SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston & Anor v Herrod & Ors* [2012] QCA 361
PARTIES:	**HARELLA CAROLINE JOHNSTON** (first appellant) **LEAH DELILAH FELSMAN** (second appellant) **v** **HAREL JOSEPH HERROD** (first respondent) **ROBERT MATTHEW HERROD** (second respondent) **RACHAEL REBECCA HOLLINGSWORTH** (third respondent)
FILE NO/S:	Appeal No 4593 of 2012 SC No 501 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2012
JUDGES:	Muir and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where parties to the proceedings are siblings and deceased was their father – where deceased in a cattle property partnership with first and second respondents – where deceased's interest in partnership and residue was left to third respondent and appellants in equal shares – where there were meetings in which discussions took place with respect to the appellants assigning their interest in partnership to first and second appellants for monetary sum – where dispute arose with respect to respondents interests under partnership agreement – where primary judge found in favour of appellants and ordered respondents to pay appellants' costs of and incidental to the proceeding to be assessed on the standard basis – where appellants submitted costs should have been awarded on an indemnity basis – where appellants

submitted that when assessing costs primary judge failed to take into account his findings regarding the conduct of respondents – where appellants submitted respondents conduct was sufficiently reprehensible to warrant an indemnity costs order – where appellants submitted the primary judge erred by, in effect, penalising the appellants for the respondents' conduct – whether costs should be assessed on the indemnity basis

Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2) [2007] FCA 1823, considered
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
Di Carlo v Dubois [2002] QCA 225, considered
Herrod & Ors v Johnston & Anor [2012] QCA 360, considered
Johnston & Anor v Herrod & Ors [2012] QSC 107, considered
Johnston & Anor v Herrod & Ors [2012] QSC 98, considered
Martinovic v Chief Executive, Queensland Transport [2005] 1 Qd R 502; [2005] QCA 55, cited
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257, cited
Underwood v Underwood [2009] QSC 107, cited
White Industries (Qld) Pty Ltd v Flower & Hart (A Firm) (1998) 156 ALR 169; [1998] FCA 806, considered

COUNSEL: R N Traves SC, with C Heyworth-Smith, for the appellants
D Fraser QC for the respondents

SOLICITORS: de Groot Wills & Estates for the appellants
Connolly Suthers Lawyers for the respondents

[1] **MUIR JA:** On 26 April 2012, the primary judge ordered that the respondents pay the appellants' costs of and incidental to the proceeding to be assessed on the standard basis. The appellants appeal against that order. They assert that costs should have been ordered on the indemnity basis. The relevant facts are to be found in the reasons in *Herrod & Ors v Johnston & Anor*.[1] There were six grounds of appeal and it is appropriate to address them in sequence.

Grounds 1 and 2 – the primary judge failed to take into account his findings regarding the conduct of the respondents

[2] The appellants' submissions were to the following effect.

[3] The primary judge found that the respondents acted unconscionably in relation to agreements entered into, or purportedly entered into, between the first and second respondents and each of the first and second appellants. He found also that the first

1 [2012] QCA 360.

and second respondents had fraudulently misrepresented the extent and value of the herd on Moonoomoo with a view to inducing the appellants to enter into an agreement to accept $55,000 for their respective interests.

[4] Despite making these findings, the primary judge found, in respect of costs, that there was substance in the submission that, if enforceable, the agreements would have effectively amounted to an agreed way of administering the estate and that, in circumstances where Harella signed an amended record of her oral agreement, it was "not unreasonable for [the respondents] to litigate the enforceability of the agreements".[2] The primary judge erred in so concluding.

[5] It is inconsistent to hold, on the one hand, that the agreements were unenforceable for fraudulent misrepresentation and unconscionability and to conclude, on the other, that it was reasonable to press for them to be upheld. The finding of fraud negates the possibility that it could have ever been reasonable to contend that the agreements were enforceable.

Consideration

[6] The logical consequence of the acceptance of the appellants' argument is that findings of fraudulent misrepresentation and/or unconscionable conduct against a defendant resulting in the setting aside of an agreement entered into between the plaintiff and the defendant will result, necessarily, in an order for indemnity costs against the defendant. That mistakes the basis on which indemnity costs orders are made. The appellants' argument fails to distinguish between findings and the arguability of the competing contentions on the issues in respect of which the findings were made. It also fails to appreciate the basis on which indemnity costs are normally decided.

[7] In *Di Carlo v Dubois*,[3] discussing the circumstances meriting the making of an indemnity costs order, White J (as she then was), Williams JA and Wilson J agreeing, observed:[4]

> "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 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…
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> 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

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2 *Johnston & Anor v Herrod & Ors* [2012] QSC 107 at [7].
3 [2002] QCA 225.
4 At [37] – [38].

> '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.'"

