary judge's view as to the balance of competing arguments, whether those arguments relate to matters of legal principle or disputed questions of fact, the importance and difficulty of such arguments and, on occasion, the amount of money involved.

- [16] I do not propose to go through each of the proposed grounds of appeal and to determine whether each of them is fairly arguable and might give grounds for the Court of Appeal to overturn the exercise of her Honour's discretion on the basis that she has made an error of law or otherwise errors of the nature identified in *House v The King*. It suffices, in my view, to say that I consider that there are arguable grounds of appeal stated in the proposed notice of appeal, which give rise to reasonable arguments that her Honour erred in the exercise of her discretion and, if that were right, that would give rise to the

opportunity for the Court of Appeal to correct what would otherwise be a substantial injustice.

- [17] In essence, then, it seems to me that leave to appeal should be granted for the reason that there are arguable grounds of appeal which might lead to the correction of an arguable substantial injustice.
- [18] Now, I should that add that while Mr Robinson, for the plaintiff, submitted that I should at least limit the leave to certain of the grounds raised in the draft notice of appeal, ultimately my conclusion is that each of them is arguable, although ground 1(d) might have less prospect of success than the others, but nevertheless each of them is sufficiently arguable to make it appropriate to grant leave to appeal on that ground.
- [19] With the amendments that I have indicated, I have signed the draft order and that will be placed with the papers.