

SUPREME COURT OF QUEENSLAND

CITATION: *Johnston & Anor v Herrod & Ors* [2012] QSC 107

PARTIES: **HARELLA CAROLINE JOHNSTON**
(first plaintiff)
LEAH DELILAH FELSMAN
(second plaintiff)
v
HAREL JOSEPH HERROD
(first defendant)
ROBERT MATTHEW HERROD
(second defendant)
RACHEL REBECCA HOLLINGSWORTH
(third defendant)

FILE NO/S: No 501 of 2007

DIVISION: Trial Division

PROCEEDING: Trial – Further Orders

ORIGINATING COURT: Supreme Court, Townsville

DELIVERED ON: 26 April 2012

DELIVERED AT: Brisbane

HEARING: Heard on the papers

JUDGE: Chief Justice

ORDER: **Order that the defendants pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the standard basis**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where plaintiffs succeeded at trial – where some offers to settle were made – where defendants' conduct claimed to be such that costs should be awarded on the indemnity basis – whether costs should be assessed on the indemnity basis

Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2) (2007) FCA 1823, cited

COUNSEL: No appearance by the plaintiffs, the plaintiffs' submissions were heard on the papers
No appearance by the defendants, the defendants' submissions were heard on the papers

SOLICITORS: de Groot for the plaintiffs
Wilson Ryan & Grose for the defendants

- [1] **CHIEF JUSTICE:** It is common ground that the defendants should be ordered to pay the plaintiffs' costs, with the issue being whether they should fall for assessment on the indemnity basis, for which the plaintiffs contend, or on the standard basis, for which the defendants contend.
- [2] A number of offers to settle passed between the parties. On 31 August 2006, the plaintiffs offered to accept \$600,000 each, inclusive of costs, in satisfaction of the family provision application "and also any other actions they may have" against the defendants. Whether the plaintiffs have done better than that cannot be determined reliably, because the family provision application remains undetermined.
- [3] On 20 February 2012, the day before the trial commenced, the plaintiffs offered to accept \$420,000 each, together with indemnity costs. The offer was expressed to remain open until noon on 21 February. It was not accepted. While that offer was not made under Part 5 of Chapter 9 of the Uniform Civil Procedure Rules, it remains relevant to the exercise of the present discretion. While each plaintiff has secured a prospective judgment for a larger amount, being \$433,709.67, that offer required the payment of indemnity costs.
- [4] The defendants' offers were made under the Uniform Civil Procedure Rules, but for substantially lesser amounts: on 3 January 2007, \$114,000 plus standard costs, and on 1 February 2012, \$100,000 plus standard costs.
- [5] I do not consider that the history of offers should be influential in the exercise of the current discretion.
- [6] The plaintiffs additionally rely on the findings made in relation to the defendants' conduct – especially the finding of fraud, and their breach of fiduciary duties whether owed as partners or trustees (cf. *Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2)* (2007) FCA 1823, paras 13-15).
- [7] There is substance in Mr Moon's position, which was that if enforceable, the agreements into which the plaintiffs entered, intended to create legal relationships, would have effectively amounted to an agreed way of administering the estate. In circumstances especially where Harella signed an (amended) record of her oral agreement, it was not unreasonable for the defendants to litigate the enforceability of the agreements. Their failure on that issue meant their failure on a host of

dependent issues which followed on. I do not consider that this matter loses significance to the disposition of costs because of the correspondence referred to in paras 104-106 of the reasons for judgment.

- [8] Notwithstanding the plaintiffs' submissions, I am not satisfied that this is a sufficiently special case to warrant the award of indemnity costs.
- [9] There will therefore be an order that the defendants pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the standard basis.
- [10] In their letter of 31 August 2006, the plaintiffs' solicitors asserted that the executors should not be entitled to their costs out of the estate. I imagine the point has no continuing relevance because the estate has been distributed. But obviously, if that is not the case, the trustees should not have recourse to any estate assets in order to meet their own costs. If any order is sought in that regard, it may be sought under the "liberty to apply" provision.