SUPREME COURT OF QUEENSLAND

CITATION:	*Schache & Ors v GP No 1 Pty Ltd & Ors* [2012] QCA 233
PARTIES:	**IAN SCHACHE** (first appellant) **ANTHONY JOHN CERQUI** (second appellant) **CAMERON DYAL** (third appellant) **JON IRVINE HERRIOT & JUDITH ANN HERRIOT** (fourth appellants) **v** **GP NO 1 PTY LTD** ACN 151 382 688 (first respondent) **ARAFURA HOLDINGS LTD** ACN 092 266 067 (second respondent) **PEARLAUTORE INTERNATIONAL PTY LTD** ACN 050 938 166 (third respondent)
FILE NO/S:	Appeal No 581 of 2012 SC No 8876 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2012
JUDGES:	Margaret McMurdo P and Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where appellants four of 578 investors (growers) in a number of managed investment schemes relating to the growing, harvesting and sale of pearls – where second respondent "responsible entity" of schemes – where schemes comprised of product disclosure statement, constitution, and management agreement – where growers had their pearls pooled with those of other growers unless they elected

otherwise and were entitled to a proportional interest – where second respondent went into administration – where administrators entered into a contract with the first respondent to provide management services to the second respondent – where administrators also caused second respondent to enter into an agreement with third respondent for the preparation of sale and marketing of scheme pearls – where pearls received by third respondent consisted of a mix of scheme pearls and pearls owned by second respondent – where appellants made application for various interlocutory orders – where primary judge did not grant orders – where appellants ordered to pay respondents' costs of the application on indemnity basis – where appellants did not directly challenge primary judge's decision not to make orders – where appellants submitted primary judge should have found a triable issue and made more limited further orders until further order – where appellants submitted that if a triable issue had been identified an indemnity cost order would be inappropriate – where appellants submitted that even if the primary judge did not err in not finding a triable issue this Court, if persuaded of the existence of a triable issue, should set aside the indemnity cost order – where appellants submitted respondents should pay the costs of both the application and appeal – whether indemnity cost order should be overturned – whether respondents should pay costs of application and/or appeal

Corporations Act 2001 (Cth), Ch 5, s 601FB
Uniform Civil Procedure Rules 1999 (Qld), r 75, r 681, r 702, r 748

AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors [2009] QCA 262, considered
Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd (1986) 10 FCR 177; [1986] FCA 85, cited
Capital Finance Corp (Australasia) Pty Ltd & Ors v Peter Pan Management Pty Ltd (in liq) & Anor [2003] VSCA 93, considered
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, considered
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, considered
Di Carlo v Dubois & Ors [2002] QCA 225, considered
Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 484, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
I S Schache and K Schache as t'ees for the Schache Superannuation Fund and as representative for investors in the Arafura Pearl Project for the financial year 2005/2006 & Ors v GP No 1 Pty Ltd & Ors [2011] QSC 413, considered

In re The Will of F B Gilbert (dec) (1946) 46 SR (NSW) 318, considered
Johnson v Tobacco Leaf Marketing Board [1967] VR 427; [1967] VicRp 45, cited
Jones v National Coal Board [1957] 2 QB 55; [1957] EWCA Civ 3, considered
Minister for Health v Brambles Australia Ltd [2006] WASC 86, cited
Morrison v Hudson [2006] 2 Qd R 465; [2006] QCA 170, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, considered
R v Birks (1990) 19 NSWLR 677, considered
Smith v Peters (1875) LR 20 Eq 511, cited

COUNSEL: M P Amerena for the appellants
L M Copley for the first respondent
A J H Morris QC, with VG Brennan, for the second respondent
D G Clothier SC for the third respondent

SOLICITORS: MacGillivrays Solicitors for the appellants
McMahon Clarke for the first respondent
Kelly & Co Lawyers for the second respondent
Banki Haddock Fiora for the third respondent

[1] **MARGARET McMURDO P:** This appeal should be dismissed with costs for the reasons given by Muir JA.

