Supreme Court
New South Wales
Court of Appeal

Case Title:	**Barakat v Goritsas**
Medium Neutral Citation:	[2012] NSWCA 8
Hearing Date(s):	9 February 2012
Decision Date:	9 February 2012
Before:	Basten JA
Decision:	(1) Direct that the application for leave to appeal and the proposed appeal be heard concurrently. (2) Order that there be a stay of the proceedings in the Common Law Division pending determination of the proceedings in this Court. (3) Order (2) will cease to operate if before the proceedings in this Court are determined, they lose their utility because of a change in the composition of the Common Law Division for the purpose of the continuation of the pending proceedings. (4) Grant leave to the parties to approach the Registrar forthwith to fix the hearing of the application for leave to appeal and the appeal with expedition, on the basis that the hearing will be completed in one day.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:	APPEAL – application for leave to appeal – basis of stay pending appeal –applicant to show reasonably arguable case for leave PROCEDURE – civil – judgments and orders – refusal to disqualify for apprehended bias - stay sought pending appeal –whether applicant need identify an interlocutory order, other than a refusal to recuse – discussion of *Michael Williams & Partners v Nicholls* [2011] HCA 48; 282 ALR 685 PROCEDURE – civil – interlocutory issues – stay pending appeal – power of judge of appeal to make order directing that trial not proceed pending determination of appeal or order directing a stay in the Court below – *Supreme Court Act 1970* (NSW s 46(2)
Legislation Cited:	*Civil Procedure Act 2005* (NSW), s 67 *Supreme Court Act 1970* (NSW), s 46(2) Supreme Court Rules 1970 (NSW), Pt 55
Cases Cited:	*Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; 148 CLR 170 *Barton v Walker* [1979] 2 NSWLR 740 *Brooks v The Upjohn Company* (1998) 85 FCR 469 *Douglas v John Fairfax & Sons Ltd* [1983] 3 NSWLR 126 *Edwards v Santos Ltd* [2011] HCA 8; 242 CLR 421 *Gas & Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48 *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; 209 CLR 478 *Jae Kyung Lee v Bob Chae-Sang Cha* [2008] NSWCA 13 *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531 *Makucha v Sydney Water Corporation* [2011] NSWCA 234 *Makucha v Sydney Water Corporation (No 2)* [2011] NSWCA 249 *Michael Wilson & Partners v Nicholls* [2011] HCA 48; 282 ALR 685 *Nicholls v Michael Wilson & Partners Ltd*

	[2010] NSWCA 222; 243 FLR 177 *Rajski v Wood* (1989) 18 NSWLR 512 *Witness v Marsden* [2000] NSWCA 52; 49 NSWLR 429
Category:	Procedural rulings
Parties:	Tony Barakat, Russell Walter Keddie and Scott John Roulstone – Applicants Maria Goritsas – First Respondent Basil Goritsas – Second Respondent Stephen Paul Firth – Third Respondent
Representation	
- Counsel:	Mr C C Branson QC/Ms M Castle – Applicants Mr R R Stitt QC/Mr G J O'Mahoney – Respondents
- Solicitors:	Verekers Lawyers – Applicants Firths – The Compensation Lawyers – Respondents
File number(s):	CA 2012/41427
Decision Under Appeal	
- Court / Tribunal:	Supreme Court
- Before:	Adams J
- Date of Decision:	6 February 2012
- Citation:	*Goritsas & Ors v Barakat & Ors* [2012] NSWSC 36
- Court File Number(s)	CA 2011/370116

JUDGMENT

1 **BASTEN JA**: The applicants are members or former members of a firm of solicitors known as Keddies Lawyers. The underlying dispute between the applicants and Basil and Maria Goritsas involved proceedings in the District Court by which Mr and Mrs Goritsas sought to recover costs paid to the applicants, said by Mr and Mrs Goritsas to have involved overcharging. The costs were originally incurred in proceedings for damages for personal injury, also brought in the District Court, by the applicants acting for Mr and Mrs Goritsas.

2 The litigation appears to have evolved in a number of ways. Relevantly for present purposes, Mr and Mrs Goritsas commenced proceedings in the Common Law Division on 18 November 2011 seeking to restrain the applicants from contacting, approaching or communicating with, former clients. At various points, orders were made by consent having that broad effect. (The precise terms of the orders are not presently relevant.) At some point, apparently in November 2011, the solicitor for Mr and Mrs Goritsas, Mr Stephen Firth, sought to be added as a party to the proceedings.

