SUPREME COURT OF QUEENSLAND

CITATION:	*John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No 2)* [2018] QSC 48
PARTIES:	**JOHN HOLLAND PTY LTD** ABN 11 004 282 268 (applicant) **v** **ADANI ABBOT POINT TERMINAL PTY LTD** ABN 93 149 298 206 (respondent)
FILE NO/S:	SC No 2604 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Jackson J
ORDER:	**The applicant pay the respondent's costs of the proceeding, to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – ABUSE OF PROCESS – where application for leave to appeal under *Commercial Arbitration Act* 1990 (Qld) s 38 – where length and volume of material oppressive – where framing of application is "tantamount to an abuse of process" – whether costs should be assessed on the indemnity basis *Civil Proceedings Act* 2011 (Qld), s 15 *Commercial Arbitration Act* 1990 (Qld), s 38 *Uniform Civil Procedure Rules* 1999 (Qld), rr 5, 681, 703 *Ainger v Coffs Harbour City Council (No 2*) [2007] NSWCA 212, cited *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, cited *Civil Mining & Construction Pty Ltd v Queensland* [2013] QSC 214, cited *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, discussed

Di Carlo v Dubois [2002] QCA 225, cited
Gordion Runoff Ltd v Westport Insurance Corp (2010) 267 ALR 74, cited
Hammercall Pty Ltd v Robertson [2011] QCA 380, cited
Horseshoe Pastoral Co Pty Ltd v Murray Smith trading as South Coast Tile and Slate Co [1995] NSWCA 200, cited
Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd (1995) 36 NSWLR 242, cited
LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo, cited
McConnell Dowell Constructors (Aust) Pty Ltd v QCLNG Pipeline Pty Ltd [2014] QSC 157, cited
Mylward v Weldon (1596) 21 ER 136, cited
Peet v Richmond [2010] VSCA 71, cited
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724, cited
Promenade Investments Pty Ltd v State of New South Wales (1992) 26 NSWLR 203, cited
Robinson v Laws [2003] 1 Qd R 81, cited
Schache v GP No. 1 Pty Ltd [2012] QCA 233, cited
Standard Bank plc v Via Mat International Ltd [2013] EWCA Civ 490, cited
Sugar Australia Pty Ltd v Mackay Sugar Ltd [2012] QSC 38, cited

COUNSEL: Written submissions by B Bradley for the applicant
Written submissions by D Piggott for the respondent

SOLICITORS: Kind & Wood Mallesons for the applicant
McCullough Robertson for the respondent

[1] On 12 December 2016, I ordered that the application for leave to appeal on a question of law arising out of an arbitral award made as between the parties was dismissed. I will refer to the reasons for that decision as "my earlier reasons".[1]

[2] The respondent applies for an order that the applicant pay the respondent's costs of the proceeding to be assessed on the indemnity basis. The applicant submits that an order should be made that it pay the respondent's costs but not on the indemnity basis.

[3] The respondent submits there are three special or unusual features of the case that warrant an order that the costs be assessed on the indemnity basis:

(a) first, the applicant conducted the application in an unacceptable manner;

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[1] *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292.

(b) second, the applicant unmeritoriously attempted to avoid the submission it made to the arbitrator that he should consider only the issues raised in the written submissions before him; and

(c) third, the nature and number of deficiencies identified in the reasons for dismissing the application indicate that the applicant failed to critically address the application and its material to the proper issues.

[4] The respondent submits those special or unusual features led to the undue prolongation of the case, loss of time and greater investment of both the respondent's and the Court's resources.

[5] The applicant submits that an order that the costs be assessed on the indemnity basis should not be made for several reasons:

(a) first, such an order is not made to punish an unsuccessful party;

(b) second, the criticisms made of the applicant's case and conduct in the reasons for judgment do not indicate the application was brought for any improper purpose;

(c) third, it was necessary for the applicant to show that any question of law that would be the subject of an appeal could substantially affect the applicant's rights so that it was incumbent on the applicant to show that the errors on which it relied as constituting the question or questions were manifest throughout the reasons for the award;

(d) fourth, although the structure of its submissions containing 35 pages of submissions and 97 pages of Annexure A was lengthy, it was not prolix and the application was not brought for any ulterior, vexatious or harassing purpose that would amount to an abuse of process; and

(e) fifth, although during closing argument, the applicant submitted to the arbitrator that he should look at the submissions and deal with the submissions in response to a question about what had to be resolved, the context of that answer was such that the applicant's attempt to raise other submissions on the application for leave to appeal was not unmeritorious; and

(f) sixth, the applicant's failure to identify the specific questions of law for which it sought leave prior to furnishing the draft order which set out those questions and identified the nature and number of the deficiencies in the reasons do not indicate that the applicant failed to critically address the application to the proper issues.