[2] **MUIR JA: Introduction** The appellants are four of 578 investors in a number of registered, managed investment schemes governed by Ch 5C of the *Corporations Act* 2001 (Cth). The "responsible entity" for each relevant scheme is the second respondent, Arafura Pearls Holdings Ltd (Administrators Appointed). Separate schemes were entered into in respect of the years ended 30 June 2006, 2007, 2008 and 2009.

[3] The documents underlying all schemes are relevantly identical. In each case they comprise: a product disclosure statement; a constitution and a management agreement. The latter was required to be in the form of the draft in schedule 1 to the constitution.[1]

[4] Under each scheme, participants such as the appellants invested monies to acquire "project interests". Each such interest entitled the participant to a specified number of identifiable "spats"[2] and "approximately 100 seeded shell at year 2". Arafura, which owned the oyster shells, had an obligation to harvest the pearls approximately four and six years after the commencement of each project. It was also obliged to sell the pearls. Scheme participants (growers), unless they elected otherwise, had their pearls pooled with other non-electing growers and were entitled to a proportional interest in the net harvest proceeds based on the number of commercial grade pearls produced from their respective project interests.

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1 Clause 1.1 of the constitution.
2 Juvenile hatchery reared oysters of the genus *Pinctada Maxima*.

[5] Arafura was an established pearl farmer which had been operating a pearl and oyster hatchery for over eight years at Elizabeth Bay in northeast Arnhem Land. It was contemplated that the scheme pearls would be farmed at that site. Prior to its financial difficulties in 2011, Arafura was the second largest pearl farmer in Australia.

[6] Arafura went into administration on 21 April 2011 and shortly thereafter receivers and managers were appointed over certain of its assets by its secured creditor, Macasins Pty Ltd. The fact that the receivers and managers had possession of some of Arafura's assets threatened the management of the schemes and the administrators lacked sufficient funds to perform Arafura's obligation, as responsible entity, to properly operate the schemes. There was evidence that the receivers were refusing to allow Arafura's property to be used for the purposes of the schemes and threatening to harvest only the pearls which Arafura produced in its own right. There was also evidence that the termination by the receivers of the services of many of Arafura's employees and the neglect of normal maintenance of the oyster beds during the receivership affected the schemes viability.

[7] The administrators, having failed to locate a replacement responsible entity for the schemes, entered into a contract with the first respondent, GP No 1 Pty Ltd, for that company to provide management services to Arafura ("the GP Management Agreement"). GP had acquired the interests of Macasins in its securities and was able to conclude the receivership.

[8] In August 2011, the administrators caused Arafura to enter into an agreement (the Pearl Sales Agreement) with the third respondent, Pearlautore International Pty Ltd, for the preparation for sale and marketing of scheme pearls. The term of that agreement, which conferred exclusive marketing rights on Pearlautore, was for five years from 1 July 2011.

[9] Pearlautore carried on the business of marketing pearls and of preparing pearls for sale by washing, polishing, weighing, counting and grading. The marketing process includes the formulation of a marketing strategy best suited to prevailing market conditions. Since the weakening of the market for pearls in recent years, approximately 90 to 95 per cent of pearl sales by Pearlautore have resulted from marketing abroad. This has materially increased marketing costs.

[10] Pearlautore marketed pearls for the group of companies of which it is a member as well as Arafura and other pearl producers. Pearlautore was the exclusive distributor of pearls produced by Arafura in its own right between 2004 and 2007. After that, and before the appointment of the administrators, Arafura conducted its own marketing.

[11] The pearls provided by Arafura to Pearlautore for marketing under the Pearl Sales Agreement consisted of the unsold residue of Arafura's 2010 harvest. These pearls were generally of lesser quality than the pearls sold or retained by Arafura and could thus be expected to fetch lower prices and to be more difficult to sell than the pearls comprising the balance of the 2010 harvest. The pearls received by Pearlautore consisted of scheme pearls and pearls owned by Arafura which had already been mixed.

