SUPREME COURT OF QUEENSLAND

CITATION:	*Menkens & Anor v Wintour & Anor* [2011] QSC 53
PARTIES:	**LEO IGNATIUS GEORGE MENKENS** (first plaintiff) and **REID MATTHEW MENKENS** (second plaintiff) v **ROBERT DESMOND PETER WINTOUR** (first defendant) and **NORTH COAST WOOD PANELS PTY LTD** ACN 071 968 771 (second defendant)
FILE NO/S:	BS 1975 of 2006
DIVISION:	Trial Division
PROCEEDING:	Originating Application – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Judgment delivered on 23 February 2011 Further Orders delivered on 28 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2011
JUDGE:	McMurdo J
ORDER:	**On the claim, the defendants pay to the plaintiffs their costs of the claim, the costs in relation to the evidence of Mr Byrne and Mr Johnson to be assessed on the indemnity basis.** **On the counterclaim, the plaintiffs pay the first defendant's costs.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the plaintiffs claim was successful – where there was serious misconduct of the litigation by the defendants – whether the judgment upon the claim was no less favourable than the offer to settle – whether the plaintiffs should have their costs on the standard or indemnity basis

PROCEDURE – COSTS – GENERAL RULE-COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where the first defendant's counterclaim was successful – whether there was some special or unusual circumstances which warrant the first defendant's costs of the counterclaim being limited

Uniform Civil Procedure Rules 1999 (Qld), r 360(1)

Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2) [2007] FCA 1823, cited
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225, applied
Degmam Pty Ltd (in liq) v Wright (No 2) [1983] 2 NSWLR 354, cited
Menkens & Anor v Wintour & Anor [2011] QSC 7, cited

COUNSEL:	S Couper QC with M Hodge for the plaintiffs C Wilson for the defendants
SOLICITORS:	Hawthorn Cuppaidge & Badgery for the plaintiffs Herbert Geer for the defendants

[1] This judgment concerns the costs of the proceedings which were determined by my judgment on 23 February 2011.[1] The plaintiffs, who were successful on their claim, seek their costs of the claim on an indemnity basis. The defendants agree that the plaintiffs should have their costs, but upon the standard basis. It is common ground that the first defendant, Mr Wintour, should have the costs of the counterclaim. But the Menkens say that those costs should be limited to what they described as the legal argument relevant to that part of the case.

Costs of the claim

[2] The plaintiffs seek indemnity costs upon two bases. The first is that the overall result was more favourable to them than what was proposed within offers to settle which they made in May 2006 and May 2007. The second is the way in which the case was defended.

[3] The offer made in May 2006 proposed that the defendants would pay the plaintiffs the sum of $300,000, or alternatively an amount of $345,000 if the defendants continued to do work for a certain clients. It proposed that the parties sever their business relationships and that the plaintiffs would use their best endeavours to have any personal guarantees given by Mr Wintour released and that "the plaintiffs [would] provide an indemnity in respect thereto". The defendants were to undertake not to approach any existing clients for 18 months. If the Menkens & Associates Unit Trust had to "defend any claims of whatsoever nature relating to the period prior to 24 October 2005 for those clients who were advised by the First Defendant", then the first defendant was to indemnify the trust for any costs associated with those claims. The offer of May 2007 again proposed that the defendants would pay to the plaintiffs the sum of $300,000 and do all things necessary to sever their business relationships. It proposed that Mr Wintour's shares and units be transferred for the nominal amount of $1.00. It made effectively the same proposal in relation

1 *Menkens & Anor v Wintour & Anor* [2011] QSC 7.

to personal guarantees given by Mr Wintour with an indemnity from the plaintiffs if he could not be released from those guarantees. The defendants were not to approach existing clients of the plaintiffs until three years from the settlement.

[4] The plaintiffs argue that the overall outcome was more favourable to them than what was proposed by either offer. They do not distinguish between the offers, in the sense of saying that one was significantly more favourable than the other. They suggest that the outcome was one in which the plaintiffs' side received in excess of $470,000.[2] However, the comparison of the offers with the outcome is problematical for several reasons. The first is that the plaintiffs sued as trustees but were sued on the counterclaim in their personal capacities. For that reason I did not, by setting off the claim and counterclaim, give judgment for a net amount.[3] Secondly, the offers would have prevented the defendants having the business of most of the clients who did transfer to them. The outcome was one in which the plaintiffs were compensated for the loss of that business to the defendants, on the basis that the defendants kept that business. Thirdly, the indemnities to be provided may have had consequences which could be now quantified, but there is no evidence here by which that quantification could be made.

