

# SUPREME COURT OF QUEENSLAND

CITATION: *Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd & Ors (No. 2)* [2009] QSC 105

PARTIES: **FAIRMONT SUITES AND HOTELS PTY LTD**  
**ACN 063 677 065 ATF J F STEWART FAMILY TRUST**  
(applicant)  
v  
**DUCK HOLES CREEK INVESTMENTS PTY LTD**  
**ACN 106 529 471 ATF DUCK HOLES CREEK**  
**INVESTMENT UNIT TRUST**  
(first respondent)  
and  
**ADVENTURA PROPERTY HOLDINGS PTY LTD ACN**  
**129 162 465 ATF THE PRUDENT VENTURES NO 1**  
**TRUST**  
(second respondent)  
and  
**LENTRO INVESTMENTS PTY LTD ACN 081 146 090**  
**ATF PRUDENT VENTURES UNIT TRUST NO 4**  
(third respondent)  
and  
**PRUDENT VENTURES PTY LTD ACN 108 680 557**  
**ATF PRUDENT VENTURES UNIT TRUST NO 5**  
(fourth respondent)  
and  
**PRUDENT VENTURES PTY LTD ACN 108 680 557**  
**ATF PRUDENT VENTURES UNIT TRUST NO 6**  
(fifth respondent)  
and  
**LENTRO INVESTMENTS PTY LTD ACN 081 146 090**  
**ATF MORROW DISCRETIONARY TRUST NO 1**  
(sixth respondent)  
and  
**LENTRO INVESTMENTS PTY LTD ACN 081 146 090**  
**ATF LENTRO DISCRETIONARY TRUST NO 1**  
(seventh respondent)  
and  
**SCOTT ATANASOFF AND MIRCA ATANASOFF**  
(eighth respondent)  
and  
**TERENCE VICTOR LEAKE**  
(ninth respondent)  
and  
**STEVEN CROFT AND ANNE CROFT ATF CROFT**  
**FAMILY SUPER FUND**  
(tenth respondent)  
and  
**TILE TRENDS (WHOLESALE) PTY LTD**

**ACN 010 529 852 ATF INGLIS DISCRETIONARY TRUST**

(eleventh respondent)

and

**MARY TERESE CHATFIELD**

(twelfth respondent)

and

**FAIRMONT SUITES AND HOTELS PTY LTD**

**ACN 063 677 065 ATF PRUDENT VENTURES UNIT TRUST NO 3**

(thirteenth respondent)

and

**PRUDENT VENTURES PTY LTD ACN 108 680 557**

**ATF PRUDENT VENTURES UNIT TRUST NO 7**

(fourteenth respondent)

and

**GUESTHOUSE SUITES PTY LTD ACN 118 144 148**

**ATF GUESTHOUSE SUITES UNIT TRUST**

(fifteenth respondent)

and

**SWISH CAR CARE PTY LTD ACN 112 375 514**

**ATF THE SWISH CAR CARE UNIT TRUST**

(sixteenth respondent)

FILE NO: BS 11419 of 2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 8 May 2009

DELIVERED AT: Brisbane

HEARING DATE: Submissions on the papers

JUDGE: Applegarth J

ORDERS: **1. Application for costs on an indemnity basis declined.**

**2. The applicant, the ninth respondent and the thirteenth respondent pay the sixth and seventh respondents' costs of and incidental to the application.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – COSTS ON INDEMNITY BASIS – where successful respondents argued that application breached compromise agreement embodied in consent orders – whether costs on an indemnity basis

*Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359, cited  
*Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225, cited  
*Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242, cited  
*Malden v Fyson* (1847) 116 ER 486; (1847) 11 QB 292, cited  
*Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, cited  
*Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337, cited

COUNSEL: J B Loel (solicitor) for the applicant, the ninth respondent and thirteenth respondent  
 J B Sweeney for the sixth and seventh respondents

