[2010] WASCA 87

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	GLEW -v- FRANK JASPER PTY LTD [2010] WASCA 87
CORAM	**:**	NEWNES JA MURPHY J
HEARD	**:**	22 APRIL 2010
DELIVERED	**:**	20 MAY 2010
FILE NO/S	**:**	CACV 19 of 2010
BETWEEN	**:**	WAYNE KENNETH GLEW First Appellant GLEW TECHNOLOGIES PTY LTD Second Appellant AND FRANK JASPER PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MARTIN CJ
Citation	**:**	FRANK JASPER PTY LTD -v- GLEW [No 2] [2010] WASC 24
File No	**:**	CIV 2179 of 2007

Catchwords:

Appeal - Whether grounds of appeal have reasonable prospect of succeeding - Rule 43(2)(g)(i) - Necessity for grounds of appeal to comply with rules - Allowances to be made where self-represented litigant - Turns on own facts

Legislation:

Rules of the Supreme Court 1971 (WA), O 4 r 3(2)
Supreme Court (Court of Appeal) Rules 2005 (WA), r 43(2)(g)(i)
Supreme Court Act 1935 (WA), s 42

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

First Appellant	:	In person
Second Appellant	:	In person
Respondent	:	Mr M A R Blundell

Solicitors:

First Appellant	:	In person
Second Appellant	:	In person
Respondent	:	Solomon Brothers

Case(s) referred to in judgment(s):

Avsar v Binning [2009] WASCA 219
Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd [2000] WASC 178; (2000) 22 WAR 372
Frank Jasper Pty Ltd v Glew [No 2] [2010] WASC 24
Gipp v The Queen [1998] HCA 21; (1998) 194 CLR 106
Glew Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289

Glew v Shire of Greenough [2006] WASCA 260
Glew v Shire of Greenough [2007] HCATrans 520
Lane v Morrison [2009] HCA 29; (2009) 239 CLR 230
Neil v Nott [1994] HCA 23; (1994) 121 ALR 148
Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd [2000] WASCA 255
Yap v Cheshire Holdings Pty Ltd [2007] WASCA 50

1 **JUDGMENT OF THE COURT**: This appeal has been brought on by a notice issued by the Court of Appeal Registrar requiring the first appellant (Mr Glew) to show cause why the appeal should not be dismissed under r 43(2)(g)(i) of the *Supreme Court (Court of Appeal) Rules 2005* (WA) (Court of Appeal Rules), on the ground that none of the grounds of appeal has a reasonable prospect of succeeding.

2 The appellants appeal against a decision of Martin CJ of 15 February 2010, in which his Honour found that the appellants had engaged in misleading or deceptive conduct in connection with certain inventions of Mr Glew. His Honour also dismissed a counterclaim by the second appellant (of which Mr Glew is the sole shareholder and director) seeking a declaration that a licence agreement relating to the inventions had been terminated: ***Frank Jasper Pty Ltd v Glew [No 2]*** [2010] WASC 24. His Honour had earlier ruled that, the solicitors for the second appellant having ceased to act, the second appellant was unable to pursue the counterclaim without legal representation. No evidence was led in support of the counterclaim.

3 While the primary judge found that the appellants had in certain respects engaged in misleading and deceptive conduct in respect of the inventions, for reasons his Honour gave he considered it was neither necessary nor appropriate to grant any relief to the respondent at that stage. His Honour stood over the issue of relief to a further hearing.

4 The appeal notice was filed by the appellants on 5 March 2010 and the respondent filed a notice of intention on 12 March 2010. The appellants' case was filed on 19 March 2010. The appellants' case is plainly defective. It does not, contrary to r 32(5) of the Court of Appeal Rules, contain submissions in respect of each ground of appeal. The document in the appellants' case entitled 'submissions' contains simply an assertion that the primary judge, the respondent and its solicitors have breached certain laws, which are then listed. In addition, the appellants' case does not contain a draft chronology that satisfies the requirements of r 32(8).

5 We should also observe that the appeal notice so far as it relates to the second appellant is irregular in that it has been filed on behalf of the second appellant by Mr Glew, who is not a solicitor. A corporation cannot commence or carry on any civil proceedings in the court except by a solicitor: O 4 r 3(2) of the *Rules of the Supreme Court 1971* (WA) (Supreme Court Rules). The application of that provision to an appeal cannot have escaped Mr Glew's attention. The same point arose in ***Glew***

Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289 [15], where the court pointed out that the appeal in that case was irregular because it had been commenced and carried on by Mr Glew on behalf of the company, contrary to O 4 r 3(2).

6 We turn then to the issue raised by the registrar's notice; that is, whether any of the grounds of appeal have any prospects of success.

