SUPREME COURT OF QUEENSLAND

CITATION:	*Shoujaa Pty Ltd & Anor v Haboob Pty Ltd as Trustee for the Shoujaa Trust & Ors* [2017] QSC 125
PARTIES:	**SHOUJAA PTY LTD** ACN 106 038 279 (first plaintiff) **SHEIKH HAMAD BIN HAMDAN AL NAHYAN** (second plaintiff) **v** **HABOOB PTY LTD AS TRUSTEE FOR THE SHOUJAA TRUST** ACN 603 376 941 (first defendant) **PETER COLIN BEATTIE** (second defendant) **WEBSTING PTY LTD** ACN 010 234 429 (third defendant)
FILE NO/S:	SC No 5099 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	16 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers.
JUDGE:	Bond J
ORDER:	**The plaintiffs pay the costs of the defendants of the review of 5 May 2017, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – COSTS – RECOVERY OF COSTS – where the plaintiffs did not comply with a trial directions order – where the defendants requested that the matter be re-listed for review to address the non-compliance – whether the plaintiffs should pay the defendants' costs of the review – whether costs should be assessed on the indemnity basis *Uniform Civil Procedure Rules* 1999 (Qld), r 5 *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, cited *Di Carlo v Dubois* [2002] QCA 225, cited *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo* [2013] QCA 305, cited

SOLICITORS: Mitry Lawyers for the plaintiffs
OMB Solicitors for the defendants

[1] This proceeding is being managed by me on the commercial list. It has been set down for an 8-day trial commencing on 28 August 2017.

[2] Prior to 19 April 2017, I had made trial directions which provided for the delivery before trial of documents containing written summaries of the evidence to be given by lay witnesses, but which assumed that the actual evidence would be given entirely orally at trial (**the evidence summaries model**): see orders made by me on 5 August 2016 and 3 February 2017.

[3] At a review on 19 April 2017, I raised with the parties my concern that if the trial was permitted to run without some part of the evidence being reduced to writing, it would not be completed within the time allocated to it.

[4] That issue was the subject of oral submissions before me on that day. The plaintiffs were happy to accept a change to the existing regime to permit the delivery before trial of written statements, with more limited oral evidence being given at trial (**the written evidence model**). The defendants opposed that course, contending for a continuation of the status quo, namely the evidence summaries model.

[5] I did not make a determination as to what form of order I would make on that day. Rather, I directed:

(a) that the plaintiffs provide a draft case management order by email to my Associate, copied to the defendants, by 4:00pm on 20 April 2017; and

(b) that the defendants provide their responsive suggestions in relation to that order by tracked changes by email to my Associate, copied to the plaintiffs, by 4:00pm on 24 April 2017,

indicating that I would make a decision on the papers.

[6] On 20 April 2017, the plaintiffs by their solicitors provided a draft order which adopted the written evidence model. The draft order proposed, amongst other things, that the plaintiffs would serve witness statements by 4:00pm on 28 April 2017.

[7] On 24 April 2017, the defendants by their solicitors provided two forms of draft order:

(a) one which accepted the plaintiffs' written evidence model, but which proposed certain amendments to it; and

(b) another, which they preferred, which was based on the evidence summaries model.

[8] The defendants also provided a note explaining why they submitted I should formulate an order along the lines of their preferred model. Notably each of the defendants' drafts adopted the plaintiffs' proposal that the plaintiffs serve their material (which would be either written statements or summaries of evidence depending on the model I chose) by 4:00pm on 28 April 2017.

[9] On 28 April 2017 I made orders on the papers, which essentially preferred the plaintiffs' proposed written evidence model. The orders which I made provided, *inter alia*, that the plaintiffs serve witness statements by 4:00pm on 28 April 2017. In other words, I adopted the timing for the plaintiffs to deliver material which was common ground between the two sides. It transpired that I did not make the order until after 4:00pm, and the parties were provided with a copy of my order at 4:26pm, but that aspect of the timing could, if it had ever mattered, have been corrected under the slip rule.

