SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer v Parbery & Ors* [2018] QCA 268
PARTIES:	**CLIVE FREDERICK PALMER** (applicant) **v** **STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ)** ACN 009 842 068 (first respondent) **QUEENSLAND NICKEL PTY LTD (IN LIQ)** ACN 009 842 068 (second respondent) **JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQUIDATION)** ACN 009 842 068 (third respondent)
FILE NO/S:	Appeal No 8282 of 2018 SC No 6593 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 176; [2018] QSC 178 (Bond J)
DELIVERED ON:	12 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Morrison JA
ORDER:	**The applicant is to pay the respondents' costs of and incidental to the application to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – where the applicant filed an application seeking to stay proceedings in the Supreme Court pending the determination of an appeal from directions made in those proceedings – where the application was withdrawn the day prior to the hearing with no explanation – whether costs ought to assessed on the indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 681

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Ghougassian v Fairfax Community Newspapers Pty Ltd [2015] NSWCA 307, applied
Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin (1997) 186 CLR 62; [1997] HCA 6, considered
Segal v Commonwealth Bank of Australia [2016] NSWCA 90, cited

COUNSEL: K S Byrne for the applicant
A G Rae for the respondents

SOLICITORS: Alexander Law for the applicant
King & Wood Mallesons for the respondents

[1] **MORRISON JA:** The respondents to the appeal in CA No 8282 of 2018 seek an order that the appellant pay their costs of an application on the indemnity basis instead of the usual standard basis.

Background and summary

[2] On 27 July 2018 the learned primary judge made case management directions in the principal proceedings (No. 6593 of 2017). The directions made that day included orders setting down the proceeding for trial commencing in April 2019. I will return to the orders in greater detail later.

[3] On 31 July 2018 Mr Palmer, as well as all other defendants to the main proceeding, filed a notice of appeal against those directions. Subsequently, on 30 August 2018, an order was made which had the effect of removing all appellants other than Mr Palmer from the appeal.

[4] On 2 August 2018 an application was filed seeking that certain of the orders made on 27 July 2018 be stayed pending determination of the appeal. An affidavit was filed to support that application.

[5] After the order removing all but Mr Palmer as appellants, Mr Palmer continued with both the appeal and the application for a stay. A stay application was listed for hearing on 5 September 2018, with submissions by the parties to be filed by 4 September 2018.

[6] At 11.14 am on 4 September 2018, the day prior to the hearing of the application for stay, solicitors for Mr Palmer informed the Deputy Registrar that he wished to withdraw the application.

[7] On 5 September 2018 the application was dismissed. Whilst the counsel appearing for the respondents to that application foreshadowed that they would seek costs on an indemnity basis rather than the standard basis, Counsel for Mr Palmer said that whilst it was conceded that costs should follow the event, they would resist any order that the costs be assessed otherwise than on the standard basis. Consequently, parties were ordered to file further submissions on that issue. The parties also agreed that the application could be determined on the papers.

Legal principles

[8] Costs are at the discretion of the court: r 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld). The ordinary rule is that costs are assessed on the standard basis, and a party who seeks to have indemnity costs awarded must show that there is some "special or unusual feature" which warrants such an order.[1] In *Colgate Palmolive Company v Cussons* some exploration was made of the sort of circumstances that might justify a finding that there was a sufficient special or unusual feature to warrant making an order for indemnity costs. Some examples proposed by Sheppard J included the commencement of an action in wilful disregard of known facts or clearly established law, the making of allegations which ought never have been made, and the undue prolongation of a case by groundless contentions. However, those were merely examples and the categories of cases where indemnity costs may be awarded are not closed.

Submissions

[9] Ms Rae, counsel for the respondents, submits that there is a special or unusual feature in this case, namely that the application for a stay was abandoned:

(a) without any explanation;

(b) the day before it was to be heard; and

(c) in circumstances where Mr Palmer and his advisors had ample opportunity to form a view as to the strength of the application much earlier than the day before it was heard; this followed because flaws in the appeal had already been identified by the learned primary judge in his own refusal to stay the proceedings, and all other defendants who had been parties to the appeal had sought to be removed from it.

[10] Ms Rae relied upon the decision of Emmett JA in *Ghougassian v Fairfax Community Newspapers Pty Ltd*[2] and *Segal v Commonwealth Bank of Australia*[3]. They were cases where proceedings had been abandoned at the last minute without any explanation, even though there had been ample opportunity to give such an explanation.