[12] In August 2011, Pearlautore received two further shipments of pearls from Arafura. These shipments also consisted of mixed Arafura and scheme pearls. A further

shipment of pearls from Arafura's 2011 harvest was received by Pearlautore in September 2011 and it commenced the process of sorting, grading and valuing.

[13] As at 24 October 2011, approximately 30,624 pearls had been sold by Pearlautore pursuant to the Pearl Sales Agreement for a gross sales price of $1,601,168. Of this sum $994,028 had been paid to the Administrators.

The proceedings at first instance

[14] On 3 October 2011, the appellants filed an originating application seeking:

1. declarations as to the ownership of the growers' oysters and pearls propagated in the schemes;

2. declarations as to "the precise location or locations of the said oysters and pearls";[3]

3. declarations as to the ownership of all funds derived from the sales of any of the said oysters or pearls;

4. an injunction permanently restraining the respondents from dealing with or attempting to deal with the said oysters and pearls;

5. an injunction permanently restraining the respondents from in any way disposing of or dealing with the proceeds derived from the sale of any of the said pearls.

[15] The proceedings were commenced by the appellants pursuant to r 75 of the *Uniform Civil Procedure Rules*, with the first, second, third and fourth applicants respectively claiming to represent the growers in the 2005/2006, 2006/2007, 2007/2008 and 2008/2009 schemes.

[16] In an amended interlocutory application filed on 5 October 2011, the appellants applied for orders that until the determination of the proceedings:

1. the oysters and pearls the property of the scheme growers and the proceeds of sale of such oysters and pearls in the possession or control of the respondents be preserved by the respondents;

2. the respondents be restrained from selling or dealing in any manner with such oysters and pearls without the written consent of the growers; and

3. Arafura be restrained from paying to GP No 1 amounts due pursuant to the GP Management Agreement without the growers written consent.

The hearing on 26 October 2011

[17] The application for the interlocutory orders was heard on 26 October 2011.

[18] The appellants argued before the primary judge that Arafura had no power under any management agreement or constitution to delegate to GP No 1 the management

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[3] The originating application, as originally filed, referred to "present location" rather than "precise location".

of any of the projects or any part of such management. Reliance was placed in particular on cl 13 of the management agreements which, it was argued, restricted any such appointment to the persons or entities identified in the clause. The primary judge rejected the appellants' argument, holding that cl 13 was permissive in nature and that, in any event, had cl 13 operated as the appellants contended, it would not have been effective because of the provisions of s 601FB of the *Corporations Act* 2001 (Cth).

[19] On appeal, counsel for the appellants expressly renounced any reliance on these arguments.

[20] Another argument advanced at first instance, related to the first argument, was that GP No 1 did not have the right to sell the growers' pearls. That argument depended on the questions of construction relevant to the first argument and it was also not pursued on appeal.

[21] The next argument was that there had been a pooling of growers' pearls with Arafura's pearls. In relation to this argument, the ground of appeal was:

> "His Honour erred in finding that as a result of the manner in which the administrators and GP No 1 Pty Ltd have dealt with the various schemes, there are sufficient records to indicate, at least, the proportion each grower is entitled to with respect to any sale."

[22] Counsel for the appellants did not attempt to support that ground of appeal. That was no doubt because the evidence did not support it. Mr Powell, one of the administrators appointed to Arafura, swore at first instance that the proceeds of sale of the Arafura pearls and the proceeds of sale of pearls of each scheme were kept in separate bank accounts. Additionally, the management agreement expressly authorised Arafura to pool growers' pearls.