7 The grounds of appeal are as follows:

> 1. Wayne Stuart Martin sat in criminal contempt of the High Court of Australia when he failed to meet the requirements of chapter 3 of the Australian constitution.
>
> 2. Wayne Stuart Martin represented himself as a justice of the supreme court of Western Australia when he was an employee of the corporation 'The Department of the Attorney General'. ABN: 70598 519443.
>
> 3. Wayne Stuart Martin sat in the supreme court of Western Australia knowing that the supreme court of Western Australia did not meet the constitutional requirements of chapter 3 of the Australian constitution.
>
> 4. Wayne Stuart Martin while acting as the chief Justice of the supreme court of Western Australia refused to allow a trial by jury contrary by [sic] section 80 of the Federal constitution and the act of Habius Corpus 1640. 1 Charles chapter 10.
>
> 5. Wayne Stuart Martin refused to allow Wayne Kenneth Glew the right to represent his company 'Glew Technologies' and then forced 'Glew Technologies' and Wayne Kenneth Glew the Director of 'Glew Technologies PTY LTD' to stand trial without representation. And therefore committed a crime against humanity being enslavement contrary to sections 268, 10, 11 and 12 of the crimes act 1914 Federal.
>
> 6. Wayne Stuart Martin handed down the decision in the above case on the 15th of February 2010 and at the time of handing down the decision ignored key parts of the evidence presented in court and acted in fraud and total bias to Wayne Kenneth Glew and 'Glew Technologies PTY LTD'.
>
> 7. Wayne Stuart Martin had revealed to him on the 9th of September 2009 two separate indictable offences, those being conspiracy to pervert the course of justice contrary to section 42 of the Crimes Act 1914 Federal and an attempt to pervert the course of justice contrary to section 43 of the Crimes Act 1914 Federal. Wayne

> Stuart Martin refused to deal with the issues revealed to him therefore making him party to the offences committed.
>
> 8. Wayne Stuart Martin refused to acknowledge the constitutional issues raised in the court on the 7th - 10th September 2009 and refused to abide by them.

8 The orders sought by the appellants are as follows:

> 1. The decision of [the primary judge] handed down on the 15th of February 2010 … be overturned and the case proceed to trial by jury in a civil matter.
>
> 2. The Court order that the decision of [the primary judge] be overturned and all criminal issues be sent to trial by jury in criminal jurisdiction.
>
> 3. The court orders that all questions of fact be identified and reserved for a judge and jury of 12 persons.
>
> 4. The court order that all costs orders be set aside until all the indictable and civil matters have been dealt with by a jury.
>
> 5. Liberty to apply.

9 It is readily apparent that none of the grounds of appeal comply with the requirements of r 32(4) of the Court of Appeal Rules. The grounds fall a long way short of what is required. That is not simply a matter of form. As Owen JA (Miller and Newnes JJA agreeing) pointed out in ***Avsar v Binning*** [2009] WASCA 219 [37], on an appeal to this court an appellant must demonstrate that there has been error of a recognised genre that falls to be corrected and which entitles the appellant to the orders sought. The grounds of appeal are a critical part of the process because they are the vehicle which guides the review process. His Honour referred to the following observations of Kirby J in ***Gipp v The Queen*** [1998] HCA 21; (1998) 194 CLR 106:

> The jurisdiction of a court of appeal ordinarily depends on the grounds of appeal that can be legally raised in support of the appeal. Under the common law system of justice, jurisdiction is the authority to decide issues between parties. In the case of an appellate court, that authority is governed by the issues raised in the notice of appeal and any notice of contention relied on to support the judgment against which the appeal is brought. In the absence of a special statutory regime, a notice of appeal that does not specify a ground of appeal is invalid and the appellate court in which it is 'filed' has no authority to determine any issue affecting the parties [58]. (footnotes omitted)

10 Due allowance must, of course, be made for the fact that Mr Glew is unrepresented. A court should always be careful to see that the rights of an unrepresented litigant have not been 'obfuscated by their own advocacy': ***Neil v Nott*** [1994] HCA 23 [5]; (1994) 121 ALR 148, 150. It must be alert to the possibility that beneath inadequately expressed and often irrelevant material there may lurk an arguable case. And some leniency may be required in relation to compliance with the rules. But in the end the allowances that can be made for a litigant in person are necessarily limited, both as a matter of fairness to the other party, who must be adequately informed of the case they have to meet, and because the provision of acceptable grounds of appeal is fundamental to the exercise of the appellate function by the court.