[6] The applicant further submits that, in any event, the respondent did not put the applicant on notice that it would be seeking a special costs order and failure to do

so is a powerful discretionary reason not to order that the costs be assessed on the indemnity basis.

Assessed on the indemnity basis

[7] The exclusively statutory power to order that one party pay another party's costs is conferred by s 15 of the *Civil Proceedings Act* 2011 (Qld) in terms that the Court may award costs in all proceedings unless otherwise provided. In addition, the rule making power conferred by s 85 of the *Supreme Court of Queensland Act* 1991 (Qld) for the practices and procedures of the Supreme Court includes, by s 21 of Sch 1 to that Act, power to make rules for costs in civil proceedings, including the assessment of costs.

[8] As rules made under the rule making power, rr 681 and 703 of the *Uniform Civil Procedure Rules* 1999 (Qld) provide, in part:

> **"681 General rule about costs**
>
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> 703 **Indemnity basis of assessment**
>
> (1) The court may order costs to be assessed on the indemnity basis.
>
> *Note—*
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> Costs on the indemnity basis were previously solicitor and client costs—see rule 743S (Old basis for taxing costs equates to new basis for assessing costs)."

[9] There are numerous cases that consider similar statutory powers to order that costs be assessed on the indemnity basis, which is sometimes included in the category of a "special" order for costs. Many of the cases refer to the 1993 decision in *Colgate-Palmolive Co v Cussons Pty Ltd*[2] as containing a leading statement of some of the relevant considerations. In the context of the legislation applying in Queensland, the Court of Appeal has made a number of useful pronouncements that inform the exercise of the general discretionary power.

[10] In *Di Carlo v Dubois*,[3] White J said:

> "… [In] *Colgate-Palmolive*… Sheppard J was able to derive a number of principles or guidelines. At p232-p234 his Honour recognised that the categories in which the discretion may be exercised are not closed. Woodward J at 637 in *Fountain* said that there needs to be some special or unusual feature in the case to justify a court departing from the ordinary practice. Sheppard J instanced the making of allegations of fraud knowing them to be false and the making of irrelevant

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2 (1993) 46 FCR 225.
3 [2002] QCA 225.

> allegations of fraud; misconduct that causes loss of time to the court and the other parties; the fact that the proceedings were commenced at or continued for some ulterior motive; or in wilful disregard of known facts; or clearly established law; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions; the imprudent refusal of an offer to compromise; and costs against a contemnor."[4]

[11] White J reviewed other cases in which cognate statements were made and continued:

> "It is important that applications for the award of costs on the indemnity basis not be seen as too readily available when a particular party against whom the order is sought is seen to carry responsibility for the state of affairs calling for a costs order without some further facts analogous to those mentioned in *Colgate* and other considered decisions."[5]

[12] In *Schache v GP No. 1 Pty Ltd*,[6] Muir JA considered the power to order costs on the indemnity basis as follows:

> "The circumstances warranting the ordering of indemnity rather than standard costs were discussed at some length by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*. In that case, his Honour observed that the settled practice in Australia has been for costs to be awarded to the successful party to a proceeding on, what is in effect, the standard basis unless the circumstances warrant departure from that course. His Honour noted that some of the circumstances which had been thought to warrant the making of an indemnity costs order were: the making of allegations of fraud which were either known to be false or irrelevant; the engaging in misconduct that caused loss of time to the court and other parties; the commencement or continuation of proceedings for some ulterior motive 'or in wilful disregard of known facts or clearly established law'; the making of allegations which ought never to have been made or the undue promulgation of a case by groundless contentions; and an imprudent refusal of an offer to compromise. Sheppard J concluded this list with the observation:
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> > 'The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.'".[7] (footnotes omitted)

[13] In *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo*,[8] Boddice J said:

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4 [2002] QCA 225, [37].
5 [2002] QCA 225, [40].
6 [2012] QCA 233.
7 [2012] QCA 233, [40].
8 [2013] QCA 305.

