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[Jackson, Sheryl](#) (2009) Supreme Court Act 1995 (Qld) s 253 - leave to appeal costs orders - appeal against substantive judgment insufficient - must be arguable case that discretion will be overturned on appeal. *Proctor*, 29(10), p. 51.

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Supreme Court Act 1995 (Qld) s 253 – leave to appeal costs orders – appeal against substantive judgment insufficient - must be arguable case that discretion will be overturned on appeal

The recent decision of the Court of Appeal in *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd* [2009] QCA 262 provides clear direction on the Court's expectations of a party seeking leave to appeal a costs order.

Background

The plaintiff was the purchaser under a gas supply agreement. The first defendant had contracted to supply the gas on behalf of the owners of the mine from which the gas was extracted, who were the second and third defendants. The central questions for determination concerned the proper construction of the force majeure provisions in the agreement.

The plaintiff was successful at first instance, and obtained declaratory relief to the effect that Dawson was not entitled to the benefit of the force majeure provisions: *AGL Sales (Qld) Pty Limited v Dawson Sales Pty Ltd* [2009] QSC 008.

The trial judge subsequently heard argument about costs. The plaintiff argued it should have its costs upon the indemnity basis from the commencement of the trial. This was based on a Calderbank offer which had been made by the plaintiff. The defendants argued that the plaintiff should have no more than 20 per cent of its costs, assessed on the standard basis. They argued that most of the trial was unnecessarily taken up with factual issues on which the plaintiff had been largely unsuccessful.

The judge concluded there was no demonstrated basis for departing from the ordinary rule as to costs. He ordered the defendants pay to the plaintiff its costs of the proceedings, including any reserved costs, to be assessed: *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2)* [2009] QSC 75. On the same day, the trial judge granted an application by the defendants for leave to appeal against that costs order under s 253 of the *Supreme Court Act 1995 (Qld)*, which provides:

253 What orders shall not be subject to appeal

No order made by any judge of the said court by the consent of parties or as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order.

The substantive appeal, involving issues relating to the construction of the gas supply contract, was dismissed with costs. That aspect of the appeal is not examined here.

In the notice of appeal, the specified grounds of appeal relating to costs were that the trial judge was in error in concluding that the plaintiff was not unreasonable in presenting a case wider than was necessary in order to interpret the gas supply agreement, and also in his conclusion that the plaintiff was not unreasonable in failing to apply for summary judgment upon the basis of its propounded interpretation of the gas supply agreement. It was also asserted more generally that the trial judge erred in concluding that there was no demonstrated basis for departing from the ordinary rule as to costs.

Leave to appeal costs orders

In the Court of Appeal, Fraser JA dealt with the appeal against the costs orders, with Muir and Chesterman JJ agreeing with his Honour's reasons. His Honour noted that ordinarily the questions to be agitated in an appeal brought by leave against a discretionary costs order would be identified in the primary judge's reasons for the grant of leave.

However, it was asserted in the amended notice of appeal and in oral submissions that the trial judge accepted the defendants' argument that it was appropriate for leave to be given because of the defendants' appeal against the substantive judgment.

Fraser JA referred to the observations of Chesterman J in *Emanuel Management Pty Ltd (in liquidation) v Foster's Brewing Group Ltd* [2003] QSC 484 at [41], to the effect that:

...the cases make it clear that leave should not be given unless there is an arguable case that, applying the principles of *House v The King* [(1936) 55 CLR 499] the discretion will be overturned on appeal. That means there must be an arguable case that the judge committed an error of law, or misapprehended the facts or that the result is inexplicably inconsistent with the facts.

His Honour found it to be apparent in these circumstances that this was not an appropriate case for leave to appeal to be granted.

He said the mere fact of an appeal against a substantive order is not a ground for granting leave to appeal against a discretionary costs order which was made consequentially upon the substantive costs order. As his Honour noted, where an appeal against a substantive order succeeds, leave is not required for the Court of Appeal to exercise its own discretion as to any appropriate, consequential revision of the costs order, but such leave is required where the substantive appeal fails: *Thorpe Nominees Pty Ltd v Henderson & Lahey* [1998] 2 QdR 216; *Re Golden Casket Art Union Office* [1995] 2 QdR 346.

Adopting the views of Mackenzie J in *Di Carlo v Dubois* [2004] QSC 014 at [4]-[5] his Honour said that the rationale for the usual requirements for the grant of leave to appeal applied equally well, regardless of whether or not there was an appeal against the substantive order.

Fraser JA noted that the defendant's written outline of argument, which was not elaborated upon orally, merely asserted that the trial judge erred in the manner described in the broad grounds of appeal. It did not identify any asserted error of principle, or point to any aspect of the trial judge's reasons for the challenged conclusions were said to be wrong, or why that was the case.

Further, no argument was presented that the result was so unreasonable as to justify the conclusion that the discretion must have miscarried. It was concluded that there was no reasonable basis upon which it could be determined that the discretion miscarried. Accordingly, the costs appeal was dismissed.

Comment

This decision is likely to impact upon common practice in relation to appeals against costs orders. It sends a clear message to trial judges that they should not give leave as of course when giving a judgment in relation to costs, and that parties seeking leave under s 253 of the *Supreme Court Act 1995* (Qld) should make a separate application.

The application should be supported by material presenting an arguable case that the trial judge made an error in the exercise of the discretion of the kind described in *House v King* (1936) 55 CLR 499.

A different, and interesting, aspect of this appeal is that it was the first wholly electronic civil appeal. The court-provided technology had been adopted at trial, and the Court of Appeal dispensed with any requirement for hard copy appeal record books.