SUPREME COURT OF QUEENSLAND

CITATION:	*ABB Aust P/L & Ors v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Aust* [2003] QCA 463
PARTIES:	**ABB AUSTRALIA PTY LIMITED** ACN 003 337 611 **DOWNER RML PTY LTD** ACN 000 983 700 **MI & E HOLDINGS PTY LTD** ACN 092 951 043 **STORK ELECTRICAL PTY LIMITED** ACN 007 102 516 (applicants/respondents) v **COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA** (respondent/appellant)
FILE NO/S:	Appeal No 5752 of 2003 SC No 4165 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	24 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2003
JUDGES:	Davies and Williams JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay respondents' costs of the appeal**
CATCHWORDS:	PROCEDURE - COSTS - APPEALS AS TO COSTS - DISCRETION - where learned primary judge granted leave to the applicants/respondents to withdraw application - where primary judge refused to make any order as to costs of the application - where determination of matter would have involved disputed facts - where primary judge thought it was not possible to make determination as to whether or not applicants/respondents could have been successful in

	application - whether primary judge erred in refusing order for costs
COUNSEL:	M O Plunkett for the appellant J E Murdoch SC for the respondents
SOLICITORS:	Hall Payne for the appellant Blake Dawson Waldron for the respondents

DAVIES JA: This is an appeal with leave of the learned primary judge given on 27 June 2003, against her refusal on 2 June 2003 to make any order as to costs of the application which, on that day, her Honour granted leave to the respondents to withdraw. The application was an originating application of 14 May 2003, in substance, that the appellant be restrained from maintaining or authorising any strike, ban or limitation by any person being an employee of the respondents at their operations in Gladstone other than for protected industrial action under the *Industrial Relations Act* 1999 (Qld).

Mr Plunkett for the applicant this morning contended that the application under the *Industrial Relations Act* or so far as it referred to that Act was misconceived and that if successful it was possible it would have to have asserted there was protected action under the Commonwealth *Workplace Relations Act*. I do not see, for the purposes of this application this morning, that that makes any difference.

A brief history of the matter in the Supreme Court is as follows. It first came before Justice Fryberg on 15 May 2003. His Honour adjourned the matter until 2 June 2003 upon an undertaking by the appellant's counsel in these terms:

> "Until 2 June 2003 the [appellant] will not take any industrial action involving the [respondents] without first giving three working days notice of its intention to do so."

On 21 and 22 May 2003 the respondents received notice from the appellant that there was to be industrial action at their Gladstone operations from midnight 26 May 2003 until midnight 30 May 2003. On that basis the matter was brought on for hearing again.

It was heard by Justice Philippides on 23 May 2003. At that hearing Mr Herbert of Counsel for the appellant advised the respondents' solicitors that there would be no industrial action for the period midnight 26 May 2003 until midnight 27 May 2003 and on that basis the matter was adjourned by consent to 27 May 2003.

On 26 May 2003 the appellant notified the respondents that there would be no industrial action for the period midnight 27 May 2003 to midnight 30 May 2003. On that basis, on 27 May 2003 Justice Byrne adjourned the matter by consent to 2 June 2003.

On 28 May 2003 the appellant notified the respondents that there was to be no further industrial action because the relevant employees had voted to accept the terms of replacement certified agreements. On 29 May 2003 the respondents' solicitor then received instructions to discontinue the proceedings and on that day sent a letter to

the appellant's solicitors requesting that they sign a consent order discontinuing the application with no order as to costs. He was subsequently advised that the appellant's solicitors would not sign the proposed consent and that the appellant would seek costs.

It was on that basis that the matter came before the learned primary judge on 2 June 2003 when her Honour granted leave to the respondents to withdraw the originating application but refused to make any order for costs. In doing so, she was exercising a discretion under Rule 307(2) of *Uniform Civil Procedure Rules*. Her Honour gave reasons for that refusal.

Her Honour thought it not possible to make a determination as to whether or not, as a matter of law, the respondents could have been successful in pursuing their primary application. She went on to take into account the history of the matter as I have outlined it and the fact that while the application remained extant, negotiations continued between the parties that resolved the threat of future industrial action that was the substance of the application. It was in those circumstances that her Honour decided that it was appropriate not to make a costs order.

The injunctive relief sought by the respondents was sought on the basis that the industrial action sought to be enjoined was not "protected industrial action" within the meaning of the *Workplace Relations Act* 1996 (Cth) or possibly the State Act. A determination of that question would have involved, it seems

to me, a number of disputed facts, not the least of which was whether the action sought to be protected was for the purpose of "supporting or advancing claims made in respect of the proposed agreement" within the meaning of section 170ML(2)(e) and (f) of the Commonwealth Act. In my opinion her Honour was correct in concluding that it was neither possible nor appropriate, on an application of this kind, to attempt to resolve disputed questions of fact which may have involved serious questions of credit.

There were other questions which may also have had to have been resolved. For example, given the relief available in an industrial tribunal whether it would have been appropriate for the Supreme Court to grant relief by way of injunction. But this question, which would have involved the exercise of a discretion, could only have been decided after a consideration of all relevant facts, as found by the Court which, as I have already indicated, it was not appropriate to embark on in deciding an application of this kind.

On the other hand, it seems plain enough that the respondents had an arguable case. Moreover, as her Honour appears to have rightly concluded, the commencement and continuance of the proceedings resulted in an agreement thereby averting industrial action which may have been damaging to both sets of litigants.

In summary I can find no error in her Honour's reasons for refusing to make an order for costs and I would therefore dismiss the appeal.

WILLIAMS JA: I agree.

MACKENZIE J: I agree.

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DAVIES JA: The appeal is dismissed and the appellant is to pay the respondents' costs of the appeal.