3 There followed disputes as to the returns provided by the applicants on subpoenas, apparently issued in the principal proceedings.

4 On 6 December 2011, senior counsel for the present respondents asserted that there had been a "clear breach by the three [applicants] of the injunction": Tcpt, 6/12/2011, p 40. Adams J directed that the applicants attend before the Court on 7 December at 2pm to provide an explanation of their conduct. When they appeared, the point was taken that if there were said to be a contravention of the injunction, the correct way to proceed was by way of motion and statement of charge, alleging a contempt, pursuant to the Supreme Court Rules 1970 (NSW), Pt 55. This

course was adopted, but disputes continued as to the particularisation of the charge and the material relied upon to support the relevant particulars.

5 On 15 December 2011 the applicants invited Adams J, by notice of motion, to disqualify himself on the basis of a reasonable apprehension of bias. The recusal application was not limited to, and indeed did not specifically refer to, the contempt proceedings. The following day, his Honour said that he would decide the application on the papers, with written submissions. Pursuant to that direction, the applicants filed written submissions on 6 January 2012, with submissions in reply being provided by the respondents on 13 January 2012.

6 On 1 February 2012, at which stage his Honour had not dealt with the recusal application, the applicants sought to have the hearing of the contempt proceedings, which had been fixed for 3 February 2012, vacated.

7 On 3 February 2012, Adams J rejected the recusal application, but adjourned the hearing of the proceedings for contempt until 16 and 17 February 2012. The hearing of the substantive proceedings is apparently listed for five days commencing on 27 February 2012. Reasons for judgment in respect of the recusal application were made available to the parties on the evening of 6 February 2012.

8 On 8 February 2012, the applicants commenced proceedings in this Court, seeking leave to appeal from the refusal by Adams J to disqualify himself "from further hearing any aspect of the proceedings" on the basis of apprehended bias.

Nature of present application

9 The applicants seek a "stay" of the proceedings in the Common Law Division. The purpose of the stay is to allow their application for leave to appeal from the refusal of the recusal application to be dealt with before further resources and time are expended in the Common Law Division.

They suggest that if their application were to be unsuccessful, there will, at worst, have been a delay in resolution of the contempt proceedings and the substantive proceedings in the Division. On the other hand, if their application were to succeed, a finding prior to trial would result in the saving of significant costs, time and resources of the parties and the Court, together with avoidance of adverse publicity, which might result from a finding (whether upheld on appeal or not) that three solicitors had acted in contempt of the Court. In the other scale there is the consideration that, if the applicants were to succeed at trial, the present application for leave to appeal would be rendered unnecessary.

10 In the past, such considerations have been weighed by appellate courts, with, perhaps, a preference to resist interlocutory intervention in trial proceedings, absent a clear indication that the applicants for intervention are likely to succeed. That course had, and no doubt continues to have, support in circumstances where a claim of apprehended bias is seen to be colourable or merely a stalking horse to achieve the result refused by the trial judge, such as delay of a scheduled trial. It has also been conventional wisdom that no appeal lies from the rejection of a recusal application as such, although a litigant could usually find an interlocutory order upon which to base an appeal: see *Barton v Walker* [1979] 2 NSWLR 740 at 755.

11 The applicants assert that the approach set out above should be revisited in the light of the reasoning of the High Court in *Michael Wilson & Partners v Nicholls* [2011] HCA 48; 282 ALR 685 at [74]-[86], in the joint judgment of Gummow ACJ, Hayne, Crennan and Bell JJ.

12 The first proposition is that *Barton v Walker* is no longer good law. That proposition needs to be analysed by reference to different aspects of that decision and the reasons given by Samuels JA, with the agreement of Reynolds and Glass JJA. At 756, Samuels JA, in considering whether there was any means to remove a trial judge who declined to recuse himself or herself, stated:

> "The proposition that one judge of this Court has authority to declare that another is disqualified from sitting in particular proceedings seems to me, if I may say so, quite absurd. Such an order would fall far beyond the scope of the declaratory power. It is necessary only to point out that no judge of this Court, or of any other court, is bound by the orders or decisions of a colleague of equal jurisdiction and status."