> "The applicable principles for the awarding of indemnity costs were usefully summarised by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*. However, those principles operate as a guide to the exercise of the relevant discretion. They do not define all of the circumstances in which the discretion is to be exercised and do not limit the width of that discretion. Further, the categories in which the discretion to award indemnity costs may be exercised are not closed.
>
> Whilst the awarding of costs on an indemnity basis will always ultimately depend on the exercise of a discretion in the particular circumstances of each individual case, the justification for an award of indemnity costs continues to require some special or unusual feature of the particular case. As was observed by Basten JA in *Chaina v Alvaro Homes Pty Ltd*, the general rule remains that costs should be assessed on a party and party basis, and the standard to be applied in awarding indemnity costs ought not 'be allowed to diminish to the extent that an unsuccessful party will be at risk of an order for costs assessed on an indemnity basis, absent some blameworthy conduct on its part.'" [9] (footnotes omitted)

[14] To those observations, it may be added that the Court of Appeal has treated a case of abuse of process as sufficient ground for an order that costs be assessed on the indemnity basis.[10]

[15] Next, a number of cases have considered whether a party who proposes to seek a special order that costs be assessed on the indemnity basis should give notice of an application for indemnity costs before the hearing of the matter. In Australia, that conception appears to have originated in the Court of Appeal of New South Wales in *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd*[11] where Kirby P said:

> "If such an order is to be made, it would be preferable that it should follow due and timely warning by the successful party to the unsuccessful that indemnity costs will be sought… In short, if the legal representatives of parties to an appeal (particularly perhaps in commercial litigation such as the present) consider that the appeal, or points in it, are obviously hopeless and doomed to fail, they would be well advised to warn their opponents that continued prosecution of the appeal, or of the hopeless points, will result in an application to the Court for a special costs order."[12]

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9 [2013] QCA 305, [21]-[22].
10 *Hammercall Pty Ltd v Robertson* [2011] QCA 380, [69].
11 (1995) 36 NSWLR 242.
12 (1995) 36 NSWLR 242, 249-250.

[16] That approach has been consistently followed since.[13] However, as the cases show, lack of warning is a relevant consideration to take into account but a warning is not a precondition to making an order for indemnity costs.

Abuse of process by oppression

[17] The categories of abuse of process are not closed, but there are recognised circumstances where the conduct of a party in starting or conducting litigation may amount to an abuse of process. One of them is where the litigation is oppressive to the other party.[14]

[18] A variety of things may make litigation oppressive in the relevant sense. But when the manner in which the litigation is conducted includes prolix documents, unnecessary or unwinnable contentions, or unreasonable factual assertions, that combine to cause excessive expense and delay for the other party, and a disproportionate burden on the public resources of the court in the disposition of the proceeding, it may reasonably be said that the proceeding and conduct of the moving party are oppressive.

[19] The present context is one where the proceeding was an application for leave to appeal under s 38 of the *Commercial Arbitration Act* 1990 (Qld). There are relevant considerations which inform what is conduct amounting to oppression on an application for leave of this kind.

[20] First, in most cases it is inappropriate to hear an application for leave of this kind and the substantive appeal, if leave is to be granted, at the same hearing.[15] To do so would not conform with the intention of the statute in expressly limiting any right of appeal to a case where the requirements for a grant of leave are established.

[21] Second, the circumstances under which the leave requirements in the form of s 38 were introduced and the purpose of those requirements were explained in *Promenade Investments Pty Ltd v State of New South Wales*.[16] In the course of that explanation, Sheller JA said:

> "There should, in my opinion, before leave is granted be powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law."[17]

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[13] *Horseshoe Pastoral Co Pty Ltd v Murray Smith trading as South Coast Tile and Slate Co* [1995] NSWCA 200, 2; *Ainger v Coffs Harbour City Council (No 2*) [2007] NSWCA 212, [29]; cf *Peet v Richmond* [2010] VSCA 71, [33]-[35].