The primary judge's findings

[23] The primary judge made the following findings in respect of the balance of convenience:[4]

> "[39] The orders sought by the applicants would, if granted, bring the pearl growing and harvesting undertakings to a halt. There is no allegation that the pearl farms are not being managed properly or that the best price possible is not being obtained. It was submitted that the administrator is acting in a self interested way and that if the administrator sells the pearls then that would amount to stealing. I reject that submission as it is based upon a misunderstanding of the scheme documents.
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> [40] The interlocutory injunctions sought would require the respondents to "freeze" the operation by not allowing anything to be done, until the determination of these proceedings, with the oysters and pearls and with any

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4 *I S Schache and K Schache as t'ees for the Schache Superannuation Fund and as representative for investors in the Arafura Pearl Project for the financial year 2005/2006 & Ors v GP No 1 Pty Ltd & Ors* [2011] QSC 413 at 9 – 10 [39] – [47].

proceeds derived from the sale of the oysters and pearls. That would, obviously, dry up the income stream and have serious consequences for the operation of the business.

[41] Other orders sought seek to enjoin the respondents from selling or dealing in any manner howsoever with the oysters and pearls without the written consent of the growers. There are over 500 growers engaged in the various schemes. It would be impossible for any business to operate if it needed to gain the written consent of over 500 people who are spread around Australia. Further, when the order seeks to enjoin the respondents from "dealing in any manner", that would include maintenance and all other acts necessary to ensure that the project remains physically viable.

[42] The order sought to restrain Arafura from paying GP the fees referred to in the Arafura Management Agreement without first obtaining the written consent of the growers whose pearls have been harvested by GP in 2011 would place Arafura in breach of its agreement and possibly lead to GP determining the contract. On the evidence, which I accept, to do that would mean that the entire project would be doomed.

[43] The interlocutory injunctions sought would not act to preserve the status quo; rather, it would cause the business to come to an end.

[44] While the named applicants have the right to commence a representative proceeding under r 75 of the *UCPR*, the other unnamed growers are not parties to this action[5] and these orders would place them in a position where their investment would be determined by the actions of others who might or might not agree to the proposals of the administrators.

[45] The interests of the applicants can be respected by the respondents agreeing to keep appropriately detailed records of their actions in undertaking the business of pearl farming and the sales which take place.

[46] The balance of convenience is clearly in favour of the respondents. The proposed interlocutory injunctions would be likely to lead to GP ceasing to fund the operations and maintenance of the pearl farms, to threaten the employment of 40 staff members employed by it to manage the farm and place it in danger of insolvency.

[47] The named applicants have, reluctantly, offered an undertaking as to damages. I do not accept that they are able to offer an undertaking on behalf of persons who are not parties in the usual sense, that is, the other growers, to this action. The applicants did not provide any material to suggest that the undertaking offered by the individual applicants

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5 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133.

> would be sufficient to account for any damage which might be suffered by the respondents."

[24] The primary judge ordered the applicants to pay the respondents' costs of the application on the indemnity basis.

The orders which the appellants contend the primary judge should have made

[25] Counsel for the appellants did not challenge the primary judge's findings in relation to the balance of convenience. Nor was it submitted that the primary judge erred in not making the orders sought by the appellant at first instance. It was contended, however, that the primary judge should have found a triable issue, albeit not necessarily one contended for by the appellants at first instance, and made the following, more limited, orders until further order.

1. Arafura preserve in a proceeds fund kept pursuant to cl 2.5(c) of each of the scheme constitutions of the Arafura Pearl Projects for the years 2005/2006, 2006/2007 and 2007/2008 the proportional interests of each non-electing grower after application of gross pearl sales from the 2010 and 2011 harvests pursuant to cl 21.3 of the management agreements for the said years.

2. That to the extent, if any, that GP No 1 has been paid a management fee concerning the non-electing growers' pearls under the agreement made between GP No 1 and Arafura dated 15 August 2011, on account of services the subject of the deferred management fee referred to in the management agreement which management fee exceeds 30 per cent of the gross pearl sales less the component which represents GST, GP No 1 is to pay the amount of that excess within seven days of the date of this order to Arafura who upon receipt is to forthwith to pay that amount into the relevant proceeds fund referred to in order 1.

3. To the extent, if any, that Pearlautore has been paid a sales and marketing fee concerning the non-electing growers' pearls under the letter of appointment from Arafura dated 8 August 2011 on account of services the subject of the sales and marketing fee referred to in the management agreements which sale and marketing fee exceeds 10 per cent of the growers' pearl sales less the component which represents GST, Pearlautore is to pay the amount of that excess within seven days of the date hereof to Arafura who upon receipt is to pay forthwith such amount into the relevant proceeds fund referred to in order 1.

