

SUPREME COURT OF QUEENSLAND

CITATION: *Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd & Ors*
(No 2) [2011] QSC 21

PARTIES: **TOGITO PTY LTD**
(plaintiff)
v
PIONEER INVESTMENTS (AUST) PTY LTD
(first defendant)
and
JAMES CONOMOS
(second defendant)
and
LEONARDUS GERARDUS SMITS
(third defendant added by Counterclaim)

FILE NO/S: BS5325/08

DIVISION: Trial Division

PROCEEDING: Costs Applications

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 23 February 2011

DELIVERED AT: Brisbane

HEARING DATES: 10 February 2011

JUDGE: Margaret Wilson J

ORDER: 1. That the plaintiff and Leonardus Gerardus Smits pay the first and second defendants' costs of and incidental to the claim on the standard basis; and
2. that the first defendant pay the plaintiff and the third defendant added by counterclaim's costs of and incidental to the counterclaim on the standard basis.

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – COSTS ON INDEMNITY BASIS – where plaintiff's claim against first and second defendants dismissed – where first defendant's claim against the plaintiff and the third defendant by counterclaim dismissed – where first and second defendant submitted that plaintiff brought and continued a baseless claim – whether costs to be assessed on indemnity basis

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – THIRD PARTIES – where third

defendant by counterclaim a director of plaintiff – where third defendant by counterclaim took active part in proceedings – whether court should exercise discretion to award costs against third defendant by counterclaim

Uniform Civil Procedure Rules 1999 (Qld) r 681

Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 ALR 406

Burns v State of Queensland and Croton [2007] QCA 240

Colgate-Palmolive Company v Cussons Pty Limited (1993) 46 FCR 225, 233-234

Di Carlo v Dubois [2002] QCA 225 at [37]

Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397, 400

Kebaro Pty Ltd v Saunders [2003] FCA FC 5

Knight v KP Special Assets Ltd (1992) 174 CLR 178, 192 – 193, 202 – 203

Smith v Madden (1946) 73 CLR 129

Symphony Group PLC v Hodgson [1994] QB 179

The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2009] 2 QdR 356, 370-371

Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd & Anor [2009] QSC 68

Vestris v Cashman (1998) 72 SASR 449, 472

COUNSEL: PW Hackett for the plaintiff
DC Gration for the first defendant
PA Freeburn SC for the second defendant
AJ Greinke for the third defendant added by counterclaim

SOLICITORS: Morgan Conley for the plaintiff
Lillas & Loel Lawyers Pty Ltd for the first defendant
Coyne & Associates for the second defendant

[1] **MARGARET WILSON J:** On 10 December 2010 I made orders dismissing the plaintiff ("Togito")'s claim against the first and second defendants ("Pioneer" and "Conomos") and dismissing Pioneer's counterclaim against Togito and the third defendant added by counterclaim ("Smits").

[2] I have considered the parties' written and oral submissions on costs.

Costs orders sought

[3] Pioneer has sought the following orders:

- (a) that Togito and Smits pay Pioneer's costs of and incidental to the claim on the indemnity basis; and
- (b) that there be no order as to costs with respect to the counterclaim.

[4] Conomos has sought the following orders:

- (a) that Togito and Smits pay Pioneer and Conomos' costs of and incidental to the proceeding on the indemnity basis; and
 - (b) that the security for costs held by the Registrar (totalling \$112,500) be paid out to Conomos in partial satisfaction of his costs, on Conomos' undertaking to refund any surplus if the costs as assessed do not exceed \$112,500 or in the event the costs orders at trial are overruled on appeal.¹
- [5] Togito has sought the following orders:
- (a) that Togito pay Conomos' costs of and incidental to the claim up until the trial, and half the costs of the trial, on the standard basis;
 - (b) that there be no order as to costs between Togito and Pioneer;
 - (c) that Pioneer pay Smits' costs of and incidental to the counterclaim on the standard basis.
- [6] Smits has sought an order that Pioneer pay his costs of and incidental to the counterclaim on the standard basis.

Discretion

- [7] Costs are in the discretion of the Court, but follow the event unless the Court otherwise orders.²
- [8] Where a plaintiff and a defendant succeed in their respective claim and counterclaim, the Court may award each the costs of the respective proceeding, although it need not necessarily do so.
- [9] It is only where a case exhibits some special or unusual feature that the Court will order costs to be assessed on the indemnity basis rather than the standard basis.³
- [10] While the Court may order costs against a non-party, it exercises that power sparingly and only in exceptional circumstances.⁴ In the present case Smits was a party only to the counterclaim made by Pioneer. Accordingly, he should be regarded as a non-party when considering Pioneer and Conomos' costs of defending the claim.

Costs of claim and counterclaim

- [11] I am minded to allow costs to follow the event of the claim, and the event of the counterclaim, subject to the question whether costs should be on the standard basis or the indemnity basis.
- [12] In coming to that view, I have not overlooked submissions about how much time was spent on evidence relevant to the counterclaim as opposed to the claim. As I observed during submissions, there was cross-examination relevant to the

¹ Transcript 1-4.

