SUPREME COURT OF QUEENSLAND

CITATION:	*Zabusky v Van Leeuwen* [2012] QSC 41
PARTIES:	**HARVEY ZABUSKY** (first applicant) and **VIRGTEL LIMITED IBC NO 311178** (second applicant) **v** **HENDRIK VAN LEEUWEN** (first respondent) and **JAMES CONOMOS LAWYERS (A FIRM)** (second respondent)
FILE NO:	BS 4405 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	2 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Daubney J
ORDER:	**The applicants shall pay the first respondent's costs of and incidental to the application for the joinder of Amalia Investments Ltd and the application for interlocutory injunctive relief (but excluding any costs associated with the hearing on 4 March 2011), such costs to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – where the applicants brought an application that a company be joined as an applicant and, an application for interlocutory injunctive relief – where the first respondent was not served at the time of the initial hearing – where an interim order was made to preserve the status quo pending service of the application on the first respondent- where the applications were dismissed - where the claim for injunctive relief was not maintainable – where there was no prima facie cause of action against the first respondent - whether costs should be awarded against the applicants on an indemnity basis

Amos v Monsour Legal Costs Pty Ltd [2008] 1 Qd R 304, considered

Colgate-Palmolive Co v Cussons (1993) 46 FCR 225, applied

Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299, considered

Zabusky & Anor v van Leeuwen & Anor [2011] QSC 270, cited

COUNSEL: G C Newton SC with SS Monks for the first respondent

SOLICITORS: Tucker & Cowen for the applicants
James Conomos Lawyers for the respondents

[1] When I gave the principal judgment dismissing the application for the joinder of Amalia Investments Ltd ("Amalia") and the application for interlocutory injunctive relief[1], I called on the parties for submissions on costs.

[2] Those submissions have been made, but not before they became entangled with submissions that the parties in a related proceeding (No 6547 of 2005) made in respect of a number of costs matters in that proceeding and the making of submissions by Mrs Amalia Zabusky, who contends that she is now acting for herself in the other proceeding. I do not need to be concerned with those matters for present purposes, which are concerned only with the applications made in this proceeding (No 4405 of 2010).

[3] It will be recalled that the application for injunctive relief first came on without the first respondent, Mr Van Leeuwen, having been served.[2] On the final hearing of both of these applications, however, Mr Van Leeuwen was represented and the applications were dismissed. It is conceded that he cannot recover any costs in respect of the hearing on 4 March 2011 at which he was not represented, but it is otherwise submitted that he should have his costs of the two applications, to be assessed on the indemnity basis.

[4] The unsuccessful applicants do not oppose orders for costs on the standard basis, but contend that costs ought not to be assessed on the indemnity basis.

[5] Two principal submissions were made on behalf of Mr Van Leeuwen:

(a) The applications failed at an elemental level, in that it was found that neither applicant had any cause of action against Mr Van Leeuwen, and the applications were therefore misconceived;

(b) A critical issue was the source of the funding for the payments to Gadens Lawyers when that firm was acting for the Van Leeuwen interests in

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1 *Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270

2 Ibid at [7].

> proceeding No 6547 of 2005, being the retainer which led to the dispute and subsequent agreement for the payment of monies to Virgtel and Global.[3] The evidence supported only one conclusion, namely that the funding had come from Mr Van Leeuwen personally, or persons associated with him.

[6] In opposing an order that costs be ordered on the indemnity basis, it was contended that the applications had "arguable merit". The applicant's submissions referred to part of the judgment of Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*[4] in which his Honour listed some of the circumstances in which indemnity costs orders had previously been held to be appropriate, and then submitted:

> "None of these factors are present. It cannot be said with any reasonable justification that the Zabusky interests brought the applications despite material demonstrating that they were bound to fail, nor that they were brought for an ulterior purpose as is sought to be made out by inference. It cannot have been unarguable because interlocutory injunctions were granted."