[14] *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 265-268 [9]-[16].

[15] *Gordion Runoff Ltd v Westport Insurance Corp* (2010) 267 ALR 74, 92-95 [102]-[113]. Although the decision of the Court of Appeal of New South Wales was set aside on appeal to the High Court, this point was not overturned.

[16] (1992) 26 NSWLR 203.

[17] (1992) 26 NSWLR 203, 226.

[22] That the argument should not be prolonged on such a leave application was not a new idea when *Promenade Investments* was decided in 1992. From 1979, in England, a similar threshold requirement for leave operated under s 1 of the *Arbitration Act* 1979 (UK). The well-known decision of the House of Lords in *The Nema*[18] in 1981 suggested that the leave application was not to involve lengthy argument. In 1982, Mustill and Boyd's *Commercial Arbitration*, said:

> "The argument on the application for leave must be comparatively brief; for otherwise the same element of potential delay will be introduced on the hearing of the application for leave as was an undesirable feature of the old system."[19]

[23] Paragraphs [16]-[23] of my earlier reasons outline the way in which the application for leave to appeal was made in the present case. As well, the hearing of the application took two days and then many more days of reading and analysis in order to absorb and deal with the arguments as presented and to prepare my earlier reasons. It was in this context that I said that "[t]he application so framed is tantamount to an abuse of process."

[24] Oppressive conduct of a proceeding is not just a matter between the parties. It concerns court administration. In early times, an extreme example of a court's displeasure with prolixity occurred in *Mylward v Weldon*,[20] where a court summarily imprisoned a pleader until a substantial fine was paid. In this court, r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) expressly provides that a party impliedly undertakes to the court to proceeding in an expeditious way and the court may impose "appropriate sanctions" if a party does not comply with those rules. In modern times, an adverse order for costs is the appropriate sanction against prolixity,[21] that is intended to compensate the opposite party rather than to punish the party in default.

[25] The applicant submits that the subject matter of the award concerned communications made during the project over several years that viewed individually and collectively constituted a breach of cl 23 of the contract. The award constituted some 646 paragraphs. The applicant submits that the condition under s 38(5)(a) that determination of the question of law "could substantially affect" the applicant's rights required it not only to demonstrate that the arbitrator made the errors it contended for but also that those errors manifested themselves throughout the reasons for the award, in explanation of the manner in which it presented the application.

[26] I accept that, to an extent, the 35 principal pages and the 97 further pages of the annexure to the applicant's written submissions were organised to highlight the proposed grounds of appeal, but in my view there were many items of detail that were unnecessary for the points to be decided on an application for leave that

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18 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.
19 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, 1st ed (1982) at 564.
20 (1596) 21 ER 136, referred to in *Standard Bank plc v Via Mat International Ltd* [2013] EWCA Civ 490, [29].
21 *Robinson v Laws* [2003] 1 Qd R 81.

either might have been omitted or might have been much simplified. Even if I were wrong about that, the applicant does not explain the 2,000 plus pages of affidavit material it read on the application, as justified for the hearing of the leave to appeal application, or why it was justified in presenting oral argument into a second day to identify and make submissions as to the questions of law on which leave should be given.

[27] In these findings I wish to make it clear that I do not intend personal criticism of any kind. I infer that the intention in presenting the application so fully was to increase its prospects of success and perhaps to show that much of the work that would be necessary for the proposed appeal if leave were granted had been done. Nevertheless, that is not what was required for the presentation of an application of leave to appeal that did not entail either excessive costs or delay. In particular, in my view, the problem was exacerbated by two other circumstances relevant to the disposition of the application for leave.