² *Uniform Civil Procedure Rules* 1999 (Qld) r 681.

³ *Di Carlo v Dubois* [2002] QCA 225, [37]; *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, 400.

⁴ *Knight v KP Special Assets Ltd* (1992) 174 CLR 178 at 192 – 193, 202 – 203.

counterclaim which was also relevant to credit, and thus allowable on the claim. In *Smith v Madden*⁵ Dixon J reviewed the authorities on the taxation of costs where the plaintiff has been successful on his claim and has obtained judgment on it with costs, and the opposing party has succeeded on his counterclaim and obtained judgment on it with costs. His Honour said –⁶

"In such a case the taxation of the costs of the action and of the counterclaim is governed by the principle that the party receiving the costs of the claim should recover the general costs and whatever was reasonably incurred in bringing and maintaining or defending the action, as the case may be, considered as if there had been no counterclaim, and that the party receiving the costs of the counterclaim should recover the further or increased costs reasonably incurred in bringing and maintaining or defending the counterclaim."

He continued –⁷

"...it may be necessary to divide an item of costs in two parts. This will occur when there is a single charge for work, but a severable part of that work relates to the claim, and the other severable part of the work relates to the counterclaim. It will then be necessary to divide the single charge in accordance with the two classes of work it covers."

The allocation of costs to the claim and the counterclaim are matters for the costs assessor.

- [13] However, as counsel for Pioneer submitted, that would result in Pioneer and Conomos having orders against Togito, which would probably go unsatisfied, while Smits and Togito would have an order against Pioneer.⁸

Whether to make cost orders against Smits

- [14] As I have said, the discretion to order costs against a non-party is exercised sparingly. In *Knight v FP Special Assets Ltd*⁹ Mason CJ and Deane J, with whom Gaudron J agreed, said –

"For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

Dawson J said –¹⁰

⁵ (1946) 73 CLR 129.

⁶ At 133-134.

⁷ At 136.

⁸ Transcript 1-30.

⁹ At 192 -193.

"The cases therefore establish a long-asserted jurisdiction to award costs in appropriate cases against a person who is not a party to the proceedings where that person is the effective litigant standing behind an actual party or where there has been a contempt or abuse of the process of the court."

- [15] Factors relevant to the exercise of the discretion, which is unfettered, have been discussed further in a number of cases, including *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*,¹¹ *Burns v State of Queensland and Croton*,¹² *Kebaro Pty Ltd v Saunders*,¹³ *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation*,¹⁴ and *Symphony Group PLC v Hodgson*.¹⁵
- [16] At all material times Smits and his wife were the directors of Togito, which was the trustee of a family trust. The company owns no real property and has paid up capital of \$3. Smits acknowledges that he has played an active part in the conduct of the litigation and that he has an interest in it.
- [17] The litigation concerned entitlement to the sum of \$323,192.61 which was paid into the trust account of James Conomos Lawyers on 3 August 2007 and paid out later that day in accordance with a trust account authority from Pioneer.
- [18] Unaware that the moneys had already been disbursed, on Sunday 5 August 2007 Togito, by Smits, sent Conomos an email asserting an interest in the moneys. It maintained that claim, and in April 2008 threatened to commence a proceeding to establish its entitlement. On 2 May 2008 James Conomos Lawyers wrote to Togito's solicitors, saying (inter alia) –¹⁶

"If you maintain proceedings against the writer or this firm, despite what we have stated, we intend to seek an order for indemnity costs against the applicant in those proceedings, the directors of the applicant and your Mr Pitman on the basis that there is no cause of action sustainable and that this has been known to both your client and your firm since August last year."

- [19] Proceeding 5325/08 was commenced on 6 June 2008. Pioneer's counterclaim against Smits was filed on 26 August 2008.
- [20] Pioneer made an application against Togito for security for its costs of the claim. Togito made a cross application for security for its costs of the counterclaim. The applications came before Fryberg J on 18 December 2008. When it became apparent that his Honour was minded to make orders for security on both the application and the cross application, Pioneer and Togito consented to the application and cross application being dismissed.¹⁷
- [21] Conomos made two applications for security for its costs of the claim. On 3 April 2009 the Chief Justice ordered that Togito provide security for Conomos' costs to the conclusion of the first day of the trial in the amount of \$90,000 and on 16 March

¹⁰ At 202.

¹¹ [2009] 2 QdR 356, 370-371.

¹² [2007] QCA 240.

¹³ [2003] FCAFC 5.

¹⁴ (2001) 179 ALR 406.

¹⁵ [1994] QB 179.

¹⁶ See affidavit of Rebecca Maree Freyling filed on 28 November 2010 (court document 208) exhibit RMF-13.

¹⁷ [2008] QSC 348.

2010 I ordered that it provide further security for Conomos' costs to the conclusion of the trial in the amount of \$22,500.