SOLICITORS: Lillias & Loel for the applicant, ninth respondent and thirteenth respondent  
 Nyst Lawyers for the sixth and seventh respondents

- [1] The successful respondents seek indemnity costs, rather than the order as to costs I proposed to make at [67] of my reasons for judgment delivered on 5 May 2009.<sup>1</sup> They submit that:
- (a) the agitation of the Rule 668 and *Mareva* proceedings constituted a breach of the compromise agreement;
  - (b) they are precluded from recovering the difference between a standard costs order and an indemnity costs order in fresh proceedings for damages for breach of contract;<sup>2</sup> and
  - (c) there is thus some “special or unusual feature” that justifies the court departing from the ordinary practice and awarding costs on an indemnity basis.
- [2] I am not persuaded that the bringing of the application constituted a breach of the compromise. The consent orders made on 22 January 2009 embodied a compromise and the applicants sought to vary those orders. They failed to establish grounds to do so. An application that seeks the favourable exercise of a judicial discretion to order a variation of an agreement<sup>3</sup> or of consent orders that embody a compromise agreement should not necessarily be treated as a breach of the relevant agreement. By their application in this matter the applicants did not signal that they did not intend to perform the compromise or comply with the consent order. They sought to vary the order, or, in the alternative, to restrain the sixth and seventh respondents’ solicitors from dealing with the sum of \$200,000 that was expected to be paid to those solicitors pursuant to the order. The application was based on

<sup>1</sup> *Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd & Ors* [2009] QSC 98.

<sup>2</sup> *Uniform Civil Procedure Rules* 1999 (Qld) r 680; *Malden v Fyson* (1847) 11 QB 292 at 301; *Anderson v Bowles* (1951) 84 CLR 310 at 322-324.

<sup>3</sup> For instance, an application for relief pursuant to s 87 of the *Trade Practices Act* 1974 (Cth).

material that the applicants submitted justified the exercise of the discretion under *UCPR* 668 to vary that consent order or the exercise of the Court's power to restrain the payment of money that was to be paid pursuant to it. The foundation of the submission for indemnity costs, namely that the application constituted a breach of the compromise agreement, is not established.

- [3] In any event, I am not persuaded that the bringing of the application in the face of the compromise and consent order otherwise warrants an order for indemnity costs. The categories of cases identified by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*<sup>4</sup> that have been thought to warrant the exercise of the discretion to order indemnity costs are not exhaustive.<sup>5</sup> As Sheppard J stated:
- “The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.”<sup>6</sup>
- [4] In *Rosniak v Government Insurance Office*<sup>7</sup> the New South Wales Court of Appeal stated that departure from the usual “party and party” basis for costs is not confined to the situation in which a party has established ethical or moral delinquency by its opponent. Mason P (with whom Meagher JA and Clarke AJA agreed) stated:
- “...the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule-maker.”
- [5] Indemnity costs have been awarded in cases where a party persists in a “hopeless case”.<sup>8</sup> This is not such a case, and the applicants do not submit that indemnity costs are warranted because the application had no reasonable prospect of success.<sup>9</sup> In such a case, indemnity costs are not awarded simply because the party conducted itself unreasonably in some way. It is the losing party's irresponsible conduct in persisting in a hopeless case in disregard of known facts or clearly established law that justifies indemnity costs.<sup>10</sup>
- [6] The application had poor prospects of success, but it was not a hopeless case. The order for costs will be the order appearing in my reasons for decision of 5 May 2009.

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<sup>4</sup> (1993) 46 FCR 225 at 233-234.

<sup>5</sup> *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337 at [43].

<sup>6</sup> (supra) at 234.

<sup>7</sup> (1997) 41 NSWLR 608 at 616 cited with approval in *Smits v Tabone* (supra) at [44].

<sup>8</sup> *Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242 at 273.

<sup>9</sup> *ibid* at 272 citing *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359.

<sup>10</sup> *Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (supra) at 272; *Todrell Pty Ltd v Finch* [2007] QSC 386 at [4].