11 The specific requirements of r 32(4) of the Court of Appeal Rules are directed to ensuring that grounds of appeal adequately identify the specific error or errors which are alleged to entitle the appellant to the orders sought. Where, as here, the grounds pay no or scant regard to the requirements of those rules, the inadequacy of the grounds of appeal is inevitable.

12 Moreover, as will become apparent, several of the grounds of appeal seek to exhume arguments advanced and lost by Mr Glew in earlier proceedings.

13 Although the grounds of appeal are manifestly deficient, the issue currently before the court can be determined having regard to the substance of what is alleged, as elaborated upon by Mr Glew in the course of the hearing.

14 Ground 1 is unclear in its terms but Mr Glew explained that it is contended the primary judge was in contempt of the High Court because the proceedings before the primary judge did not accord with the requirements of ch III of the Commonwealth Constitution as described in ***Lane v Morrison*** [2009] HCA 29; (2009) 239 CLR 230. That is because, Mr Glew argued, the amendment in 2005 to sch E to the *Constitution Act 1889* (WA), together with the enactment of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), had the result that an oath of allegiance to the Crown was no longer required to be taken by, among others, members of this court. The *Constitution Act* was therefore 'repugnant to the Commonwealth Constitution' and the Supreme Court no longer meets the requirements of ch III (ts 6).

15 A similar contention by Mr Glew has twice been rejected by this court. In ***Glew v Shire of Greenough*** [2006] WASCA 260, Mr Glew relied on other legislation which altered references to the Crown or to her Majesty to the Governor or the State, to argue that as a result neither the Local Court nor the District Court had any lawful authority. Wheeler JA (with whom Pullin and Buss JJA agreed) delivered detailed reasons in which her Honour explained that Mr Glew's argument had no arguable foundation in law ([16] - [20]). An application by Mr Glew for special leave to appeal to the High Court was dismissed: ***Glew v Shire of Greenough*** [2007] HCATrans 520 (6 September 2007). Undaunted, Mr Glew subsequently relied upon the same ground in ***Glew Technologies Pty Ltd v Department of Planning and Infrastructure***, where he contended that the 'changing of the name of the Crown' in certain State legislation meant that both the Magistrates Court and the Supreme Court lacked the authority of the Crown and therefore were invalidly constituted because they failed to meet the requirements of ch III. The argument fared no better on that occasion than it had the first time.

16 In this case, the contention has been presented in fresh apparel but the essential point remains the same. It has no more substance than it had in its former guise. It follows that ground 1 has no reasonable prospect of success. For the same reason, ground 3 is also without any reasonable prospect of success.

17 Ground 2 is frivolous and vexatious.

18 There is no substance in ground 4. In this court, s 42 of the *Supreme Court Act 1935* (WA) sets out the circumstances in which trial by jury is available in civil proceedings. Section 42 provides, in effect, that if, on the application of a party to an action, the court is satisfied that (relevantly) a claim of fraud is in issue, the action shall be tried by jury unless the court is satisfied that (among other things) the trial requires any prolonged examination of documents or scientific examination which cannot conveniently be made with a jury. Unless an order for trial with a jury has been made, a civil trial is heard by a judge without a jury: O 32(3) of the Supreme Court Rules.

19 On 23 July 2009, before the trial had commenced, Mr Glew made an oral application to the primary judge for trial by jury. That was opposed by the respondent. His Honour refused the application, concluding that the trial involved technical issues and the examination of documents which made it inappropriate for a jury trial. On the appeal, Mr Glew did

not challenge the exercise of the primary judge's discretion. Rather, he contended that the refusal of a jury trial infringed s 80 of the Commonwealth Constitution and habeus corpus. Section 80 provides that the trial on indictment of an offence against a law of the Commonwealth shall be by jury. This, self-evidently, was not such a trial. Nor does habeus corpus assist Mr Glew. This ground has no reasonable prospect of success.

20 Ground 5 appears to assert, in effect, that the primary judge erred in refusing to allow the first appellant to act on behalf of the second appellant in the action. It is clear that the primary judge was not in error in so ruling. We have already pointed out that by reason of O 4 r 3(2) of the Supreme Court Rules, a corporation can act only by a solicitor in civil proceedings in the court. See also ***Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd*** [2000] WASC 178; (2000) 22 WAR 372. In the course of the hearing on the appeal, Mr Glew referred to his argument before the primary judge (ts 184 - 188) that O 4 r 3(2) of the Supreme Court Rules was inconsistent with the *Corporations Act 2001* (Cth) and therefore invalid by virtue of s 109 of the Commonwealth Constitution. The primary judge held there was no inconsistency, direct or indirect. His Honour was, with respect, plainly correct. Accordingly, there is no substance in that contention.