[10] Indeed, sensibly, the defendants did not take any point about not getting the statements on 28 April 2017. On 2 May 2017 the defendants' solicitors wrote to the plaintiffs' solicitors in the following terms:

> We refer to the above matter and to the Direction Orders of Justice Bond dated 28 April 2017.
>
> Pursuant to Order 8, the Plaintiffs signed Witness Statements were for each lay witness intended to be relied on at the trial of this matter was due on or before 4:00pm on 28 April 2017.
>
> Given the public holiday in Queensland, being 1 May 2017, we note that the Plaintiffs Witness Statements are due by 4.000 [sic] pm today.

[11] On 3 May 2017 at 2:22pm, the defendants' solicitors again wrote to the plaintiffs' solicitors. The letter:

(a) noted that the plaintiffs had not complied with my order of 28 April 2017;

(b) noted that the plaintiffs had not provided any explanation for their non-compliance;

(c) noted that the plaintiffs had not indicated any concern as to their ability to provide the witness statements by 28 April 2017 at the review on 19 April 2017, or at any time prior to my making the order referred to above;

(d) indicated that the defendants intended to approach my Associate at 4:00pm to arrange for the matter to be listed for further review;

(e) invited from the plaintiffs (before 4:00pm) an explanation of their non-compliance with the order; and

(f) concluded as follows:

> > Furthermore, in the event that your clients' signed witness statements are provided and an acceptable resolution as to the timetable can be reached before any such Review occurs, our preference would be to resolve these matters without incurring the costs of an appearance.
> >
> > We reserve all of our clients' costs.

[12] On 3 May 2017 at 3:22pm the plaintiffs' solicitors responded. It is appropriate to set out the relevant parts of the letter in full:

> We are writing to advise that, for the reasons outlined below, our clients will not be in a position to file and serve their witness statements until 12 May 2017.
>
> On 19 April 2017, Bond J conducted a directions hearing where the parties each contended for very different directions, particularly in respect of witness statements. His Honour adjourned the hearing and asked each of the parties to provide him with further amended draft orders. His Honour indicated that, after considering each of the drafts, he would decide the matter on the papers.
>
> Your clients' primary position on witness statements was that there should not be any served in advance of trial, and that all evidence-in-chief should be given orally. A written submission to that effect was submitted by your clients' Counsel together with their proposed draft.
>
> There was a reasonable possibility that his Honour would make the orders sought by your client, which would have done away with the need for our clients to serve witness statements in advance of trial. Consequently, our clients' witness statements were not readied for filing on 28 April. However, substantial work towards completion of those witness statements was undertaken in any event.
>
> As it transpired, his Honour did not deliver his decision until after the time contemplated by our clients' draft had already passed. This was approximately 10 days after the parties appeared at the directions hearing.
>
> Further, our clients have changed Senior Counsel to progress the matter to trial. Peter Davis QC has been retained and will be settling the witness statements. Mr Davis is currently in a matter before the courts in Cairns but we reasonably expect that he will be in a position to settle the witness statements by 12 May 2017.
>
> We therefore seek your clients' consent to our clients filing and serving their witness statements on or before 4pm on Friday, 12 May 2017. Our clients will agree to a similar extension for the delivery of your

clients' witness statements. If an order is preferred, we are happy to provide a draft for your consideration. Should your clients oppose this course, we will arrange to have the matter relisted before his Honour.

[13] I regarded that letter and the behavior of the plaintiffs to be high-handed, to say the least. Their draft order reflected their proposal to have their witness statements done by 28 April. The defendants' draft order proposed having something done by that date which would have been easier, namely delivery of summaries not statements. Yet the plaintiffs had taken it upon themselves to regard the fact that I was in the process of choosing, relevantly, between 2 options, each of which was to happen on 28 April, as a warrant to put themselves in the position that they could not do either on 28 April, but would need a 2 week delay. At first blush, their explanation seemed unacceptable. The defendants' concern was understandable.

[14] I listed the matter for review, as requested by the defendants. At the review on 5 May 2017 I made orders which, *inter alia*:

(a) by consent, required the plaintiffs to serve witness statements by 12 May 2017;

(b) directed the plaintiffs' solicitor, Mr Mitry, to file, by 12 May 2017, an affidavit explaining the plaintiffs' non-compliance with the order of 28 April 2017; and

(c) directed the parties to exchange written submissions as to the costs of the review.