[5] In my conclusion the plaintiffs have not established that the judgment upon the claim was "no less favourable than the offer to settle", in terms of r 360(1) of the *Uniform Civil Procedure Rules 1999* (Qld).

[6] The plaintiffs' alternative argument for indemnity costs is that the defendants unduly prolonged the hearing by giving false evidence to dispute the plaintiffs' claim. The argument cites *Degmam Pty Ltd (in liq) v Wright (No 2)*;[4] *Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2)*[5] and *Colgate-Palmolive Company v Cussons Pty Ltd*[6] where Sheppard J said that the categories of case for which indemnity costs could be appropriate included where allegations were made which ought never to have been made or the case was unduly prolonged by groundless contentions.

[7] It is not uncommon for cases to turn upon questions of fact, where evidence tendered by the unsuccessful party is rejected as being untrue. That circumstance, of itself, is not thought to warrant an award of costs on the indemnity basis. But where there are further circumstances, such as the knowledge by the unsuccessful party of the falsity of the evidence particularly where the tender of that evidence results in a significantly longer trial, that party's conduct might tend to place the case within that exceptional class for which indemnity costs are granted.

[8] In the present case, I found that Mr Wintour did retain electronic material containing information which he used wrongfully. I rejected, in particular, his evidence that he had been able to locate former clients in a number of ways without at all using this material. The question of whether he did retain and use that electronic material occupied a good part of the trial. It must have involved also a very substantial expenditure for the preparation of the case, especially given the complexity of the exercise of tracing the electronic data. Moreover, the plaintiffs' task was made more difficult by the defendants' breach of their obligation to make proper disclosure. I

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2 The amount of the judgment on the claim less the amount of the judgment on the counterclaim.
3 *Menkens & Anor v Wintour & Anor* [2011] QSC 7 at [148].
4 [1983] 2 NSWLR 354 at 358.
5 [2007] FCA 1823.
6 (1993) 46 FCR 225 at 233.

refer here particularly to the "discovered file", as I described it in the principal judgment. The plaintiffs had to apply for an order permitting them to take a copy of the hard drive upon which, as it happened, this file was stored. Having unsuccessfully resisted that application, Mr Wintour then sought to keep the discovered file from the plaintiffs by deleting it from Mr Johnson's copy of that hard drive, at the same time misrepresenting that it was part of the material which had been deleted as irrelevant or privileged. This was a serious misconduct of the litigation on the part of the defendants, and makes Mr Wintour's denials that he kept and misused electronic information all the more serious. In my view, this is conduct which warrants some award of indemnity costs. But it would be wrong to visit the defendants with indemnity costs for the entirety of the plaintiffs' claim, because there were some questions of fact and law upon which the defendants succeeded.

[9] The difficulty then is in defining the costs which should be awarded upon the indemnity basis, so as to avoid yet further costs in this expensive litigation by complicating the assessment. The best course is to identify the relevant costs with certainty, although that might mean that some costs incurred upon this subject matter would not be assessed upon this higher basis. I conclude that the plaintiffs should have their costs of the claim against the defendants upon the indemnity basis as to the costs of the evidence of Mr Byrne and Mr Johnson, and otherwise upon the standard basis.

Counterclaim

[10] The first defendant succeeded upon his counterclaim and the starting point is that he should have his costs absent some special or unusual circumstance. The plaintiffs argue that "[t]he issue in the counterclaim was with respect to the value of the units". They argue that this issue was essentially a legal one. In my view, it involved both legal and factual questions. But as the plaintiffs argue, the factual questions were ultimately resolved by the uncontested evidence of Mr Lytras, the expert called by the plaintiffs. Mr Wintour had the opinion of his own expert witness, but relied upon the plaintiffs' expert.

[11] I do not accept that these circumstances warrant the costs of the successful counterclaim being "limited to the costs of the legal argument as to the basis of valuation of the units". The fact that, ultimately, Mr Wintour did not further lengthen this case by calling his own expert evidence on the point should not count against him. He should have his costs as a successful counterclaimant. The plaintiffs will be ordered to pay the costs of Mr Wintour on the counterclaim, assessed upon the standard basis.