

SUPREME COURT OF QUEENSLAND

CITATION: *Chan & Ors v Macarthur Minerals Ltd & Ors* [2019] QSC
168

PARTIES: **SING CHUK CHARLES CHAN**
(first plaintiff)
and
WAI LAP VICTOR CHAN
(second plaintiff)
and
WAI TAK KWOK
(third plaintiff)
v
MACARTHUR MINERALS LIMITED
ACN 103 011 436
(first defendant)
and
ALAN PHILLIPS
(second defendant)
and
JOE PHILLIPS
(third defendant)

FILE NO: BS No 518 of 2016

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 July 2019

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Flanagan J

ORDER: **The plaintiffs pay the defendants' costs of the proceeding.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – where the defendants have been successful on two occasions in striking out the plaintiffs' pleadings – where, after the first occasion, the plaintiffs delayed in filing an amended pleading – where, on the second occasion, the Court also dismissed the proceeding in its inherent jurisdiction – whether the defendants should be awarded their costs of the proceeding on the indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 702, r 703
Bartlett v Barclays Bank Trust Co Ltd [1980] Ch 515, cited
Chan & Ors v Macarthur Minerals Ltd & Ors [2017] QSC 13, related
Chan & Ors v Macarthur Minerals Ltd & Ors [2019] QSC 143, related
Colgate-Palmolive Company and Anor v Cussons Pty Ltd (1993) 46 FCR 225, cited
Di Carlo v Dubois & Ors [2002] QCA 225, cited
LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors [2013] QCA 305
Mio Art Pty Ltd v Macequest Pty Ltd (No 2) [2013] QSC 272, cited
NSW Medical Defence Union Ltd v Crawford (1992) 11 ACSR 406, cited
Oshlack v Richmond River Council (1998) 193 CLR 72, cited
Robertson Vlahos (No 2) [2010] QSC 475, cited
Rosniak v Government Insurance Office (1997) 41 NSWLR 608, cited
Thiess Pty Ltd v FLSMIDTH Minerals Pty Ltd (No 2) [2010] QSC 120, cited

COUNSEL: R G Bain QC with C Jennings for the plaintiffs
 L F Kelly QC with D J Pyle for the defendants

SOLICITORS: McBride Legal for the plaintiffs
 Shand Taylor for the first defendant
 Clayton Utz for the second and third defendants

- [1] The defendants have been successful on two occasions in striking out the plaintiffs' pleadings. On the second occasion, I also ordered that the proceeding be dismissed. The defendants now seek to recover their costs of the proceeding on the indemnity basis. The plaintiffs accept they should pay the costs of the proceeding but only on the standard basis.

Background

- [2] I have set out the history of the proceeding in the Reasons published on 7 June 2019.¹
- [3] The proceeding commenced on 11 January 2016 with the plaintiffs' filing of a claim and statement of claim. At its core, the plaintiffs' case was that the first defendant engaged in misleading or deceptive conduct by representing that it would enter into a particular agreement by which the plaintiffs stood to profit and then deciding not to enter into such an agreement without communicating that decision. The second and third defendants were said to be knowingly involved in this conduct. In reliance on the

¹ *Chan & Ors v Macarthur Minerals Limited & Ors* [2019] QSC 143.

first defendant's representation, so the case went, the plaintiffs acquired a company and caused it to incur debts in the exploration of a mining tenement in Western Australia, leading to the company's insolvency. (The first plaintiff also personally incurred minor debts.) Justice Philip McMurdo J (as his Honour then was) ultimately ordered the plaintiffs, as directors of the company, to compensate for its insolvent trading. In its final form, the plaintiffs' prayer for relief sought recovery of the amounts paid under Philip McMurdo J's orders (and recovery of the debts personally incurred by the first plaintiff).