4. [Directions as to record keeping].

5. Costs reserved.

Consideration

[26] The considerations addressed by the primary judge, in paragraphs [39] – [46] inclusive of his reasons, overwhelmingly favoured the refusal of the relief sought in the amended application even if the primary judge had concluded that there was a serious question to be tried. The matters raised in paragraph [44] of the reasons would, of themselves, have been sufficient justification for the refusal to make the

orders sought. There was no evidence that the application was supported by the great bulk of growers. Nor was there evidence that they had been informed of the proceedings or of the relief sought by the appellants. Plainly, the outcome of the interlocutory application had the potential to adversely affect the financial interests of such growers to a material extent.

[27] The evidence did not disclose the need for any urgent relief to protect the interests of the appellants or growers. The primary judge found that it had not been established that the appellants' property was being dealt with by the respondents to their disadvantage. That finding was not challenged on appeal.

[28] It was argued that the primary judge erred in treating the relief sought by the appellants as injunctive in nature rather than as orders for the interim preservation of property. As the orders were of the latter kind, so it was contended, the Court was not required to consider the merits of the appellants' case in order to find the existence of a serious question to be tried.[6] The Court, it was asserted, has wide powers to do whatever is necessary in the administration of justice.[7]

[29] Even if these submissions were to be accepted, the balance of convenience considerations referred to and discussed above would have remained relevant as would the propriety of making such orders without all growers being given the opportunity to be heard. Also, it is plainly not the case that proposed order 3 in the amended interlocutory application was not injunctive in nature. Orders 2 and 4 would also have restrained parties from exercising contractual and proprietary rights.

[30] The orders sought by the appellants on appeal were merely that:

1. The appeal be allowed.

2. The respondents pay the appellants' costs of the appeal on a standard basis.

3. The order as to costs made by the primary judge on 23 December 2011 be vacated.

4. The costs of and incidental to the application filed 3 October 2011 be reserved.

[31] It was submitted by counsel for the appellants that events since the hearing before the primary judge and, in particular, orders made in the Federal Court on 24 April and 28 May 2012, had made the relief sought in the interlocutory application inappropriate. The orders made on 24 April included orders appointing the administrators pursuant to s 601NF(1) of the *Corporations Act* 2001 (Cth) to take responsibility for ensuring that each of the Schemes is wound up in accordance with its respective constitution and appointing the administrators receivers of the property of each of the schemes.

[32] It is apparent that the sole point of the appeal is to attempt to overturn the indemnity costs order. Counsel for the appellants argued that had the primary judge identified a triable issue, it would have followed that an indemnity costs order would have

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6 *Johnson v Tobacco Leaf Marketing Board* [1967] VR 427 at 430.

7 *Smith v Peters* (1875) LR 20 Eq 511 at 513; *Minister for Health v Brambles Australia Ltd* [2006] WASC 86 at [20].

been inappropriate. He further argued that even if, contrary to his contention, the primary judge did not err in not finding a triable issue, once this Court was persuaded that a triable issue existed, the justice of the case required the setting aside of the indemnity costs order. These arguments betray a misunderstanding of relevant principle.

[33] The appropriate costs order to be made on the determination of an interlocutory application depends on the result of that application and on the merits of the parties' respective contentions in that application, not on the identification of a triable issue or on the merits of the issues to be ultimately decided on the trial of the proceedings. The strength of the appellants' case in respect of such issues is normally a relevant consideration, but even an applicant with a strong case for final relief will fail on an application for interlocutory relief if a case for the granting of that relief is not made out.

[34] The primary judge, as was appropriate and, indeed, necessary, in making the indemnity costs order focussed on the merits of the interlocutory application. The matters canvassed above make it abundantly plain that the prospects of the appellants persuading any judge to make the orders sought, or orders which had similar consequences in the circumstances existing at the time of the hearing before the primary judge, were exceedingly slight.

