

SUPREME COURT OF QUEENSLAND

CITATION: *Tyler v Krause & Ors* [2002] QCA 544

PARTIES: **PHILLIP ALEXANDER TYLER**
(plaintiff/appellant)
v
**PETER LAWRENCE KRAUSE & NOMINAL
DEFENDANT**
(first defendants/first respondents)
NOMINAL DEFENDANT
(second defendant/second respondent)

FILE NO/S: Appeal No 2423 of 2002
DC No 57 of 2001

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal - Further Order

ORIGINATING
COURT: District Court at Toowoomba

DELIVERED ON: Judgment delivered on 16 August 2002
Further Order delivered on 13 December 2002

DELIVERED AT: Brisbane

HEARING DATE: 2 August 2002

JUDGES: McPherson JA, White and Wilson JJ
Judgment of the Court

FURTHER
ORDER: **Costs of each of the respondents to the appeal be paid on
the indemnity basis by the solicitors for the appellant.**

CATCHWORDS: COSTS

COUNSEL: G R Mullins for the appellant
K N Wilson for the respondents

SOLICITORS: Shine Roche McGowan for the appellant
McInnes Wilson for the first respondents
Gadens Lawyers for the second respondent

- [1] **THE COURT:** This is an application by the respondents to an unsuccessful appeal brought by the plaintiff against a decision in the District Court striking out his action for damages in that Court. The appeal was dismissed with costs in *Tyler v Krause and Others* [2002] QCA 295. What is now sought by the respondents in an application made in their written outline of submissions on the appeal is an order that the costs of the appeal be paid on an indemnity basis by the solicitors for the appellant. Leave was given by the President to the respondents to deliver further submissions in support of the application. The appellant or his solicitors have not

availed themselves of the opportunity to respond to the application or submission, and they do not intend doing so.

- [2] The following matters are relevant to the exercise of the discretion to make the order sought. It was conceded by solicitors of the appellant at the hearing of the application to strike out in the District Court that they knew the appellant plaintiff was in prison at the time proceedings in the action were commenced. Without the consent of the Public Trustee, those proceedings were commenced without authority. Under the general law a solicitor who institutes an action without authority is personally liable for the defendant's costs of doing so. *Young v Toynbee* [1910] 1 KB 215, 226; *Attorney-General v Wilde* (1946) 47 SR NSW 99, 109. The authorities are helpfully collected in the reasons for judgment of McGill DCJ in *Nominal Defendant v Kisse* [2001] QDC 290, in which his Honour made an order for costs on an indemnity basis against solicitors in circumstances somewhat similar to those here.
- [3] The appellant's solicitors were referred to the decision of the Full Court in *Fitzpatrick v Jackson* [1989] 2 Qd R 542 and to the relevant provisions of the *Public Trustee Act 1978*. They declined the respondent defendants' invitation to discontinue the proceedings without incurring liability for costs. Instead, the application to strike out the action was opposed and the appeal against it was unsuccessfully pursued. Plainly they took upon themselves the risk that the Court of Appeal would follow the decision in *Fitzpatrick v Jackson*, which is what in fact happened.
- [4] In these circumstances, the order sought is appropriate. The order of the Court therefore is that the costs of each of the respondents to the appeal be paid on the indemnity basis by the solicitors for the appellant.