- [4] The essence of the defendants' complaints with the plaintiffs' case was that, first, the plaintiffs' liability under Philip McMurdo J's orders did not stand in a relationship of cause and effect with the defendants' alleged conduct, and secondly, certain allegations that were key components to the pleas of misleading or deceptive conduct and knowing involvement were unsupported.
- [5] An amended statement of claim was filed on 18 March 2016. On 1 April 2016, the defendants applied, among other things, to strike out the amended statement of claim. A further amended statement of claim was filed on 8 August 2016. The defendants maintained their application. The application was heard before Bond J. His Honour struck out certain paragraphs of the statement of claim with leave to re-plead.² Among other things, his Honour concluded that the plea concerning the first defendant's uncommunicated decision, which was said to be inconsistent with what it had represented, was not arguably supported by the particulars provided.³ As concerns causation, Bond J observed, "If there is a way to plead material facts which justify a reasonable inference that the impugned conduct was itself a direct or indirect contributing cause of the plaintiffs' decision to cause [their company] to incur debts whilst insolvent, it has not yet been done".⁴
- [6] A second further amended statement of claim was filed on 14 September 2018, approximately eighteen months after Bond J's decision. The defendants once again applied to strike out the plaintiffs' pleading, and for the dismissal of the proceeding.
- [7] The matter came before me on 13 March 2019. The plaintiffs were offered and accepted one last chance to amend the statement of claim. A third further amended statement of claim was duly filed on 29 March 2019.
- [8] The defendants persisted with their application. I heard it on 8 May 2019. In summary, I found that the third further amended statement of claim did not address the problems identified in Bond J's Reasons. The plaintiffs' pleading still did not plead an arguable causal link between the impugned conduct and the plaintiffs' liability under Philip McMurdo J's orders.⁵ The plaintiffs also had not progressed the allegation concerning the first defendant's uncommunicated decision not to go ahead with the pleaded agreement, and otherwise made unsupportable assertions concerning the second and third defendants' knowing involvement in that decision.

² *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13.

³ [2017] QSC 13 at [26]-[36].

⁴ [2017] QSC 13 at [62].

⁵ [2019] QSC 143 at [35]-[36].

- [9] Accordingly, I struck out certain paragraphs of the third further amended statement of claim. I also ordered the summary dismissal of the proceeding on the ground that the pleading did not disclose a reasonable cause of action (to the extent it sought recovery of amounts paid under Philip McMurdo J's order) and otherwise that the proceeding was frivolous, vexatious, and would operate as an abuse of process if it were to continue.
- [10] It is against this background that it falls to be determined whether the defendants should be awarded their costs of the proceeding on the indemnity basis.

The parties' submissions

- [11] The defendants submit that they are entitled to an award of costs on the indemnity basis because:⁶
- (a) they have been the subject of proceedings over an extended time in which central allegations in the case against them were never able to be, and could not be, articulated by the plaintiffs;
 - (b) the allegations made against them were serious;
 - (c) the plaintiffs were given an opportunity and had fair warning by Bond J but did not in substance address the defects in the pleading identified by his Honour; and
 - (d) the proceeding against them was vexatious or frivolous and would have operated as an abuse of process if it were to have continued.
- [12] These factors, it is submitted, take the proceeding outside the normal run of proceedings that are unsuccessful in the ordinary course of litigation.⁷
- [13] For their part, the plaintiffs agree that they should pay the defendants' costs, subject to two qualifications.⁸ The first qualification is that any order should reflect the terms of the *Uniform Civil Procedure Rules* 1999 (Qld) and accordingly the defendants should only be awarded "the costs of the proceeding" (as opposed to, for example, "costs of and incidental to the proceeding").⁹ The second qualification is that the plaintiffs are only liable to pay the defendants' costs on the standard basis.
- [14] As to that, the plaintiffs rely on the following propositions:

⁶ Submissions by the Defendants in Relation to Costs filed 14 June 2019, paragraph 14.

⁷ Submissions of the Defendants in Relation to Costs filed 14 June 2019, paragraph 15.

⁸ Plaintiffs' Submissions on Costs filed 21 June 2019, paragraph 2.