[35] The primary judge did not find that there was no serious question to be tried in the proceedings. He found that the "serious question" contended for by the appellants (that the appellants' property was being dealt with by the respondents to the disadvantage of the appellants) had not been made out. It was not contended that the finding could not be sustained. But, in any event, the primary judge based his refusal of relief on the balance of convenience.

[36] A judge has a discretion as to costs which has sometimes been referred to as "unfettered".[8] The discretion, however, must be exercised judicially, without caprice and having regard only to relevant considerations.

[37] In *Oshlack v Richmond River Council*,[9] McHugh J, referring to statutory provisions in relation to costs similar to r 681 of the *Uniform Civil Procedure Rules*, observed:

> "Although the statutory discretion is broadly stated, it is not unqualified. It clearly cannot be exercised capriciously. Importantly, the discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation. In this manner, the law has gradually developed principles to guide the proper exercise of the discretion and, in some cases, to highlight extraneous considerations which, if taken into account, will cause the exercise of the discretion to miscarry."

[38] Rule 681 of the *Uniform Civil Procedure Rules* provides:

> "(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> (2) Subrule (1) applies unless these rules provide otherwise."

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8 *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 121.

9 (1998) 193 CLR 72 at 96.

[39] Rule 702 provides that unless the rules or an order of the court otherwise provides, costs must be assessed on the standard basis. Rule 703 empowers the court to order costs on the indemnity basis.

[40] The circumstances warranting the ordering of indemnity rather than standard costs were discussed at some length by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*.[10] In that case, his Honour observed that the settled practice in Australia has been for costs to be awarded to the successful party to a proceeding on, what is in effect, the standard basis unless the circumstances warrant departure from that course. His Honour noted that some of the circumstances which had been thought to warrant the making of an indemnity costs order were: the making of allegations of fraud which were either known to be false or were irrelevant; the engaging in misconduct that caused loss of time to the court and other parties; the commencement or continuation of proceedings for some ulterior motive "or in wilful disregard of known facts or clearly established law";[11] the making of allegations which ought never to have been made or the undue promulgation of a case by groundless contentions; and an imprudent refusal of an offer to compromise. Sheppard J concluded this list with the observation:[12]

> "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."

[41] It has been said that "[t]he authorities do not support the proposition that simply instituting or maintaining a proceeding on behalf of a client which has no or substantially no prospect of success will invoke the jurisdiction. There must be something more namely, carrying on that conduct unreasonably".[13] Persistence in a hopeless case has been recognised as a circumstance which might make it appropriate for an indemnity costs order to be made.[14]

[42] In *Di Carlo v Dubois & Ors*,[15] in a discussion of the circumstances meriting the making of an indemnity costs order, White J (as she then was), Williams JA and Wilson J agreeing, observed:[16]

> "There are numerous authorities which discuss the circumstances in which a court will be justified in making an order for indemnity costs. Two are regularly cited – *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, a decision of Woodward J, and *Colgate-Palmolive*. From his review of the cases Sheppard J was able to derive a number of principles or guidelines. At pp 232-4 his Honour recognised that the categories in which the discretion may be exercised are not closed. Woodward J at

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10 (1993) 46 FCR 225.

11 At 231.

12 At 234.

13 *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* (1998) 156 ALR 169 at 236, referred to in *Martinovic v Chief Executive, Queensland Transport* [2005] 1 Qd R 502 at 508; *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41 at 52 per Fraser JA, McMurdo P and Philippides J agreeing.

14 *Huntsman Chemical Co Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242 at 272 per Rolfe AJA, but c.f. the reasons of Kirby J at 247 – 250 and his Honour's discussion of the rationale underlying the awarding of party and party or standard costs.

15 [2002] QCA 225.