13 It is possible to read those words as precluding any appeal from final, let alone interlocutory, orders on the basis of a reasonable apprehension of bias. If that were so intended, it is a principle which has, to my knowledge, generally not been followed. If, on the other hand, it merely required an order against which to appeal, beyond dismissal of the motion for recusal, that is a proposition which has been consistently applied; it has not usually been difficult to identify a later interlocutory order or, where the matter arose towards the end of the hearing, a final order: *Gas & Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48 at 64 (Gummow and Heerey JJ); *Jae Kyung Lee v Bob Chae-Sang Cha* [2008] NSWCA 13. This approach was not doubted in *Michael Wilson & Partners*, where it was affirmed that "a later interlocutory order made by a judge who has refused an application that the judge not hear the matter on account of a reasonable apprehension of bias is an order against which leave to appeal can be sought on the ground that the judge who made the order should not have done so": at [81].

14 A second principle which was accepted in *Barton v Walker* was that neither prerogative relief nor injunctive relief would lie against a decision of a judge of the Supreme Court not to recuse himself or herself: at 755C. That issue was not before the High Court in *Michael Wilson & Partners*, but a question as to the scope of the principle may arise from the reasoning in *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531 and *Edwards v Santos Ltd* [2011] HCA 8; 242 CLR 421. As there has been no attempt to engage the supervisory jurisdiction of this Court in the present case, it is not necessary to explore that issue further.

15 This contention had, however, a second limb, namely that the subject matter of the proposed appeal could be the decision of the primary judge to reject the recusal application. The applicant submitted that the plurality in *Michael Wilson & Partners* had sanctioned such a course. That submission was based upon two passages in the judgment, each of which was, concededly, part of the obiter discussion in relation to waiver. Thus, at [84], their Honours referred to a "failure to seek leave to appeal against refusal of an application that a judge not try the case on account of a reasonable apprehension of bias". There was also reference to "an application for leave to appeal against the rejection of an application that a judge not hear a matter due to apprehended bias": at [86]. The applicants also referred to the reference in *Brooks v The Upjohn Company* (1998) 85 FCR 469 at 475, in the judgment of Beaumont, Carr and Branson JJ, to the "somewhat artificial device of fastening on" interlocutory orders, other than the refusal to recuse, to provide the subject-matter of an appeal.

16 The step said to have been taken by the High Court in these passages is no doubt one which could be taken by that Court. However, the passages in which the statements quoted appear were directed to other issues and bear the hallmarks of concise, if elliptical references, to an application for leave to appeal based on the *ground* of the refusal to recuse. The express reference to both *Gas & Fuel Corporation* and to *Brooks*, in the same passage in the joint judgment, together with the affirmation set out at [13] above of the approach adopted in *Gas & Fuel Corporation*, is inconsistent with some implicit rejection of the need to identify an interlocutory order, other than the refusal to recuse, to form the basis of an application for leave to appeal. At best, the applicant's submission involves an uncertain inference: that is an insufficient basis for departing from an established line of authority in courts of appeal in this country, including not merely the two judgments just referred to, but also *Rajski v Wood* (1989) 18 NSWLR 512 at 518 (Kirby P), 527 (Hope AJA) (Priestley JA agree with both) and *Witness v Marsden* [2000] NSWCA 52; 49 NSWLR 429 at [96] (Heydon JA, Mason P agreeing). A single judge of this Court should continue to

follow the overwhelming weight of appellate authority in the absence of any clear statement by the High Court to the contrary.

17 Upon the Court indicating to counsel for the applicants that, on a preliminary view, the draft notice of appeal was deficient, counsel foreshadowed an application to amend to challenge, (a) the refusal of the primary judge to grant a stay to permit these proceedings to be determined before trial, and (b) the order of the primary judge fixing the dates for hearing of the contempt proceedings. Counsel for the respondents accepted that no prejudice could follow from such an amendment. For the purposes of this application it is sufficient to assume that such an amendment will be made in due course and that, on that basis, the jurisdiction of this Court is properly engaged.

18 The third principle of importance which the applicants derive from *Michael Wilson & Partners* concerns the manner in which this Court should proceed, on the basis that there is an interlocutory application for leave to appeal from an appellable order of the trial judge. Accepting that the comments of the plurality in *Michael Wilson & Partners* were obiter – see at [75] – and that the issue arose in relation to the possible waiver of the right to object, flowing from the failure of the respondents in that case to pursue their unsuccessful recusal applications by way of an interlocutory appeal, the principles enunciated should nevertheless be followed. Those principles go beyond considering whether the complainant who fails to seek leave to appeal has waived any right to complain about the final judgment, and extends to the approach this Court should take in dealing with an interlocutory application for leave to appeal. The first proposition to be noted appears at [79]:

> "In most cases, a judge's refusal of an application that the judge not try, or continue to try, a case on account of reasonable apprehension of bias will constitute a final determination by the judge that the facts and circumstances relied on by the applicant do not establish the relevant apprehension. In such a case, it may be that an applicant who does not seek to challenge the refusal by

> seeking leave to appeal should be held to have given up the point."