⁹ Plaintiffs' Submissions on Costs filed 21 June 2019, paragraph 2 citing *Mio Art Pty Ltd v Macequest Pty Ltd (No 2)* [2013] QSC 272 at [6]-[22] per Jackson J.

- (a) The policy of the Courts in hostile litigation remains to order the payment of costs on a standard basis save only in special circumstances;¹⁰
- (b) A number of circumstances in which a Court may order costs on the indemnity basis were identified in *Colgate-Palmolive Company and Anor v Cussons Pty Ltd*.¹¹ The circumstances include where conduct in the proceeding of the party against whom the order is sought is “plainly unreasonable” or involves some “delinquency”;¹²
- (c) The reference in r 171(2) to an award of costs on the indemnity basis “does not dictate that there should be a greater disposition towards making an order for costs to be paid on the indemnity basis in the case of applications to strike out under UCPR r 171 than in the case of other interlocutory applications”;¹³
- (d) The existence of particular facts and circumstances capable of warranting the making of an order for payment of costs, for instance, on the indemnity basis, does not mean that judges are necessarily obliged to exercise their discretion to make such an order. The costs are always in the discretion of the Court.¹⁴

[15] Regarding the circumstances of the case, the plaintiffs note that the sufficiency of the pleading was the subject of extensive written submissions and oral argument by senior counsel.¹⁵ They also point out that Bond J permitted them to press their claim. The plaintiffs submit that their conduct in resisting the defendants’ second strike out application should not be viewed as unreasonable or delinquent, given they were attempting to meet the observations in Bond J’s Reasons.¹⁶

[16] As for the delay in filing the second further amended statement of claim after his Honour’s decision, they accept the blame for this delay but seek to put it in its proper context. During this period, the plaintiffs and defendants were engaged in the process of assessing the defendants’ costs of the application before Bond J, and the defendants did not apply for dismissal for want of prosecution.¹⁷

[17] The plaintiffs further dispute that the allegations in the pleading are such as to justify an award of costs on the indemnity basis because, while serious, they were neither

¹⁰ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 3(a) citing *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 547; *NSW Medical Defence Union Ltd v Crawford* (1992) 11 ACSR 406 at 428 per Kirby P; *Colgate-Palmolive Company and Anor v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 per Sheppard J.

¹¹ (1993) 46 FCR 225.

¹² Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 3(b) citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 82-90 per Gaudron and Gummow JJ; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 616 per Mason P.

¹³ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 3(c) citing *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 271 at [37] per Jackson J.

¹⁴ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 3(d) citing *Colgate-Palmolive Company and Anor v Cussons Pty Ltd* (1993) 46 FCR 225 at 234 per Sheppard J.

¹⁵ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 4.

¹⁶ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 7.

¹⁷ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 6.

allegations of fraud that were known to be false nor were they irrelevant to their case.¹⁸ Finally, the plaintiffs submit that the Court’s finding that the proceeding was “vexatious or frivolous, and would operate as an abuse of process if it were to continue” should not be taken as a description of the plaintiffs’ conduct in the proceeding.¹⁹