[7] The final sentence in that submission is an overstatement. An interim injunction was obtained at the first hearing at which the only party represented was the second respondent, against whom no relief could properly be sought in any event. The first respondent had not even been served at that stage. An interim order was made to preserve the status quo in the short term, pending service of the application on the first respondent. There were no findings made with respect to the merits of the application. Indeed, on the interim hearing the solicitor who appeared on behalf of the applicants expressly, and properly, conceded that if evidence was adduced to prove that Mr Van Leeuwen had paid all the money then "that changes the complexion of [the case]".[5]

[8] In *Colgate-Palmolive Co v Cussons*, Sheppard J said that:[6]

> "In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to warrant the Court in departing from the usual course."

[9] His Honour observed, by reference to previous cases, that it was "useful to note some of the circumstances which have been thought to warrant the exercise of the discretion" to award costs on the indemnity basis, and concluded by saying:[7]

> "Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. <u>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</u>." (Underlining added)

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3 Ibid at [3] – [4].

4 *Colgate-Palmolive Co v Cussons* (1993) 46 FCR 225.

5 Transcript of proceedings, *Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270 (Supreme Court of Queensland, Daubney J, 4 March 2011) at [pg 7, p20]

6 *Colgate-Palmolive Co v Cussons* (1993) 46 FCR 225 at [233].

7 Ibid at [234]

[10] See also the judgment of Chesterman J (as he then was) in *Emanuel Management Pty Ltd (in liquidation) & Ors v Fosters Brewing Group Ltd & Ors and Coopers & Lybrand & Ors*.[8]

[11] An order for indemnity costs is exceptional, and such costs are awarded only for good reason.[9] Again, this draws attention to whether an indemnity costs order is warranted on the particular facts and circumstances of the case.

[12] Notwithstanding the applicants' submissions, it is clear that the case for injunctive relief against Mr Van Leeuwen was not maintainable. The first applicant, Mr Zabusky, did not even profess to have a personal cause of action against Mr Van Leeuwen. The bringing of the application for injunctive relief in the name of the second applicant was fraught with difficulty, and prompted the application for the joinder of Amalia, albeit with no application for the injunctive relief to be brought as a derivative proceeding.[10] And in any event, for the reasons canvassed in the principal judgment by reference to Mr Zabusky's own affidavit, no cause of action by Virgtel against Mr Van Leeuwen was disclosed. To the extent that the material disclosed a cause of action against Mr Van Leeuwen, this was the action which is the subject of the claim against him by the receiver of VTL.

[13] Moreover, as is addressed in the principal judgment, the evidence adduced on behalf of Mr Van Leeuwen was that none of the money paid to Gadens for legal fees and none of the money paid in respect of the VCAT proceeding came from Virgtel. Despite receiving this evidence, the applicants did not seem to consider that the complexion of the case had changed, and persisted with the applications. I note in passing that the Zabusky interests had been informed almost a year previously that Mr Van Leeuwen was the source of the legal fees paid for the applicants in the principal proceeding.

[14] This application for interlocutory injunctive relief was not one where it might have been said that there may have been an arguable case had a different view been taken of the evidence. In this case, there was no *prima facie* cause of action against the first respondent, even on the applicants' own material.

[15] In those circumstances, I consider it appropriate that the first respondent have his costs on the indemnity basis.

[16] In the written submissions lodged on behalf of the Zabusky interest, counsel for those parties feinted at the prospect of an application to stay this costs order pending appeal. An appeal by the Zabusky interests against the principal judgment has since been dismissed by consent, and accordingly there is no need to consider this matter further.

[17] Accordingly, there will be the following order:

> The applicants shall pay the first respondent's costs of and incidental to the application for the joinder of Amalia Investments Ltd and the application for interlocutory injunctive relief (but excluding any

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8 *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299

9 *Amos v Monsour Legal Costs Pty Ltd* [2008] 1 Qd R 304 at [29].

10 *Zabusky & Anor v van Leeuwen & Anor* [2011] QSC 270 at [35].

costs associated with the hearing on 4 March 2011), such costs to be assessed on the indemnity basis.