[15] Mr Mitry's affidavit was filed as directed. It reprised only the two explanations for the plaintiffs' non-compliance advanced in the letter of 3 May 2017, quoted at [12] above, namely:

(a) that there was a "reasonable possibility" that I would resolve in favour of the defendants' primary draft order, which required only the service of witness summaries; and

(b) that the plaintiffs' had changed Senior Counsel and that their new Senior Counsel had requested an opportunity to review the witness statements before they were filed.

[16] As to the first explanation:

(a) The course upon which his clients should have been embarked, consistent with their duty under r 5 UCPR and their communications to the Court at the review of 19 April and the subsequently provided draft order, was to put themselves in the position of being able to deliver their written statements on the date and by the time that they had represented they could.

(b) Mr Mitry notes, correctly, that the order I made on 28 April 2017 was not made until after 4:00pm that day. The consequence is that the plaintiffs could hardly be criticized for not providing their statements on that day. (And they have not been.)

(c) But the fact that I might have selected the evidence summaries model could, at best, and if I had chosen it, have explained a brief delay to prepare summaries of the evidence which would be contained in the written statements which should have been ready. As it transpired, I took the course which the plaintiffs urged on me.

(d) I reject the explanation. It does not exculpate the plaintiffs from their failure to behave in the way described in (a).

[17] As to the second explanation:

(a) Despite the fact that I had specifically ordered Mr Mitry to provide an explanatory affidavit after a review hearing in which it must have been evident that I could not have been satisfied with what I had read in the 3 May 2017 letter, Mr Mitry's affidavit did not identify when the decision to brief new Senior Counsel was made.

(b) The only information touching upon that subject in his affidavit is the following:

(i) On 27 April 2017 a solicitor from Mr Mitry's office conferred with new Senior Counsel.

(ii) The new Senior Counsel had previously requested he have an opportunity to review witness statements before they were filed. (When that request was made is not apparent.)

(iii) On 28 April 2017, the solicitor from Mr Mitry's office informed Mr Mitry that the new Senior Counsel was unavailable because he was briefed to run a trial in Cairns for 4 weeks.

(iv) Mr Mitry emailed my Associate on 1 May 2017 indicating that there had been a change of Senior Counsel, but, notably, not raising any suggestion that the change might have any impact on the timetable.

(c) Inability to comply with a timetable can sometimes be explained adequately by the need to change counsel. Existing counsel might, for example, become unavailable through no fault of the client or the client's solicitors. However, a client cannot excuse non-compliance with a timetabling order by voluntarily exercising their right to change counsel. In light of the absence of material from Mr Mitry I will infer that such further detail as they could have adduced on the question of the timing of briefing new counsel or the reasons for it would not have assisted them.

(d) The result is that the change of Senior Counsel is not an adequate explanation for the failure to comply with the timetable and for the conduct which necessitated the further review hearing on 5 May 2017.

[18] The defendants have applied for an order that the plaintiffs pay their costs of the review on 5 May 2017. The plaintiffs contend that the appropriate order is that the costs of the review be each party's costs in the proceeding. I think the order the defendants seek is justified because the need for an additional review was occasioned solely by the plaintiffs' delay, for which no adequate explanation has been put forward. Had the plaintiffs conducted themselves in the way that they had represented to the Court that they could, they would have been in a position to deliver witness statements on 28 April 2017 and could, given the timing of my order, have delivered them within the time frame which was mentioned in the defendants' solicitors' email of 2 May 2017. They have not put forward any explanation which would suggest they should not carry the costs burden of the additional review.

[19] The defendants also seek an order that the costs be assessed on the indemnity basis.

[20] The court has a broad discretion to order indemnity costs. The applicable principles were summarised by Sheppard J in the well-known decision of *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 232-234. Those principles have been accepted by the Court of Appeal: see *Di Carlo v Dubois* [2002] QCA 225 at [37]; *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo* [2013] QCA 305 at [21]. The guiding principle is that an order for indemnity costs will only be appropriate where there is some "special or unusual feature" of the case which justifies the court departing from the ordinary rule.