19 That reasoning clearly has consequences in respect of an application which is in fact made, seeking leave to appeal. Their Honours continued at [86]:

> "As explained earlier these points need not be decided. It is, however, important to add, contrary to what was said in the Court of Appeal, that an application for leave to appeal against the rejection of an application that a judge not hear a matter due to apprehended bias may well be a case where the usual criteria would require leave to be granted, at least if a long and costly trial would be wasted if the judge's decision were incorrect."

20 Those remarks appear to be directed to the final two sentences in my judgment in this Court in *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 222; 243 FLR 177 at [77], which read:

> "Whether this Court would have favoured such a course [that is, granting leave to appeal] at a point where the trial was about to begin may be doubted. As noted in *Lee* at [36] and [37], the Court will generally exercise restraint and not interfere in proceedings at an interlocutory stage unless there is some clear reason to do so, sufficient to outweigh 'the undesirability of discontinuity, disruption or delay' in the orderly hearing of a claim."

21 *Lee v Cha* involved an application made on the 29th day of a trial which was continuing, and was likely to continue for some significant time: at [6]. The circumstances in *Michael Wilson & Partners* were quite different, the trial not having commenced at the time the unsuccessful recusal applications were made, and should have been approached differently from *Lee,* had that been necessary: cf *Makucha v Sydney Water Corporation (No 2)* [2011] NSWCA 249.

Basis of leave application

22 The stay sought by the applicants is not the stay of the execution of a judgment or order subject to appeal. Nevertheless, the principles stated in *Alexander v Cambridge Credit Corporation Ltd (Receivers appointed)* (1985) 2 NSWLR 685 provide relevant guidance. First, which is not

controversial, the power to grant a stay is discretionary. Secondly, the onus to demonstrate a proper basis for a stay that will be fair to all parties is borne by the applicant: judgment of Kirby P, Hope and McHugh JJA at 694F. Further, the mere filing of a notice of appeal will not, of itself, demonstrate an appropriate basis for a stay. In circumstances where an application for leave to appeal is brought from an interlocutory order, the grant of a stay will depend upon various circumstances, one of which is the likelihood of a grant of leave to appeal.

23 An application for leave to appeal against the refusal of a motion to recuse is not merely a matter involving practice and procedure: cf *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; 148 CLR 170 at 176-177 (Gibbs CJ, Aickin, Wilson and Brennan JJ); *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; 209 CLR 478 at [13] (Gaudron, McHugh and Hayne JJ). In the present case, the factors militating in favour of a grant of leave are that the issue is one which goes to the heart of the proper administration of justice between the parties; the ruling of the trial judge was in effect final in respect of the matters raised before him, and to allow the trial, which has not commenced, to proceed without determining the issue, could involve a waste of significant time and resources. It is not suggested that the application is motivated by any improper purpose, nor that there has been any delay in bringing the application.

24 The respondents did, however, contend that the applicants had made no attempt to establish a reasonably arguable case for overturning the decision of the primary judge. Counsel for the applicants sought to rectify that position by seeking leave to file further submissions in respect of the grounds sought to be agitated on appeal. Given the urgency of the application and the commitments of the Court, that request was declined. In those circumstances, the parties accepted that the question of whether there were reasonably arguable grounds should be addressed by the Court itself considering the judgment, the grounds identified in the draft notice of appeal and a document in the application book headed "Draft summary of applicants' argument".

25 A reading of that material suggests that the applicants may face significant difficulties in establishing their grounds. Thus, as in *Michael Wilson & Partners*, the case involved the conduct of interlocutory stages of the proceedings and did not involve (as it presently appears) any findings in relation to witnesses' credibility. Unlike *Michael Wilson & Partners*, the interlocutory proceedings were, for the most part, conducted in the presence of both parties. To a significant degree, the reasonable apprehension of bias is said to flow from the tenor and manner of exchanges with counsel, together with interventions in the cross-examination of certain witnesses. It is also said that there was a degree of unseemly urgency in the manner in which steps were required to be taken by the applicants, demonstrating that an adverse assessment of their conduct had already been formed: see generally, *IOOF Australia Trustees Ltd v Seas Sapfor Forests Pty Ltd* [1999] SASC 249; 78 SASR 151 at [174]-[195] (Doyle CJ).