[11] Mr Byrne, appearing for Mr Palmer, submitted that there was no basis to warrant a departure from the usual rule as to costs. The application for indemnity costs invited speculation as to the outcome of the application for a stay, which was inappropriate in the circumstances as the application was not heard, submissions were not filed by Mr Palmer and the respondents' submissions had not been served before notice of discontinuance was given. Further, submissions in the substantive appeal had not been filed at that time. It was therefore contended that the court should not speculate on the prospects of the success of the appeal nor try a hypothetical action by drawing a conclusion as to the prospects of the stay application.[4]

[12] It was submitted that the absence of an explanation for discontinuing an interlocutory application is not, of itself, a basis to award indemnity costs. It was submitted that an

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[1] Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225 at 230.
[2] [2015] NSWCA 307 at [54]-[57].
[3] [2016] NSWCA 90 at [30].
[4] Reliance was placed on Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin (1997) 186 CLR 62 at 624.

explanation was either not strictly called for, or it could be inferred that Mr Palmer considered the orders sought were not worth the cost of pursuing them.[5]

[13] Mr Byrne contended that whilst the application had been discontinued at a late stage relative to the hearing, it had only had a short history and therefore the circumstances were not analogous to that which was the case in *Ghougassian*, where a fully prepared appeal was abandoned the day before it was to be heard.

Discussion

[14] The application for stay sought that only some of the orders made by the learned primary judge on 27 July 2018 be stayed. They were orders number 3, 7 to 9 and 17 to 20. Reference to the order made shows that it covered a number of discrete topics, as follows:

(a) amendment of the pleadings – comprehended orders 1 to 3, with order 1 requiring the plaintiffs in the proceedings to amend, and order 3 being directed towards a responsive pleading and production of documents under r 222 *UCPR*;

(b) an application for disclosure and for costs were postponed to 3 August 2018, to be heard by the learned primary judge; this comprehended orders 4 to 6, under which both plaintiffs and defendants in the main proceeding were required to carry out steps;

(c) applications for summary disposition of two applications relating to setting aside subpoenas and summary disposition of Mr Palmer's removal application were directed to be heard on 14 August 2018 by the learned primary judge; this comprehended orders 7 to 9, which required each of the two sides to carry out the various steps;

(d) an application by Mr Palmer to have the learned primary judge recuse himself was the subject of orders 10 to 15, leading to a hearing on 12 September 2018;

(e) three strike out applications (two by plaintiffs and one by defendants) and an application by the defendants for leave to proceed against a party were the subject of orders leading to a hearing on 8 October 2018; these were the subject of orders 16 to 23; order 16 listed the four applications for hearing on 8 October 2018 and orders 17 to 23 were directions obliging each side to take various steps to bring the matter on; and

(f) the main proceedings were set for trial commencing in April 2019; this was the subject of orders 24 and 25.

[15] That review of the orders made on 27 July 2018 is sufficient to demonstrate that the stay was only limited in scope. The stay did not seek to prevent the plaintiffs carrying out steps such as the amendment of the pleadings or the preparation of material and submissions for the applications said to be heard on 3 August 2018. Nor did it seek to prevent the defendants themselves from being subject to orders requiring them to take steps to participate in a hearing on 3 August 2018. Further, no stay was sought in respect of the orders listing the strike out applications and the application for leave to proceed, for hearing on 8 October 2018. Finally, the stay did not seek to prevent the consideration, on 3 August 2018, of the precise date of commencement of the trial.[6]

[5] Referring to Segal v Commonwealth Bank of Australia at [31].
[6] Order 25.

[16] Thus, it seems to me to be correct in my view, the stay sought is properly to be viewed as only a partial stay, albeit that the defendants sought primarily to be relieved of the necessity to amend the pleadings, provide a response to the request for production of documents, and respond to certain applications.

[17] It is true to say that no explanation was given as to why the application for a stay had been abandoned. None was forthcoming in the correspondence which notified that decision, nor on 5 September when the matter was called on. The notification given on 4 September was less than one hour before the deadline under which submissions had been directed to be filed. No submissions on the part of Mr Palmer were provided to the court, thereby preventing any explanation that might have been given in that way to avoid the conclusion that it was simply a case of abandoning a bad case. Therefore, I have been left uninformed of any fact from which it might be inferred that the stay application was a strong case abandoned for commercial or practical reasons. For reasons which will appear, the better inference is that it was a bad case abandoned for that reason.

[18] The stay was sought pending an appeal against the orders made on 27 July 2018, all of which were classically case management orders made in the context of the management of a commercial cause. Thus, the orders had the character that follows from the listing of a matter on the commercial causes list, where it cannot be allowed to languish, and must proceed under careful management.