[21] The defendants submit that the special or unusual feature which exists in the present circumstances and which justifies an indemnity costs order is that the circumstances which led to the delay must have been known to the plaintiffs on 19 April 2017. They contend that the plaintiffs "acted in an unreasonable fashion such that a further review was necessitated, which might have been avoided if full and proper disclosure of the plaintiffs'

ability to finalise its evidence had been made to the Court at the review conducted on 19 April 2017".

[22] The defendants contend that I should infer such knowledge on behalf of the plaintiffs from the following matters:

(a) **first**, that the plaintiffs' assertion that the delay was because of the "reasonable possibility" that I would resolve in favour of witness summaries does not stand up to scrutiny, and that it would not have been reasonable to "stop work" pending my determination of the order to be made;

(b) **second**, that the plaintiffs' requested extension until 12 May 2017 was notably longer than the eight day timeframe which was proposed in the draft order they provided on 20 April 2017, and that there was no evidence of any relevant change in circumstance between 20 April and 28 April 2017;

(c) **third**, that the plaintiffs' change of Senior Counsel must have occurred prior to 1 May 2017, but that Mr Mitry does not otherwise depose to when the plaintiffs became aware that a change in Senior Counsel would be required, and when it took place;

(d) **fourth**, that on 31 March 2017 the plaintiffs' first suggested the date of 28 April 2017 to the defendants, and that prior to this the plaintiffs had been content to agree to serve their summaries of evidence by 14 April 2017; and

(e) **fifth**, that the plaintiffs said nothing about their inability to comply, which must have been known to them at the very latest by the time the directions were made on 28 April 2017.

[23] It does not seem to me that any of these points justify the inference that the plaintiffs had knowledge as at 19 April 2017 that they would not be able to serve the witness statements by 28 April 2017. None of the matters raised provide any basis for drawing an inference one way or the other about the state of the plaintiffs' knowledge as at 19 April 2017. I make the following observations:

(a) I agree that the "reasonable possibility" argument does not withstand scrutiny, but that does not affect one way or the other whether the plaintiffs' knew, as at 19 April 2017, that they would not be able to serve the witness statements by 28 April 2017.

(b) That the extension until 12 May 2017 sought in the plaintiffs' letter of 3 May 2017 (extracted at [12] above) was longer than the timeframe proposed in their draft order of 20 April 2017 is not a fact which speaks to the plaintiffs' knowledge as at 19 April 2017.

(c) There is no basis to infer that the plaintiffs' change of Senior Counsel occurred before 19 April 2017. No proper application of the rule in *Jones v Dunkel* (1959) 101 CLR 298 to the inadequacies of Mr Mitry's explanation would permit that inference to be drawn. It follows that the change of counsel is not a matter relevant to the plaintiffs' knowledge at 19 April 2017.

(d) That the plaintiffs first suggested the date of 28 April 2017 to the defendants on 31 March 2017 is not a fact relevant to the plaintiffs' knowledge as at 19 April 2017.

(e) That the plaintiffs said nothing about their inability to comply after the order was made on 28 April 2017 is not relevant to their knowledge as at 19 April 2017.

[24] The defendants also submitted that the plaintiffs have a "pattern of non-compliance with directions about witness summaries". The plaintiffs responded that any inquiry into the past conduct of the parties would reveal a "long history of noncompliance by both sides".

The defendants in reply asserted that to date, only the plaintiffs have defaulted on directions to serve witness summaries or witness statements. I think the parties' past conduct should be put to one side. It does not seem to me to be relevant to the present dispute, which concerns only the costs of the review of 5 May 2017. In any event, no evidence has been placed before me justifying the broad assertions contained in the parties' submissions.

[25] The result is that I do not accept the defendants' argument as to the justification for the making of an indemnity costs order.

[26] I order that the plaintiffs pay the costs of the defendants of the review of 5 May 2017, to be assessed on the standard basis.