SUPREME COURT OF QUEENSLAND

CITATION:	*Di Carlo v Dubois & Ors* [2003] QCA 415
PARTIES:	**SALVATORE DI CARLO** (plaintiff/respondent) **v** **PHILIP JAMES DUBOIS** (first defendant/applicant) **PHILIP DUBOIS (MEDICAL) PTY LIMITED** ACN 010 673 864 (second defendant/applicant) **DENNIS RICHARD OSBORNE, PHILIP JAMES DUBOIS, STEPHEN BENNETT KELLER, PIYOOSH KOTECHA, GARY EDWARD O'ROURKE, MARK JAMES READY, PETER STOREY, CHARLES BRUCE LEIBOWITZ, PETER CHARLES LUSH, MICHAEL DAUNT, DAVID ALEXANDER NOBLE and PETER FERGUS LEIGH trading as QUEENSLAND X-RAY SERVICES** (third defendants/applicants) **MATER PRIVATE HOSPITAL** (fourth defendant) **MICHAEL CORONEOS** (fifth defendant)
FILE NO/S:	Appeal No 9805 of 2001 SC No 1281 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	18 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2003
JUDGES:	Jerrard JA Judgment of the Court
ORDERS:	**1. The application dated 16 September 2003 for a stay of enforcement by the plaintiff of the costs order in his favour made by this Court on 25 June 2002 be adjourned to a further hearing before myself to a date to be fixed**

2. Until further order of this Court on that application, the plaintiff be and remain stayed from enforcing that order

3. Costs of this application be reserved to the adjourned hearing

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where costs order made in respondent's favour following an interlocutory appeal – where respondent agreed to applicants' offer to settle the costs order based on the term that it would be paid within 21 days of the agreement – where respondent now seeks to enforce that order following unanswered requests for payment – where applicants contend that respondent will be unable to meet his liability for costs ordered against him – where applicants contend that costs ordered against the respondent far exceed the costs awarded in his favour – where costs ordered against respondent are yet to be assessed – whether enforcement of costs order should be stayed pending assessment

Elphick v MMI General Insurance Ltd & Anor [2002] QCA 347; Appeal No 7316 of 2002, 6 September 2002, referred to

COUNSEL: R V Hanson QC, with P Feely, for the applicants
N M Cooke QC for the respondent

SOLICITORS: Flower and Hart for the applicants
Baker and Johnson for the respondent

[1] JERRARD JA: This matter is a hearing of an application by parties - whom I will call the defendants for the stay - for an order for a stay of the execution of a costs order in favour of a party - whom I shall call the plaintiff.

[2] The applicants were the defendants and respectively the first, second and third defendants in action number S1281 of 1996 in which they were sued by the plaintiff.

[3] The trial of that action when first heard was adjourned after the fourth day and the plaintiff was ordered to pay

the defendants' costs. The plaintiff appealed those orders and that matter was heard as Appeal No. 9805 of 2001. The plaintiff was successful in having the costs order against him set aside and this Court ordered that the Judge hearing the resumed trial make orders concerning the costs thrown away, if I can call it that, of the parties by reason of there having been appearances for four days in that adjourned and ultimately aborted trial.

[4] This Court ordered that the defendants pay the plaintiff's costs of that appeal. The costs of that interlocutory appeal have been agreed between the plaintiff and defendants at $15,000. An order that the plaintiff have those costs agreed at $15,000 paid by the defendant was made on 25th June 2002.

[5] The defendants have applied by an application filed September 2003 for a stay of that order in these circumstances. They are that the trial has now been heard and determined on its merits and the trial Judge conducting the second trial has, in his reasons for judgment, declared that the plaintiff's action against the defendants, namely the first, second and third defendants, be dismissed and judgment was given by the Court for the plaintiff against the fifth defendant. That defendant is not party to this application for a stay.

[6] The judgment of the Court in the trial division against the plaintiff on the merits was pronounced on 16 July 2003. The learned Judge, I am informed, has not issued an order in formal terms, he having at first announced that the plaintiff's actions against the applicant/first, second and third defendants was dismissed with costs, including costs of the first trial and any other reserved costs, and then learnt, from counsel for those defendants,

that this Court had reserved the costs of the first trial to that Judge for further consideration.

[7] The Judge, I am informed, heard further submissions on that, including on an application by the plaintiff for a Bullock or *Gould v Vaggelas* order against the fifth defendant in respect of the costs the plaintiff was ordered to pay to the first, second and third defendants, and judgment on that application is reserved, as is judgment on the application by all parties for the costs thrown away on the first trial in their favour.

[8] The respondent/plaintiff complains of the conduct of the applicant/defendants in that the respondent/plaintiff explains his agreement to settle his costs of the appeal at $15,000 as being, in part, based on the offer by the applicant/defendants to pay that $15,000 within 21 days of acceptance of the offer.

[9] The offer was made on 23 April 2003 and accepted on 29 April 2003 and, accordingly, that sum ought to have been paid by somewhere around 20 May 2003 and it has not been. That explicit offer to pay, and within 21 days, that amount, was made after the end of the hearing of the evidence in the second trial, which occurred in November 2002, but before the judgment was pronounced in July 2003.