26 Without careful attention to the transcripts, it is not possible to understand how the fair-minded lay observer might have viewed some of the exchanges between counsel and the bench. It is clear from some of the extracts contained in the judgment that there was, on some occasions, a level of friction between counsel for the applicants and the bench. In these circumstances, one consideration bearing on an application for leave to appeal will be the fact that the rejection of the recusal application involved, at least in part, an assessment by the primary judge as to how the fair-minded observer would appraise his conduct in court. There will, not infrequently, be grounds for permitting a review of such an assessment where any significant basis for concern can be perceived.

27 In these circumstances, although it is not a matter which the Court constituted by a single judge is able to resolve, it is sufficient to accept that leave is likely to be granted. The manner in which such an issue is usually addressed is by directing that the leave application and the proposed

appeal be heard concurrently. That is a direction that I can make and I propose to do so.

Vacation of hearing dates

28 The foregoing discussion provides the context in which it is necessary to consider whether the applicants are entitled to a "stay". Assuming there is power to make such an order, the circumstances militate in favour of it. Thus, the primary judge has indicated an intention to proceed, by declining to vacate the hearing dates; the purpose for hearing the appeal prior to the trial would be frustrated if the trial were to go ahead before the appeal were disposed of, and, given the pressure of business in this Court, it would not be possible to list the matter before the hearing of the trial, as presently fixed. Thus, subject to the question of power, such an order should be made.

29 The question of power was not directly addressed in the written submissions of the parties, no doubt because the matter came on (as these matters do) in haste. In *Makucha v Sydney Water Corporation* [2011] NSWCA 234 I raised a question as to the power of a single of the Court to make an order, the effect of which would be to vacate a hearing fixed before another judge, contrary to the orders and directions of the judge before whom the trial was proceeding: at [3]. It was not a matter which needed to be determined in that case, because the application was unsuccessful for other reasons.

30 Circumstances will arise in which a judge in a trial division may make a "self-executing" order, which has the potential to bind a judge at a future stage of the proceedings; in other circumstances, a judge may seek to vary orders made at an earlier interlocutory stage, although not self-executing. The power to take such steps was given careful consideration by Hunt J in *Douglas v John Fairfax & Sons Ltd* [1983] 3 NSWLR 126. His Honour had no doubt that such power existed: at 134-135. It is also clear that a judge of the Court has power to order a stay of proceedings where the justice of the case demands it, pursuant to the power contained in s 67

of the *Civil Procedure Act 2005* (NSW). No doubt, as a matter of practice, that power will not be exercised to vacate or override an earlier order given by another judge absent a change in circumstances.

31 The present case falls in a different class; in the absence of any submission to the contrary, it is sufficient to assume that a judge of appeal may make an order pursuant to s 46(2) of the *Supreme Court Act 1970* (NSW) to preserve the status quo pending the hearing of an appeal. In relation to an appeal against an interlocutory order, that may involve, in an appropriate case, directing that the trial not proceed, pending determination of the appeal, or ordering a stay of proceedings in the Court below, having a similar effect.

32 Both parties accepted that the nature of the proceedings is such that they should be dealt with expeditiously. While an interlocutory appeal will inevitably cause some delay in the further hearing in the Court below, that delay should be minimised. That can be done by granting the parties leave to approach the Registrar forthwith to seek a hearing date in this Court. To obtain appropriate expedition, the parties should anticipate that the matter will be fixed for one day only.

Conclusion

33 For the reasons set out above favouring a grant of leave to appeal, and on the basis that the application for leave and the appeal will be heard concurrently, I propose to order a stay of the proceedings in the Common Law Division. The appropriate orders are:

(1) Direct that the application for leave to appeal and the proposed appeal be heard concurrently.

(2) Order that there be a stay of the proceedings in the Common Law Division pending determination of the proceedings in this Court.

(3) Order (2) will cease to operate if before the proceedings in this Court are determined, they lose their utility because of a change in the composition of the Common Law Division for the purpose of the continuation of the pending proceedings.

(4) Grant leave to the parties to approach the Registrar forthwith to fix the hearing of the application for leave to appeal and the appeal with expedition, on the basis that the hearing will be completed in one day.

I certify that the preceding 33 paragraphs are a true copy of the reasons for judgment of the Hon Justice Basten

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Associate

9 February 2012

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