

SUPREME COURT OF QUEENSLAND

CITATION: *7-Eleven Stores Pty Ltd v United Petroleum Pty Ltd & Anor*
[2011] QSC 85

PARTIES: **7-ELEVEN STORES PTY LTD**
ACN 005 299 427
(applicant)
v
UNITED PETROLEUM PTY LTD
ACN 085 779 255
(first respondent)
FINESSE PROPERTIES PTY LTD
ACN 119 991 329
(second respondent)

FILE NO: SC No 9382 of 2009

DIVISION: Trial Division

PROCEEDING: Application for leave to appeal against costs order

DELIVERED ON: 15 April 2011

DELIVERED AT: Brisbane

HEARING DATE: 24 March 2011

JUDGE: Peter Lyons J

ORDER: **The application be dismissed.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE
GENERAL RULE – ORDER FOR COSTS ON
INDEMNITY BASIS – where trial judge ordered first
respondent to pay costs of second respondent of and
incidental to the proceeding, on the indemnity basis – where
first respondent made oral application for leave to appeal the
order – whether cost order involved an error of law

Supreme Court Act 1995 (Qld), s 221, s 253
Uniform Civil Procedure Rules 1999 (Qld), r 681

Bullock v London General Omnibus Company [1907] 1 KB
264, cited
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992]
HCA 28, considered
Sanderson v Blyth Theatre Company [1903] 2 KB 533, cited

COUNSEL: P Franco for the applicant
D O’Sullivan for the first respondent
N Ferrett for the second respondent

SOLICITORS: Shand Taylor for the applicant
Clayton Utz for the first respondent
Swaab Attorneys for the second respondent

- [1] **PETER LYONS J:** On 24 March 2011, I made an order that the first respondent (*United Petroleum*) pay the costs of the second respondent (*Finesse Properties*) in respect of the proceedings up to that time (with a limited exception) on the indemnity basis. United Petroleum has applied for leave to appeal against that order.
- [2] It is necessary to set out something of the background to the action. Finesse Properties leased premises, on which were constructed a service station and shop, to the applicant (*7-Eleven Stores*). 7-Eleven Stores subleased the premises to United Petroleum. In essence, the sublease incorporated the principal terms of the lease.
- [3] A difficulty was encountered with an underground fuel tank. United Petroleum called on 7-Eleven Stores to rectify it, and 7-Eleven Stores in turn called on Finesse Properties to do so.
- [4] Some weeks later, United Petroleum purported to terminate the sublease, and abandoned the premises. 7-Eleven Stores commenced proceedings against United Petroleum, essentially seeking a determination that the sublease remained in force. United Petroleum contested the proceedings, asserting that it had validly terminated the lease. It lodged a counterclaim against 7-Eleven Stores, including a claim for loss and damage alleged to have arisen out of the delay in repairing the underground fuel tanks. There was also a claim for loss and damage relating to an alleged failure to rectify the roof of the building.
- [5] 7-Eleven Stores had also commenced proceedings against Finesse Properties. The claim against Finesse Properties was made on the footing that 7-Eleven Stores had breached its obligation to United Petroleum to carry out repairs to the premises; but in turn Finesse Properties had breached its obligation under the lease to carry out those repairs; and accordingly it was liable for any loss it might suffer as a result of any liability it had to United Petroleum.
- [6] On 16 December 2010, I delivered reasons for judgment, consequent upon a hearing. In essence I held that United Petroleum had not validly terminated the sublease, and that its counterclaim must fail. However, I gave the parties time to make submissions about the orders to be made, including costs. That resulted in the hearing of 24 March 2011, and the order in respect of which United Petroleum seeks leave to appeal.
- [7] At the hearing on 24 March 2011, Finesse Properties sought an order for costs against United Petroleum (referred to as a *Sanderson* order¹) on an indemnity basis. For United Petroleum, submissions were made in opposition to this application, on the ground that the circumstances did not justify the making of the order. In addition, a submission was made to the effect that a *Sanderson* order was simply an alternative to an order which might have been made in favour of Finesse Properties against 7-Eleven Stores for its costs, and a further order that 7-Eleven Stores be entitled to recover the costs paid to Finesse Properties from United Petroleum (referred to as a *Bullock* order²); and that as no basis was established for making an order for indemnity costs in favour of Finesse Properties against 7-Eleven Stores, then none should be made in favour

¹ *Sanderson v Blyth Theatre Company* [1903] 2 KB 533.

² *Bullock v London General Omnibus Company* [1907] 1 KB 264.

of Finesse Properties directly against United Petroleum. I did not accept that submission.