Consideration

- [18] The starting point is that costs should be awarded to a successful party assessed on the standard basis. This is reflected in r 702 of the *Uniform Civil Procedure Rules 1999* (Qld). The Court has a discretion, however, to order costs to be assessed on the indemnity basis.²⁰ There must be “some special or unusual feature of the particular case”²¹ to warrant the making of such an order—winning is not enough.²² That is so even if the successful party’s victory is comprehensive. Indeed, this Court has previously declined to make an indemnity costs order despite a defendant being successful in obtaining summary judgment.²³ The common feature underlying the instances where a costs order on the indemnity basis has been made is that the unsuccessful party has engaged in blameworthy conduct to a degree justifying a departure from the ordinary rule as to costs. In the final analysis, however, “costs are always in the discretion of the trial judge”.²⁴
- [19] Although the circumstances in which the Court may award costs on an indemnity basis are not closed,²⁵ some assistance may be derived from *Colgate-Palmolive Company and Anor v Cussons Pty Ltd*,²⁶ where Sheppard J identified some of the circumstances that have justified the making of a costs order on the indemnity basis.²⁷ They do not need to be repeated here save as to one which the defendants submit is analogous to the present case, namely “the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions.”²⁸
- [20] It can be immediately appreciated that the defendants were overwhelmingly successful in defending this proceeding. The plaintiffs’ pleadings were struck out twice and it was ultimately concluded that the final pleading did not disclose a reasonable cause of action and that the failure to progress allegations material to the pleas of contravening conduct was indicative of the proceeding’s vexatious and frivolous nature. However, as observed above, the defendants’ resounding success is not, of itself, sufficient to justify an award of costs on the indemnity basis. It remains to be considered whether the plaintiffs’ conduct in the proceeding justifies the making of such an order.

¹⁸ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 8.

¹⁹ Plaintiffs’ Submissions on Costs filed 21 June 2019, paragraph 9.

²⁰ *Uniform Civil Procedure Rules 1999* (Qld), r 703(1).

²¹ *Colgate-Palmolive Company and Anor v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 per Sheppard J; *LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors* [2013] QCA 305 at [22] per Boddice J, Holmes JA and Philip McMurdo J agreeing.

²² *Thiess Pty Ltd v FLSMIDTH Minerals Pty Ltd (No 2)* [2010] QSC 120.

²³ See, for example, *Robertson Vlahos (No 2)* [2010] QSC 475.

²⁴ *Colgate-Palmolive Company and Anor v Cussons Pty Ltd* (1993) 46 FCR 225 at 234 per Sheppard J.

²⁵ *Di Carlo v Dubois & Ors* [2002] QCA 225 at [37].

²⁶ (1993) 46 FCR 225.

²⁷ (1993) 46 FCR 225 at 233-4.

²⁸ *Colgate-Palmolive Company and Anor v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 per Sheppard J.

- [21] As to that, I find myself unable to conclude that the plaintiffs ought never to have made the impugned allegations. The plea to recover amounts paid under Philip McMurdo J's orders was a somewhat novel one, but one which, in my view, raised a genuine legal controversy. This is so notwithstanding the fact that it could be dealt with through the vehicle of a strike out application(s) in the fashion of a demurrer. Additionally, it should be noted that Bond J did not rule out the viability of such a plea.²⁹ This was reflected by his Honour's order giving leave to re-plead. It was legitimate for the plaintiffs to take that opportunity to attempt to resolve the defects that his Honour had identified. It was also legitimate for the plaintiffs to accept the offer to amend their pleading once more. Although the plaintiffs ultimately failed to address what were considered to be fatal flaws in their case, they should not be penalised for persisting in circumstances where the Court gave them liberty to do so.
- [22] As to the nature of the allegations, the parties agree that they were serious in nature. However, it should be borne in mind that s 52 of the *Trade Practices Act 1975* (Cth) imports an objective standard. The allegations did not go so far as to allege fraud in its strict sense, let alone did the plaintiffs allege fraud in circumstances where they knew it to be false or where it was irrelevant to their case. Further, there is no suggestion and nor is it otherwise apparent that the plaintiffs commenced the proceeding for an ulterior motive.
- [23] As to the delay between Bond J's decision and the filing of the second further amended statement of claim, it is regrettable that the plaintiffs did not prosecute their claim in a timely manner. However, when viewed in the context of what was complex commercial litigation, I am not persuaded that the delay here justifies a costs order on the indemnity basis.
- [24] Having regard to all of the circumstances of the case, in the exercise of the discretion under r 703(1) of the UCPR, I decline to make the order sought by the defendants.

Disposition

- [25] I order that the plaintiffs pay the defendants' costs of the proceeding.

²⁹ [2017] QSC 13 at [48]: see footnote 3.