[28] First, much of the material and submissions were directed to the contention that the arbitrator had made errors in law because of the failure to consider, decide or provide reasons for not deciding that individually each of the "Impugned Representations"[22] was a material representation calculated to influence the Superintendent made in circumstances that constituted a breach of the "Disclosure Standard".[23]

[29] As discussed in my earlier reasons, the sheer number of suggested Impugned Representations and alleged failures to meet the Disclosure Standard presented very significant practical issues for the proposed appeal,[24] but the applicant faced the further difficulty that it had not submitted to the arbitrator that was the way in which he should deal with the case in its lengthy written submissions to him or when he specifically requested direction as to what issues the applicant wanted him to address in deciding the award.[25] This point was the basis for my finding that:

> "The applicant cannot avoid the criticism that it now seeks to depart from what it said to the arbitrator as to how he should deal with the applicant's case and that it now seeks to criticise as appellable the absence of findings in the arbitrator's reasons that the applicant did not squarely submit he should make anywhere in 192 pages of written submissions."[26]

[30] Second, the applicant's challenges to the arbitrator's findings that were submitted to entail errors of law, because the arbitrator did not deal with the application of the Disclosure Standard to the Impugned Representations as a separate alternative basis for the applicant's claim for relief before the arbitrator, were generally speaking challenges to the findings of fact made by the arbitrator as to the alleged breaches of cl 23.

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22 *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [42].
23 *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [50].
24 *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [45].
25 *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [63].
26 *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [69].

[31] The applicant further submits that it approached the questions of law in the present case having regard to the practice adopted in other applications under s 38.[27] However, in my view, nothing in those cases suggests that the present application in form or content was consistent with a usual practice that has developed for the hearing of an application under s 38 in this court. The application in the present case was so extensive and wide ranging as to the proposed grounds of appeal that it was not possible on reading it to identify what were the questions of law which would have been the limited subject of the proposed appeal.

Unmeritorious submission

[32] I do not, however, accept the respondent's submission that a reason for awarding indemnity costs is that the applicant unmeritoriously attempted to avoid the submission it made to the arbitrator that he should "look at the submissions and deal with the submissions".[28]

[33] While it is true that a reason why the application did not succeed was that the proposed questions for the appeal were based on a case that was not that which the applicant had clearly submitted for the arbitrator's decision, and, in effect, I held that the applicant would be limited on any appeal by the case that it had conducted before the arbitrator, that finding is not a matter of unmeritorious conduct. Whether a point sought to be advanced on appeal is within the scope of the case as it was conducted below is an everyday question of law in appellate practice that does not attract disapprobation just because it is resolved against an appellant.

Nature and number of deficiencies

[34] Likewise, I do not generally accept the respondent's submission that the nature and number of the deficiencies identified in the reasons for dismissing the application warrant an order for indemnity costs because they indicate that the applicant failed to critically address the application and its material to the proper issues.

[35] To support this submission, the respondent lists 30 points from my earlier reasons. But, in my view, the number of points on which an applicant fails is not a per se basis indicating an award of indemnity costs.

[36] As to the nature of the points raised, in my view, only two warrant mention in addition to the points previously made about the potentially oppressive character of the material in support of the application and the questions sought to be addressed on the application for leave to appeal.

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[27] *McConnell Dowell Constructors (Aust) Pty Ltd v QCLNG Pipeline Pty Ltd* [2014] QSC 157; *Civil Mining & Construction Pty Ltd v Queensland* [2013] QSC 214 and *Sugar Australia Pty Ltd v Mackay Sugar Ltd* [2012] QSC 38.

[28] *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [63].

[37] First, it will be remembered that the Impugned Representations constituted approximately 140 different communications and meetings.[29] In pressing the application for leave to appeal, the applicant did not shrink from the position that the arbitrator was required, in effect, to consider each and all of the Impugned Representations in deciding whether there was a breach of cl 23, including any combination of the Impugned Representations that was available.

[38] Second, had the arbitrator or the court on appeal reached the conclusion that any of the Impugned Representations amounted to a breach of cl 23, the applicant also submitted that it was for the arbitrator or the court to consider all available permutations and combinations as to whether the breach or breaches justified termination of each of the contracts and it was not for the applicant to have produced to the arbitrator the combination of findings that would amount to a substantial breach justifying termination.[30]

[39] In my view, the applicant's position on these points contributed to the potential for the application for leave to appeal to be oppressive.

Conclusion

[40] In my view, there was oppression in the material filed in support of and in the conduct of the application for leave to appeal. Although the respondent did not warn the applicant that it would seek an order for indemnity costs, my evaluative judgment overall is that an order should be made that the costs be assessed on the indemnity basis.

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[29] *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [42].
[30] *John Holland Pty Ltd v Adani Abbott Point Terminal Pty Ltd* [2016] QSC 292, [245].