- [8] An oral application was then made for leave to appeal against the order for costs, limited to the question whether the costs should have been awarded on the indemnity basis, on the ground identified.
- [9] In view of the late hour at which this occurred, and because of the issue raised, arrangements were made for written submissions on the application for leave to be provided by United Petroleum and Finesse Properties. In its written submissions, United Petroleum submits that the Court was “unable properly to order that (United Petroleum) pay (Finesse Properties’) costs on the indemnity basis”. It submitted that its conduct could only properly form the basis for an order that it pay the costs of 7-Eleven Stores on an indemnity basis; and that the difference between the position of 7-Eleven Stores and United Petroleum was that, 7-Eleven Stores having succeeded against United Petroleum, United Petroleum had a *prima facie* obligation to pay the costs of 7-Eleven Stores, an obligation which did not exist in relation to the costs of Finesse Properties. It also submitted that an order made on the indemnity basis in these circumstances was “unprecedented”, and the decision arguably involved an error of law. These submissions were generally controverted on behalf of Finesse Properties.
- [10] The application was made pursuant to s 253 of the *Supreme Court Act 1995* (Qld) (*1995 Act*), which makes leave necessary for an appeal against the costs order.
- [11] The principles applicable for the application were identified in the written submissions on behalf of United Petroleum as follow:

“7. ...

(a) The court should be satisfied that there is an arguable case that it has committed an error of law, or misapprehended the facts, or that the result is inexplicably inconsistent with the facts (or that the discretion to order costs otherwise miscarried in the manner identified in *House v The King*): *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 484 at [41] (Chesterman J), approved *AGL Sales (Queensland) P/L v Dawson Sales P/L and ors (sic)* [2009] QCA 262 at [50] (Fraser JA);

(b) Leave is accordingly not given merely for the asking: *Di Carlo v Dubois* [2004] QSC 041 at [5] (McKenzie J);

(c) Whether leave to appeal should be granted will usually depend on the primary judge's view as to the balance of competing arguments, whether those arguments relate to matters of legal principle or disputed questions of fact, the importance and difficulty of such arguments, and, on occasions, the amount of money involved: *Morrison v Hudson* [2006] QCA 170 at [24] (Keane JA), approved *Yara Nipro P/L v Interfert Australia P/L* [2010] QCA 128 at [67] (Fraser JA).”

- [12] The submissions of Finesse Properties point to a legislative policy underlying s 253, said to be “to prioritise finality in litigation over risk of error”. It was also submitted that an important or difficult argument is a necessary element of a successful application for leave, which was not identified in the present case.
- [13] Since the application asserts an arguable error of law, it is necessary to pay attention to the power which was being exercised. In Dal Pont, *Law of Costs* (2nd ed), s 221 of the 1995 Act is identified as the general source of the power for this Court to award costs.³ The correctness of this view might be doubted. In *Knight v FP Special Assets Ltd*⁴ this section (then s 58 of the *Supreme Court Act 1867* (Qld) (*1867 Act*)) was held not to be the source of this Court’s power to award costs. That is because the section confers a power in respect of cases “not provided for otherwise than by this section”. At that time, O 91 r 1 of the *Rules of the Supreme Court* provided that (subject to certain other provisions) the costs of all proceedings in this Court “shall be in the discretion of the Court or Judge”. It was held that O 91 r 1 was the source of power to award costs, rather than s 58 of the 1867 Act.
- [14] Rule 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) provides that costs of a proceeding “are in the discretion of the court but follow the event, unless the court orders otherwise”. This language is sufficiently similar to the language of O 91 r 1 to point strongly to the conclusion that r 681, and not s 221 of the 1995 Act, confers power on this Court to make orders for costs. However, it is not critical to reach that conclusion in this case.
- [15] Whether the power to award costs is conferred on the Court by r 681, or by s 221, the power is, for the present purposes, not subject to any relevant fetter.
- [16] It has long been accepted that a broad power to make an order for costs extends to the power to make a *Sanderson* order. No basis has been identified for submitting that it would be an error of law to make such an order on an indemnity basis, in circumstances which would, in an action between United Petroleum and 7-Eleven Stores, justify such an order.
- [17] While the circumstances in which such an order has been made may be rare, it would seem that they are not unprecedented. The research of Mr Ferrett of Counsel, for Finesse Properties, has identified an example of a *Sanderson* order made on an indemnity basis.⁵ The rarity of the occasions on which such an order has been made does not, it seems to me, justify the grant of leave.
- [18] The application for leave to appeal against the order for costs should be dismissed.

³ Dal Pont, *G E Law of Costs* 2nd ed LexisNexis Butterworths, Australia, 2009 at [6.7].

⁴ (1992) 174 CLR 178.

⁵ *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* [2002] NSWSC 450 at [106].