21 On the appeal, Mr Glew also argued that the Supreme Court Rules were invalid as constituting an exercise of legislative power by the court, contrary to s 71 of the Commonwealth Constitution. We do not understand that submission. The power of this court to make rules of court is provided by s 167 of the *Supreme Court Act*. There is nothing in s 71, or in any other provision, of the Commonwealth Constitution which bears upon that power.

22 It follows that ground 5 of the grounds of appeal has no reasonable prospect of success.

23 Ground 6 was explained by Mr Glew at the hearing before us to be a contention that, as part of a conspiracy against him involving the primary judge, the respondent and the respondent's legal representatives, the primary judge ignored 'key parts of the evidence' in order to find for the respondent. It was not sought to be alleged that the primary judge had simply overlooked or failed to take the (unspecified) evidence into account. The appellants' complaint was firmly grounded in an allegation that his Honour deliberately ignored the evidence as part of the alleged

conspiracy. Mr Glew made it very clear that it was intended to be an allegation of dishonesty.

24 It hardly needs to be said that an allegation of dishonesty or impropriety is a very serious matter. It is well-established that such an allegation should not be made unless there is a proper factual basis for it and, where such an allegation is made, it must be clearly and distinctly alleged and precise particulars of it provided. A party should not be obliged to defend any legal proceedings, for any period, based on generalised allegations of dishonesty or impropriety: ***Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd*** [2000] WASCA 255 [41]. It is improper for a party to make generalised allegations of fraud: ***Yap v Cheshire Holdings Pty Ltd*** [2007] WASCA 50 [15].

25 In this case, the allegation could hardly be in more general terms. No particulars have been given of the alleged fraud and even the evidence alleged to have been ignored remains unidentified. The submissions (such as they are) do not go beyond a simple assertion that the primary judge, the respondent's legal representatives and the respondent have breached a number of provisions of the *Crimes Act 1914* (Cth), the Commonwealth Constitution, habeas corpus and the *Criminal Code 1913* (WA). In our view, the ground is quite improper and must be struck out.

26 Ground 7 is inexplicable on its face. In the course of the hearing we were informed by Mr Glew that the alleged offences related to a proposed amendment to the respondent's statement of claim during the course of the trial. The offences were said to be part of the conspiracy referred to in relation to ground 6. The alleged offences require some brief explanation.

27 On 8 September 2009, in the course of the trial, senior counsel for the respondent provided to Mr Glew and to the court a minute of proposed amendments to the statement of claim. No order was made at that stage in relation to the proposed amendments. Shortly before the court rose for the day, senior counsel informed the court that the respondent would not move to amend the statement of claim in accordance with that minute but that another minute of proposed amendments would be provided to the court and Mr Glew that evening (ts 268 - 271). That occurred. At the resumption of the hearing on 9 September, Mr Glew contended that, having regard to its terms, the provision on 8 September of the earlier minute of proposed amendments was fraudulent and constituted a criminal offence (ts 282 - 283). The primary judge described that proposition as 'nonsense' (ts 283). We respectfully agree. In any event, ground 7 does not allege error by the primary judge of a nature that would entitle the

appellants to relief on the appeal. Ground 7 has no reasonable prospect of success.

28 The 'constitutional issues' referred to in ground 8 were identified by Mr Glew in the course of the hearing before us to be the same issue as he had identified in relation to ground 1; that is, that the proceedings before the primary judge did not accord with the requirements of ch III of the Commonwealth Constitution. This ground has no reasonable prospect of success for the reasons given earlier.

29 As none of the grounds of appeal has any reasonable prospect of success, we would dismiss the appeal by the first appellant. It necessarily follows that the appeal by the second appellant must also be dismissed, quite apart from the fact that it is irregular.

30 In the event the appeal was dismissed, the respondent sought an order that the appellants pay the respondent's costs of the appeal to be taxed, including costs pursuant to item 32 of the Supreme Court scale. Item 32 permits the recovery of costs reasonably incurred but not covered by any other item in the scale. It is not applicable to an order for party and party costs unless the court so orders. The respondent submits that unless such an order is made there is a prospect that the respondent will be entitled to recover only a small part of its costs; in particular, that it may be entitled to recover only the costs of filing the respondent's notice of intention. However, if an order is made on the basis that item 32 is to apply, the respondent will be able to recover for work reasonably carried out in connection with this hearing.

31 In our view, it was appropriate that the respondent appear on the hearing of this matter and therefore it is appropriate that it be able to recover the reasonable costs it has incurred in doing so. We would make the costs order sought.

32 We would therefore make the following orders:

1. the appeal is dismissed; and

2. the appellants are to pay the respondent's costs of and incidental to the appeal, including costs pursuant to item 32 of the scale of costs, to be taxed.