

SUPREME COURT OF QUEENSLAND

CITATION: *Chung v McKinnirey* [2003] QSC 190

PARTIES: **YUK MAN WINNIE CHUNG**
(plaintiff/respondent)
v
GEOFFREY JAMES MCKINNIREY
(defendant/applicant)

FILE NO: S 56 of 2003

DIVISION: Trial Division

PROCEEDING: Order for Costs

DELIVERED ON: 25 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2003

JUDGE: B W Ambrose J

ORDER: **I order that the plaintiff pay to the defendant his costs of and incidental to his application to have her action permanently stayed to be assessed on a standard basis**

CATCHWORDS: COSTS – where defendant successfully applied for stay of plaintiff’s action – whether court has power to make usual order for costs

Property Law Act 1974 (Qld), Part 19, s 341, s 341(1), s 341(2), s 341(4)(g)
Supreme Court Act 1995 (Qld), s 221
Uniform Civil Procedure Rules 1999 (Qld), r 689

Twyford v Dunkley (1947) 53 ALR (CN) 616b

COUNSEL: G K W Page SC for the applicant
C C Wilson for the respondent

SOLICITORS: Barry & Nilsson acting as Town Agents for Paul & Paul for the applicant
Quinn & Scattini for the respondent

- [1] **AMBROSE J:** On 28 May 2003 I ordered that the plaintiff’s claim be permanently stayed.
- [2] The plaintiff’s claim was made pursuant to Part 19 of the *Property Law Act 1974* (“the Act”).

- [3] Essentially the claim was permanently stayed because on the facts considered at some length in reasons for judgment I concluded that this court had no jurisdiction to entertain her claim. The defendant succeeded upon his application to stay the plaintiff's action having entered only a conditional notice of defence with a view to contending that this court had no jurisdiction to entertain the claim because it did not truly come within Part 19 of the *Property Law Act*.
- [4] When judgment was delivered counsel for the defendant sought an order that the plaintiff pay his costs of obtaining a permanent stay of her claim.
- [5] Counsel for the plaintiff however contended that no order for costs ought be made against the plaintiff having regard to the provisions of s 341(1), (2) and (4)(g) of the Act.
- [6] I intimated to the parties that my view was that the plaintiff should pay the defendant's standard costs of his application to stay her action unless I were persuaded that it was not possible to make such an order having regard to the terms of s 341 of the Act.
- [7] Counsel for the defendant made submissions in writing. Counsel for the plaintiff did not make submissions in writing.
- [8] Generally speaking when a defendant successfully challenges the jurisdiction of a court to entertain proceedings instituted against him by a plaintiff who unsuccessfully argues that the court does have jurisdiction, the successful defendant will obtain an order for costs against that plaintiff who has unsuccessfully invoked the jurisdiction of that court putting the defendant to the expenses of having the proceedings stayed or struck out.
- [9] This court clearly has power to make such an order in my view under s 221 of the *Supreme Court Act* 1995 and under UCPR 689. In *Twyford v Dunkley* (1947) 53 ALR (CN) 616b, Lowe J held that regulation 75 under the *National Security (Landlord and Tenant) Regulations* declaring that no costs should be allowed in an action for the recovery of possession of land by a lessor under those regulations, had no application where it was not shown that the defendant was ever a lessee of the plaintiffs. He held –
- “On the facts as they stand before me it is not shown that he was ever a lessee of the plaintiffs, who have brought him to court by wrongly invoking the Regulations. He therefore stands outside their operation.”
- [10] Lowe J then ordered that the defendant should have judgement against the plaintiffs with costs.
- [11] In my view on the facts of this case the plaintiff has failed to show that the proceeding she instituted against the defendant should properly be categorised on the facts as “a proceeding under this part”. At best it was a proceeding “purportedly” under Part 19.
- [12] Even if it was to be so categorised in my judgment the circumstances in which the proceeding was instituted by the plaintiff justify the making of an order that she pay the costs properly incurred by the defendant in having it permanently stayed, under both s 341(2) and s 341(4)(g) of the Act.

- [13] I therefore order that the plaintiff pay to the defendant his costs of and incidental to his application to have her action permanently stayed to be assessed on a standard basis.