[19] The grounds of the appeal in respect of which the stay was sought were as follows:

(a) that the orders and directions should not have been made given the "high likelihood of an application being made for orders that [the learned primary judge] recuse himself";

(b) there was a failure to apply, to the commercial list review, the principle that if an allegation of apprehended bias is made out, a retrial will be ordered irrespective of possible findings on other issues;

(c) the matter should not have been set down for trial in April 2019, that being "unreasonable or plainly unjust to do so in the absence of advanced notification of the proposed date before the commercial list review on 27 July 2018"; and

(d) in setting the matter down for trial the learned primary judge did not take into account, or gave insufficient weight to various relevant matters including the high likelihood of an application that his Honour recuse himself, that if that application was successful the trial date would be vacated, with consequent waste of time and cost, that pleadings were still being amended, discovery had not taken place and a trial plan and pre-trial directions had not been determined or argued.

[20] The quality of those grounds had been the subject of review by the learned primary judge himself in two decisions, each of which pre-dated the application for stay.

[21] The first decision was given on 27 July 2018 and the second on 3 August 2018. In the first, *Parbery v QNI Metals Pty Ltd*[7] the reasons were those made in respect of an application that no directions be made pending the hearing of the recusal application that was at that point foreshadowed. The learned primary judge categorised the

[7] [2018] QSC 176.

attitude of the defendants (including Mr Palmer) as being that "nothing at all should occur until after the recusal applications are heard".[8] The learned primary judge also recorded an argument made on behalf of the defendants, that any directions would be wasted if recusal eventually occurred. That argument was rejected, the learned primary judge concluding that even if he recused himself:

> "The most likely course would be that some other judge would be scheduled to handle the case. It might be, of course, that that other judge needs to hear and make further timetabling considerations. But I am not persuaded that even if a recusal application is made and I am persuaded that my duty lies in recusing myself, any decisions I make as to case management are wasted."[9]

[22] The second decision was delivered on 3 August 2018,[10] the day after the application for stay was filed and nearly four weeks before all defendants but Mr Palmer removed themselves, and directions were given for the filing of submissions. The occasion was the hearing which had been the subject of orders 4 to 6 made on 27 July 2018. His Honour's reasons was not confined to dealing with an application to recuse, but also the applications which had been deferred for hearing on 3 August 2018, and the subject of orders 4 to 6 in the orders made on 27 July 2018. In the course of his reasons the learned primary judge had to deal with an application that the proceedings be stayed pending the final hearing of the recusal application. That, in turn, required the learned primary judge to examine the grounds of appeal. What was sought by that application was that orders not be made in respect of procedural matters pending determination of the recusal. That contention was rejected, each expressed as being a flaw for two reasons, the first being that there were no determinations of questions of credit concerning Mr Palmer in making the procedural directions. The second was expressed somewhat differently, that the orders would not be wasted:

> "Even if that was not a sufficiently fatal flaw insofar as the stay application relies on the recusal application, there is then the flaw in the proposition that timetabling decisions that I might address as contemplated by the order I made last Friday would be wasted. That proposition was advanced by Mr Byrne on behalf of all defendants for whom he appeared and also by Mr Palmer. I reject the argument. This matter will come to trial. Disclosure will occur. Timetabling directions will have to be met. If, on 12 September 2018 or as soon thereafter as I can make a decision, I determine that I should not handle the trial, then the fact that I would have made the decisions that will have, *ex hypothesi*, have been made by me will not lead to waste. Whoever manages the case after me will have the benefit of the fact of those directions having been made and the parties having presumably complied with orders made by the Supreme Court of Queensland."[11]

[23] In answer to the proposition advanced by Mr Palmer, that the directions would require an allocation of resources and priorities, the learned primary judge pointed out that the matter was being dealt with on the commercial list, and involved serious allegations that needed to be resolved.[12]

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[8] [2018] QSC 176 at 4.
[9] [2018] QSC 176 at 5.
[10] [2018] QSC 178.
[11] [2018] QSC 178 at 9.
[12] [2018] QSC 178 at 9-10.

[24] The learned primary judge then turned to the question of whether there was a good arguable case for the various appeal grounds. His Honour rejected that there was and central to that conclusion was the fact that the directions made were by way of case management, and would not be wasted even if his Honour recused himself. His Honour expressly rejected the suggestion that the appeal rights would be rendered nugatory unless the stay was granted, or would be otherwise wasted and thus cause irretrievable prejudice. His Honour said:

> "… [T]he basis for the proposition that appeal rights would be rendered nugatory turns on the notion that the timetabling orders that I did make and which I might make in relation to the matters otherwise to be dealt with by me today, would be wasted, or irretrievable prejudice would be suffered, even if the appeal was upheld. But I do not accept that there is any consequence that should be so regarded.
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> The most that could be expected is an alteration to the timing of the matters with which, *ex hypothesi*, I would have dealt with in advance of the appeal, but these are matters that will need to be dealt with in the course of the interlocutory steps in this case. Even if the timetable changes, consequent upon the Court of Appeal allowing the appeal and remitting those matters back to me or another judge, that which will have been spent in the interim seeking to address the timetable that would be operative would not be wasted.
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> It might be that some money was spent earlier than it might otherwise have been spent, but in the context of this large and complex case, I accept the submission by senior counsel for the plaintiffs, that that sort of prejudice should be regarded as *de minimis*."[13]

[25] I respectfully accept the submission made by the respondents, that two previous decisions must have indicated to the defendants[14] that the prospects on the stay application were poor, principally because, for two reasons, first because the prospects of appeal were poor, and secondly, the prospects of the stay being granted were poor because the directions being made would not be wasted and would not result in irredeemable prejudice.

[26] In my view, the application for the stay should be regarded as one which, had the defendants and Mr Palmer been properly advised, would never have been made. That characterisation must be taken into account when considering the unexplained abandonment of the application at the last minute.

[27] In *Ghougassian*, Emmett JA referred to the position where a claim is abandoned and a subsequent application is made for indemnity costs:

> "[53] Mere abandonment of a claim may not, of itself, be sufficient to warrant an order for indemnity costs. If, upon material reflection and consideration of the questions, an appellant resolves to abandon an appeal at a stage when the issues have been clarified, it does not necessarily follow that indemnity costs should be ordered. Parties should not be discouraged from the proper, albeit late, abandonment of unwinnable appeals for

[13] [2018] QSC 178 at 11.
[14] And ultimately to Mr Palmer once all other defendants had removed themselves.

> points. The reality is that close attention to an appeal is often not made until shortly before the hearing of the appeal. Parties should not be discouraged from abandoning bad arguments by reason of the possibility of an order for indemnity costs.
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> [54] However, the overall attitude of Mr Ghougassian to the conduct of the proceedings gives rise to an inference that they had no legitimate object. That inference is confirmed by the complete abandonment at the last moment without any explanation. There may be good reasons why parties would seek to withdraw an appeal at hearing, quite unconnected with the acceptance of the proposition that the appeal is hopeless. Mr Ghougassian has had ample opportunity to adduce evidence to explain why the proceedings were abandoned at the last moment, but has elected not to do so. On the other hand, Mr Ghougassian submits that the respondents did not warn him in advance that they considered the appeal to be hopeless and that they would seek an order for indemnity costs should the appeal proceed.
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> [57] While, as I have said, the abandonment of unwinnable appeals or points does not of itself justify an order for indemnity costs, the other factors present in this case justify such an order. Abandonment without explanation, in combination with other factors, may justify an order for indemnity costs. For example, where an action is commenced or continued in circumstances where the moving party, properly advised, ought to have known that there were no prospects of success, indemnity costs may well be appropriate. In the present circumstances, the abandonment of the proceedings at the last moment, without explanation, exacerbates the matter."[15]

[28] In *Re Minister for Immigration & Ethnic Affairs (Cth); Ex parte Lai Qin*[16] McHugh J referred to the situation where orders for costs might be made even when there has been no hearing on the merits:[17]

> "In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.
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> Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried … [b]ut such cases are likely to be rare."

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[15] [2015] NSWCA 307 at [53], [54] and [57]. Internal citations omitted.
[16] (1997) 186 CLR 622.
[17] Ex parte Lai Qin at 624-625.

[29] In my view, this is a case where it was unreasonable to bring the application for a stay and persist with it, particularly in the face of the reasoning exposed in the previous two decisions by the learned primary judge. The continued utility of the directions to bring the main proceedings to trial, particularly given that it is a matter subject to the close management which is the hallmark of the commercial causes list, was obvious and would have been the subject of proper advice.

[30] In my view, I reject the contention that there is some distinction to be drawn between the situation in cases such as *Ghougassian* and *Segal v Commonwealth Bank of Australia*, based on the fact that in those cases what was withdrawn was the actual appeal, rather than some interlocutory order. There is no difference in principle in my view.

[31] This is an appropriate case where the discretion should be exercised to order that the costs incurred in respect of the abandoned application for stay should be paid on the indemnity basis. Like *Ghougassian,* this was a case where the applicant, properly advised, should never have brought the application and it was abandoned at the last minute without any explanation being given for the abandonment. The inference I draw is that it was belatedly realised that there was no prospect of success. In those circumstances the unexplained abandonment warrants the making of the order for indemnity costs.

[32] I therefore order that the applicant pay the respondents' costs of and incidental to the application to be assessed on the indemnity basis.