16 At [37] – [38].

> 637 in *Fountain* said that there needs to be some special or unusual feature in the case to justify a court departing from the ordinary practice…
>
> The New South Wales Court of Appeal in *Rosniac v Government Insurance Office* (1997) 41 NSWLR 608 noted at 616 that the discretion to depart from the usual party and party basis for costs is not confined to the situation 'of what Gummow J described as the 'ethically or morally delinquent party' in *Botany Municipal Council v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (1992) 34 FCR 412 at 415. Their Honours observed however, that:
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> > '…the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule maker.'"

[43] The above review of authorities suggests that this was not an obvious case for the awarding of indemnity costs. However, the appeal is against the exercise of a discretion and, in order to succeed, the appellants' must show that the primary judge erred in exercising his discretion. Error may be established by demonstrating that the primary judge: acted on a wrong principle; took into account irrelevant facts or considerations; failed to take relevant facts or considerations into account; or mistook the facts.[17] Error may also be shown if, although it is not apparent how the primary judge arrived at his decision, it is plainly unreasonable or "unjust" on the facts.[18]

[44] There is another relevant consideration. The appeal is from a costs order made on an interlocutory application rendering applicable the sentiments expressed in the oft-cited statement of Sir Frederick Jordan in *In re the Will of F B Gilbert (dec)*:[19]

> "… I am of opinion that, … there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal."

[45] In *Capital Finance Corp (Australasia) Pty Ltd & Ors v Peter Pan Management Pty Ltd (in liq) & Anor*,[20] Phillips JA, Ormiston JA and Ashley AJA agreeing, observed:

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17 *House v The King* (1936) 55 CLR 499 at 505.
18 *House v The King* (1936) 55 CLR 499 at 505.
19 (1946) 46 SR (NSW) 318 at 323.
20 [2003] VSCA 93 at [9].

> "An appeal against the exercise of discretion is always difficult to sustain, and particularly so where the appeal is over costs. The appellant carries a heavy onus in seeking to establish error in such cases and where, as here, there is no matter of principle involved and the questions raised relate to the facts, the task is the more difficult. When the arguments could have been, but were not, put below to the judge during argument on costs, the task, in my opinion, is all but insuperable…"

[46] And I note that in *Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors*,[21] Chesterman J said in words subsequently quoted with approval in *Morrison v Hudson*:[22]

> "The evident purpose of s 253[23] is to limit appeals 'as to costs only.' This is because decisions on costs afford a prime example of a discretionary judgment which parliament has recognised should be left to the trial judge."

[47] Having regard to the breadth of the discretion reposed in the primary judge and the principles just expressed, I have concluded that the appellants have not established that the exercise of the primary judge's discretion miscarried. In that regard, I have in mind the bringing and prosecution of the application for interlocutory relief without affording growers the opportunity to be heard, coupled with the maintenance of the application notwithstanding the evidence of likely serious financial detriment to the parties, growers and employees of Arafura should the relief sought be granted.

[48] There were other unusual features of this appeal. The appellants applied to the primary judge for leave to appeal against the costs order. The primary judge ordered on 21 June 2012 that the appellants have leave to appeal against that order "conditionally upon the grant by the Court of Appeal of any necessary extension of time with respect to such an appeal under s 748 of the UCPR".

[49] On appeal, the respondents contended that an extension of time within which to appeal was required. The appellants contended to the contrary. The respondent also argued that although the primary judge's order did not confine the appeal to an argument that an order for standard rather than indemnity costs should have been made, such a qualification could be discerned in the primary judge's reasons and the order should be construed accordingly. The authority for this proposition was said to be an observation of Fraser JA in *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors*.[24] I agreed with Fraser JA's reasons in that matter as did Chesterman JA. I rather think that it would come as a surprise to his Honour that his reasons were being cited as authority for the proposition that, at least as a general proposition, it was permissible to confine the scope of an order giving unqualified leave to appeal by reference to the judge's reasons for the order. His Honour's observation that, "Ordinarily, the questions to be agitated in an appeal brought by leave against a discretionary costs order would be identified in the primary judge's reasons for the grant of leave", merely concerned his Honour's expectations as to the content of a primary judge's reasons.

