SUPREME COURT OF QUEENSLAND

CITATION: *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors* [2003] QSC 486

PARTIES: **SOUTHERN CROSS MINE MANAGEMENT PTY LTD (ACN 082 767 548)**
(plaintiff)
v
ENSHAM RESOURCES PTY LTD (ACN 011 048 678)
(first defendant)
and
BLIGH COAL LIMITED (ACN 010 186 393)
(second defendant)
and
IDEMITSU QUEENSLAND PTY LTD (ACN 010 236 272)
(third defendant)
and
EPDC (AUSTRALIA) PTY LTD (ACN 002 307 682)
(fourth defendant)
and
LG INTERNATIIONAL (AUSTRALIA) PTY LTD (ACN 002 806 831)
(fifth defendant)
and
KENNETH JOHN FOOTS
(first defendant added by Counterclaim)
and
FOOTS PTY LTD (ACN 010 195 061)
(second defendant added by Counterclaim)
and
RAYMOND NORMAN BIRD
(third defendant added by Counterclaim)
and
LITTLE DIGGER MINING LIMITED (ACN 096 110 717)
(fourth defendant added by Counterclaim)
and
NORMA AGNES FOOTS
(fifth defendant added by Counterclaim)
and
KENNETH JOSEPH HILL
(third party to Counterclaim)
and
KENNETH JOHN FOOTS & RAYMOND NORMAN

	BIRD (fourth parties to Counterclaim)
FILE NO:	S9548 of 2002
DIVISION:	Trial
PROCEEDING:	Costs Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	15 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2003; 26 November 2003
JUDGE:	Chesterman J
ORDER:	**The first, second, third, fourth and fifth defendants pay the first, second and third defendants' by counter-claims costs of and incidental to the application heard of 29 October 2003, to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE – COSTS - DEPARTING FROM THE GENERAL RULE - ORDER FOR COSTS ON AN INDEMNITY BASIS - application for costs to be assessed on the standard basis where strike out of pleadings - UCPR r 171(2) - whether the claim which was struck out was known to be untenable - consideration of *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 *Uniform Civil Procedure Rules (Qld),* Rule 171(2) *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, followed *Colgate Palmolive v Cussons* (1993) 46 FCR 225, considered *Cosgrove v Johns* (2000) QCA 157, considered *DiCarlo v Dubois & Ors* [2002] QCA 225, considered *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, considered *Telpark Pty Ltd v Raine & Horne (Qld) Pty Ltd* [2001] QSC 396, distinguished
COUNSEL:	Mr P Keane QC with him Mr S R Lumb for the applicants/ first and second defendants added by counterclaim Mr G D O'Sullivan for the plaintiff and fourth defendant added by counterclaim Mr W Sofronoff QC with him Ms M A Hoch for the first, second, third, fourth and fifth defendants

Mr J C Bell QC with him Mr D A Kelly for the third defendant added by counterclaim

SOLICITORS: Minter Ellison for the first and second defendants added by counterclaim

James Watt & Co for the plaintiff and the fourth defendant added by counterclaim

Allens Arthur Robinson for the first, second, third, fourth and fifth defendants

Gateway Lawyers as town agents for South & Geldard for the third defendant added by Counterclaim

[1] On 26 November last I made orders on the application of the first, second and third defendants by counter-claim striking out some parts of the defendants' statement of claim. I had proposed making an order that the defendants pay the applicant's costs of the application to be assessed on the standard basis but I refrained from making the order when informed by counsel for the applicants that they wished to apply for an order that their costs be assessed on the indemnity basis. Accordingly the formal order made was that costs be reserved to enable the parties to make written submissions.

[2] UCPR 171(2) expressly confers power on the court, if it strikes out part of a pleading, to order the cost of the application to be paid on the indemnity basis.

[3] The argument advanced in support of the order is that the claims which were in effect struck out by my order were 'proscribed by *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 and the alleged duty … lacked all practical content … The (defendants) were clearly alive to the decision of *Brunninghausen* which proscribed such duties. The (defendants) unsuccessfully sought to challenge the correctness of the principle espoused in *Brunninghausen*.'

[4] Although not put so bluntly, the argument really is that the claim which was struck out had been pleaded in clear disregard of notorious legal principle and was known to be untenable.

[5] If that were a correct depiction of events it would call for an award of indemnity costs. In listing instances in which a court would be justified in making such an order Sheppard J in *Colgate Palmolive v Cussons* (1993) 46 FCR 225 included one of commencing proceedings in wilful disregard of clearly established law.

[6] An award of indemnity costs is not to be had for the asking. Thomas JA pointed out in *Cosgrove v Johns* (2000) QCA 157 that some unusual circumstance is required before a court will order indemnity costs rather than costs to be assessed on the standard basis. This latter is the ordinary consequence for an unsuccessful party. In *Rosniah v Government Insurance Office* (1997) 41 NSWLR 608 at 616 Mason P (with whom Clarke A-JA agreed) said that there must be some evidence of unreasonable conduct, at the least, before an award of indemnity costs should be made, 'because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity.'

His Honour's remarks were endorsed by the Court of Appeal in *Di Carlo v Dubois & Ors* [2002] QCA 225. White J, who gave the judgment of the court, remarked that:

> 'It is important that applications for an order for costs on the indemnity basis not be seen as too readily available … without some further facts analogous to those mentioned in *Colgate* …'

[7] The case is a borderline one. However, I do not think it fair to categorise the impugned pleading as being one which disregarded 'clear law'. By striking out part of the pleading I accepted the correctness of the judgments in *Brunninghausen*. I did so because the principle expressed appeared to me to be correct and because I apprehended that I should follow a considered decision , directly on point, of an appellate court of another State. Although it is a clear decision directly on point, it may not be the last word on the subject. The law relating to fiduciary obligations cannot, I think, be said to be definitively established. It was not, I think, irresponsible of the defendants to plead the case which I struck out. Conduct of that kind is ordinarily necessary before an order of indemnity costs will be made.

[8] A subsidiary ground for declining the order sought is that in an application of this kind there should not be a substantial difference between indemnity costs and standard costs. The application consisted of submissions on law by reference to pleadings only. The scope for expense to be incurred which would not be allowed on the assessment of costs should be small, if it exists at all.

[9] The case of *Telpark Pty Ltd v Raine & Horne (Qld) Pty Ltd* [2001] QSC 396 is clearly distinguishable for the reasons identified by Mr Sofronoff QC and Ms Hoch. That was a case where the plaintiff accepted that its pleading was defective, after the defendant had commenced an application to strike it out, and then refused a reasonable offer to pay the applicant's costs incurred in making the application.

[10] The plaintiff, which was not an applicant, also sought an order that it should recover its costs incurred with respect to the application, also to be assessed on the indemnity basis.

[11] The appropriate order is that there be no order as to the costs of the plaintiff. It was not a party to the application, nor did it need to be so. It appeared by counsel who addressed no substantive submissions to the court.

[12] The orders will therefore be that the first, second, third, fourth and fifth defendants pay the first, second and third defendants' by counter-claims costs of and incidental to the application heard on 29 October 2003, to be assessed on the standard basis.