[10] The plaintiff contends that he has been disadvantaged by accepting the offer on the basis of the promise of payment, and the affidavits filed in his support suggest some shilly-shallying by the applicant/defendants in that they did not respond for some time to his correspondence demanding payment and have now responded by suggestions that the $15,000 should be treated as security for the costs of an appeal, which, I am told, has been filed by the plaintiff although they had not, at the time of those

suggestions, applied to this Court for any order for security for costs of that appeal. I am told that they have now done this, although that application has not been served upon the plaintiff and I am further informed that it is to be heard in November of this year by this Court.

[11] The plaintiff is subject to a Part 10 Arrangement and the affidavit material before me tells me that, since its commencement, no money has been paid to the controlling trustee of the plaintiff's Part 10 Arrangement, and the applicant/defendants hold the view that the plaintiff will be unable to meet his liability for costs of the second trial ordered by the Judge and, likewise, if so ordered, the costs of the first trial. In any event, the applicant/defendants contend that the costs of the second trial far exceed the agreed costs of the appeal.

[12] The application by the defendants is now somewhat muddied by the plaintiff's calculation of his costs of both the first and second trials, and the plaintiff's contention that if he has an order for costs in his favour in respect of the costs thrown away in the first trial, the ultimate amount of costs due to him will exceed those due to the defendants.

[13] The defendants dispute this and I think their contentions have considerable merit, since the figures that the plaintiff provides strongly suggest that the plaintiff is really including as costs thrown away on the first trial, costs which are plainly the cost of preparation of that first trial. However, as it so happens, the person putting forward those figures on the plaintiff's behalf has not sworn the affidavit which was relied on, but will do so. Counsel for the applicant/defendants has not had

any opportunity to cross-examine that deponent should he so wish.

[14] I think, in the circumstances, it is premature to attempt to guess which way Justice Mackenzie will go when making his determination as to who, if anyone, has a costs order made in their favour in respect of the costs thrown away on the first trial. Those orders, if made, will be relevant in determining whether or not the applicant/defendants do clearly have a far greater entitlement to costs from the respondent/plaintiff than is their current agreed obligation to pay him $15,000.

[15] Also of some relevance is the point, taken somewhat *sotto voce* by senior counsel for the plaintiff and, perhaps really, suggested in the arguments of senior counsel for the defendants, namely that the learned trial Judge conducting the second trial has so far only really expressed reasons for judgment and may not have, in any of the senses provided or described in the Rules, actually published or made final orders.

[16] The plaintiff is in a poor position to press that argument in this Court today because he has appealed those orders, which assumes that they were made, but the defendants are concerned that the argument may exist. Certainly the outline of argument for the plaintiff suggests or asserts that the defendants "have no final order".

[17] I think, in the circumstances, it is desirable that this matter be adjourned not only to await the determination of Justice Mackenzie as to costs, but also some order of his Honour, produced by at least one of the parties, so that I can be satisfied that there is a final order that the defendants have entitling them to have an assessment of costs and to have those costs paid by the plaintiff. As

yet I have not seen any copy produced to me by any party of the notice of appeal or of any order by the learned Judge.

[18] I intend to, and I will, by order, stay the respondent/plaintiff from enforcing the costs order in his favour until further order by myself on the application by the defendants. I will do that because I consider that the applicant/defendants have an arguable case for the grant of a stay in that it seems to be commonsense and just that if their costs orders far exceed what the plaintiff is to pay them, that those two amounts should be set off against each other. And that commonsense result is made more apparently just, in this case, by the simple fact that the plaintiff is said to be unable, in any event, to pay them the sums he will be assessed as liable to pay them.

[19] For that reason, I am prepared to grant a stay until I know the results of the costs orders yet to come from Justice Mackenzie. It may be that the applicant/defendants ultimately fail in their application because of what seems to have been some deliberate conduct on their part in which they have agreed to pay costs and not done so, and seem, subject to argument, to have attempted to avoid the correspondence from the plaintiff asking for the fruits of the agreement. However, that remains to be debated and relevant to that will be the actual basis upon which a Court exercises a jurisdiction to set off one lot of costs against another without a specific provision in the Rules allowing the Court to do that.

[20] If, as Justice Dutney fairly considered, in the matter of *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347,

the source of the jurisdiction is equitable, I consider that the applicants are in a poorer position than if, as I considered in the same case, the source of the jurisdiction is really an inherent power exercised by the Judges of the Courts at common law and at which, I think, a more rigorous or commonsense approach is taken. If it is an inherent jurisdiction then the applicants' conduct in agreeing to pay $15,000 and not doing so may not matter as much as the fact that there is this assessed and agreed sum owed by them to the plaintiff and the fact that the plaintiff owes them so much more.

[21] For these reasons, expressed at such length, I make the following orders:

1. I order that the application, dated 16 September 2003, for a stay of enforcement by the plaintiff of the costs order in his favour made by this Court on 25 June 2002, be adjourned to a further hearing before myself to a date to be fixed.

2. I further order that until further order of this Court on that application, the plaintiff be and remain stayed from enforcing that order.

3. The costs of this application be reserved to the adjourned hearing.

...

JERRARD JA: Now, Mr Cooke and Mr Hanson, I expressly give leave to the parties to provide further written submissions, should they so choose, as to the basis upon which this Court exercises a jurisdiction to set off costs orders resulting from one order against the costs orders resulting from another.

I do not demand that it happen but it would assist. It may affect the result.