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21 [2003] QSC 484 at [30].
22 [2006] 2 Qd R 465.
23 *Supreme Court Act* 1995.
24 [2009] QCA 262.

[50] However, in view of the conclusions I have reached above, it is unnecessary to pursue these arguments any further.

[51] The appellants sought an order that the respondents pay their costs of the application and of the appeal. That may be thought somewhat bold in light of the absence from the notice of appeal of any ground in respect of costs and the concession by the appellants' solicitor at first instance that the appellants could not resist an order for costs on the standard basis.[25]

[52] When the primary judge's reasons were delivered on 23 December 2011, the solicitor for the appellants asked to be given an opportunity to provide written submissions in respect of indemnity costs. The request was denied. Indemnity costs had been sought by the respondents in their addresses at first instance so that the appellants had been alerted to the need to counter the respondent's arguments.

[53] When the solicitor made his request, the primary judge asked if he was familiar with the case. He responded:

> "Not at the level that I would like to have been. [Senior counsel] would have been here to hear your Honour's judgment, but is unwell. So, I'm a little bit at a disadvantage in so far as resisting the – in truth, I can't resist an order for costs, but in terms of indemnity costs, I'm a little bit taken at a disadvantage…"

[54] I do not think that, on appeal, the appellants pursued a contention raised before the primary judge that there had been a denial of natural justice resulting from the refusal of the solicitor's application. If the issue remained a live one, I would find against the appellants.

[55] In the circumstances, the appellants should have been prepared to argue costs. As senior counsel was unavailable, other counsel could have been retained. It was not suggested that senior counsel's indisposition was sudden. Nor does it appear that prior notice of counsel's indisposition was given to the respondents' respective legal representatives or that they were requested to consent to the deferral of an argument on costs.

[56] The primary judge referred to the general undesirability of allowing further time for costs arguments to be developed, no doubt having in mind the inevitability that adjourning to another day would materially increase costs and pose administrative difficulties for the parties and the Court. The solicitor could have applied to have the matter stood over to allow him sufficient time to peruse the reasons more carefully and formulate his argument. If he had done so, I consider that the judge would have been remiss in not acceding to the request. Indeed, I think that it would have been desirable for the primary judge to enquire whether the solicitor would like to have the matter stood down for a while. Had such a request been refused, there may well have been a denial of procedural fairness.

[57] It was not argued, however, that any failure to stand the matter down constituted an appellable error and I do not intend to be critical of the primary judge. The matter came before him at 9.30 am, presumably before the commencement of another matter or matters at 10.00 am.

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[25] Reasons 21 June 2012 at [15].

[58] There is another matter which deserves mention. Counsel for the appellants conceded, in effect, that there was no reasonable prospect that the relief sought in the amended interlocutory application would be granted. He argued, however, that the primary judge should have disregarded the relief sought and made such orders as were necessary to protect the interests of the appellants. The judge could have given more limited or different relief to the appellants than that sought. That is commonly done in hearings of the nature of this interlocutory application and it appears from the primary judge's reasons[26] that he was not averse to giving directions which could afford some protection to the appellants' interests.

[59] However, it was not the primary judge's obligation in a hard fought hearing in which the appellants were represented by senior counsel to refashion the applicant's case. It is open to judges to take a more proactive role to achieve a just result but they need to proceed with caution. It remains fundamental to the adversarial process that the parties select the issues for determination by the Court[27] and "[t]o a large extent the parties to such proceedings are bound by the manner in which they conduct them".[28]

Conclusion

[60] For the above reasons, I would dismiss the appeal with costs.

[61] **WHITE JA**: I have read the reasons for judgment of Muir JA and agree with his Honour's reasons and the order which he proposes.

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26 Para [48].

27 *Jones v National Coal Board* [1957] 2 QB 55 at 63.

28 *R v Birks* (1990) 19 NSWLR 677 at 683 per Gleeson CJ; see also *Coulton v Holcombe* (1986) 162 CLR 1 at 8.