- [22] Before the order was made by the Chief Justice, Smits offered an undertaking in lieu of security. His solicitors advised Conomos' solicitors that he had \$3 million on deposit with a bank and that he was willing to provide documentary evidence to that effect. They responded that their client would accept the offer on condition that evidence of that deposit and of his financial circumstances was provided. Such evidence was never provided, and before the order was made by the Chief Justice, Smits lent the \$3 million to a company upon security of a mortgage. His Honour considered this conduct very relevant in determining to order security for costs.¹⁸
- [23] There has never been any evidence that Togito's own financial position was such that it would be able to meet a costs order against it. At all material times Smits has been the driving force behind the litigation and the person who stood to benefit from it. His conduct, both in his personal capacity and as a director of Togito, was at the core of the litigation.
- [24] One factor relevant to the exercise of the discretion to order costs against a non-party is whether the non-party was warned that costs might be sought against him, although such a warning is not a prerequisite.¹⁹
- [25] In the present case, Smits had express notice that Conomos would seek a costs order against him personally even before the litigation was commenced.²⁰ Further, Conomos' refusal to accept his undertaking to be responsible for any costs Togito might be ordered to pay him should in all the circumstances have alerted him that Conomos was keen to be protected against Togito's failing to meet his costs.²¹
- [26] As I have recounted, the applications for security for costs made by Pioneer and Togito were dismissed by consent. It may be fair comment that Pioneer did not want to suffer an order against it. Nevertheless, the whole episode must have alerted Smits, as director of Togito, of Pioneer's concern to be protected against costs.
- [27] Thus, I consider that, subject to the question whether costs should be assessed on the standard basis or the indemnity basis, the just and equitable outcome would be orders –
- (a) that Togito and Smits pay Pioneer and Conomos' costs of and incidental to the claim; and
 - (b) that Pioneer pay Togito and Smits' costs of and incidental to the counterclaim.

Standard or indemnity costs?

- [28] In *Colgate-Palmolive Company v Cussons Pty Limited*²² Sheppard J listed a number of instances where indemnity costs might be warranted: the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

¹⁸ [2009] QSC 68.

¹⁹ *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2009] 2 QdR 356, [68] and the cases cited therein.

²⁰ See the letter of 2 May 2008 referred to in [18].

²¹ *Vestris v Cashman* (1998) 72 SASR 449, 472.

²² (1993) 46 FCR 225, 233-234.

misconduct causing the Court and other parties to waste time; the commencement or continuance of proceedings for some ulterior motive or in wilful disregard of known facts or clearly established law; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions; the imprudent refusal of an offer of compromise; and costs against a contemnor.

- [29] In seeking costs on the indemnity basis, counsel for Pioneer and Conomos submitted that Togito had brought and continued a baseless claim in which it had made allegations of serious misconduct against a solicitor, and that it had been guilty of dishonest non-disclosure of the email from Smits Mr Guthrie of Dibbs Abbott Stillman referred to in paragraph [84] of my reasons for judgment.²³
- [30] Of course there is a critical distinction between bringing a baseless claim and failing to succeed on a claim for which there is some basis in fact and law. Togito's case rested in large part on its assertion that in August 2007 Conomos agreed or undertook to hold the \$323,192.61 in his trust account pending the determination of the dispute with it (Togito) – which it failed to prove. Smits was not present at court when that agreement or undertaking was allegedly made, although he was in communication with his solicitors earlier that day by email and just before the order was made by telephone. The statements of Ms Downes, Mr Guthrie and Ms Gubbins denying the existence of any such undertaking or agreement, which I accepted, were not made until after the litigation was commenced. Counsel for Togito submitted that it was nevertheless Smits' understanding that such an agreement or undertaking had been made, and that in the context of the application for indemnity for costs, it was that understanding which was relevant. As I observed during submissions on costs, I made no finding on whether there was some breakdown in communication between Smits and his solicitors. In all the circumstances, I cannot be satisfied that Togito knowingly commenced a baseless claim.
- [31] Togito did not disclose the e-mail Smits sent Guthrie at 7.52 am on 2 August 2007 –
- "I confirm my instructions to deny any fraud and to allow the payments in accordance with the Chesterman J Order less the Trustee costs agreed to be paid by Jim from the Pioneer balance. Thanks for your input."²⁴ (Emphasis added.)
- Conomos obtained a copy of it when it obtained non-party disclosure against Dibbs Abbott Stillman.
- [32] Togito's non-disclosure of the email has not been satisfactorily explained. It was on Dibbs Abbott Stillman's file. It was sent from one of Smits' computers (either his personal computer or one he used for business purposes), and it was presumably stored on the hard drive of that computer. Unlikely as it seems, it may have been a case of oversight, and without the relevant evidence being tested by cross-examination, I decline to find that the non-disclosure was deliberate.
- [33] In all the circumstances, I decline to order indemnity costs.

²³ See [2010] QSC 421, [84].

²⁴ Statement of Guthrie (exhibit 8), SDG 3.

Orders

[34] There should be orders –

- (a) that the plaintiff and Leonardus Gerardus Smits pay the first and second defendants' costs of and incidental to the claim on the standard basis; and
- (b) that the first defendant pay the plaintiff and the third defendant added by counterclaim's costs of and incidental to the counterclaim on the standard basis.