[8] In *Colgate-Palmolive Company v Cussons Pty Ltd*,[5] Shepherd J 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";[6] the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions; and an imprudent refusal of an offer to compromise.

[9] Shepherd J observed:[7]

> "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."

[10] It was said in *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)*,[8] 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".

[11] It may be seen from the foregoing that, in determining whether indemnity costs should be ordered, the normal focus is on the conduct in and in respect of the litigation by the party against whom the costs order is to be made. The primary judge appeared to have accepted that the respondents' arguments were not obviously unsustainable. His Honour was entitled to take that view. The respondents, in fact, succeeded on appeal in showing error in some of the primary judge's findings of fact and law.

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5 (1993) 46 FCR 225.

6 At 231.

7 At 234.

8 (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.

[12] This ground was not made out.

Ground 3 – the respondents' conduct was sufficiently reprehensible to warrant an indemnity costs order

[13] The appellants relied, in this regard, on findings made by the primary judge that the first and second respondents were aware that their misrepresentations as to the value of the cattle were false when made. Also relied on was the finding that the oral evidence of the respondents, particularly of the first and second respondent, "was marked by evasiveness and defensiveness"[9] and the preference of the primary judge for the evidence of the appellants over that of the respondents. The appellants cited *Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2)*,[10] in which Gilmour J observed:

> "This is not a case where merely arguments 'attended by uncertainty' were before the Court … It is not a case involving witnesses who gave evidence believing it to be true but as to which they were mistaken… This matter involved a concerted effort on the part of four key witnesses to present a false defence which has led to the applicants incurring very considerable costs over a long period in meeting and overcoming that defence."

[14] As has been mentioned already, the respondents' arguments were not entirely bereft of merit. The case is rather different in nature to that considered by Gilmour J. The primary judge, having seen the witnesses and the unfolding evidence, was in a much better position than this Court to appreciate whether the circumstances merited the making of an indemnity costs order.

[15] In *Capital Finance Corp (Australasia) Pty Ltd & Ors v Peter Pan Management Pty Ltd (in liq) & Anor*,[11] Phillips JA, Ormiston JA and Ashley AJA agreeing, observed:

> "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…"

[16] This ground was not made out.

Ground 4 – the respondents' conduct as executors, trustees and fiduciaries – "compete restitution"

[17] The appellants contended that an order for costs on the standard basis was inconsistent with the finding that an order for compound interest was justified so as to make complete restitution. Complete restitution cannot be achieved in this case without an award of costs on the indemnity basis.

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9 *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [74].
10 [2007] FCA 1823.
11 [2003] VSCA 93 at [9].

Consideration

[18] Compound interest, in circumstances such as those considered in *Herrod & Ors v Johnston & Anor*, is not awarded on a punitive basis but, essentially, to restore beneficiaries to the position they would have been in had there been no breach of trust and, where appropriate, to ensure that the defendant does not retain a profit. The principles governing the award of compound interest do not coincide with those governing an award of costs. Just as the primary judge exercised a discretion in awarding compound interest, he exercised a separate discretion not to order indemnity costs.

[19] This ground was not made out.

Ground 5 – the primary judge erred by, in effect, penalising the appellants for the respondents' conduct

[20] The appellants argued as follows.

[21] It is normal in estate litigation for the costs of the successful beneficiaries to be paid from the estate on the indemnity basis.[12] The respondents' conduct deprived the appellants of their interest in the deceased estate and permitted the estate to be distributed to themselves and their mother.

[22] Had the estate not been distributed, the appellants would have been entitled to an order for payment of indemnity costs from the estate and they should not be worse off because the respondents denuded the estate of assets. The primary judge erred in failing to take these matters into account.

[23] It is unlikely that the primary judge, who dealt at some length with the appellants claims and who made findings concerning the wrongful disposition of the assets of the estate, did not have such matters in mind in making his costs determination. That is despite the fact that the appellants written submissions on costs (there was no oral argument) did not advance the argument now under consideration. The failure to advance at first instance the argument now relied on does not assist the appellants.

Ground 6 – the primary judge failed to take into account the history of offers

[24] The appellants' submissions referred to offers made by both the appellants and the respondents before the commencement of the trial. Particular reliance was placed on an offer on 31 August 2006 by the appellants to settle a related Family Provision application and any other actions the appellants may have against the respondents "arising out of their conduct as trustees of their father's estate".

[25] The primary judge, in fact, dealt with the offers to settle at some length in his reasons. Discussion in relation to them occupied about half of the appellant's written submissions on costs. The primary judge explained why he did not find the history of the offers in relation to costs helpful in exercising his discretion. His reasons in that respect appear entirely conventional and were not shown to be wrong.

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12 *Underwood v Underwood* [2009] QSC 107 at [32].

Conclusion

[26] For the above reasons I would order that the appeal be dismissed with costs.

[27] **GOTTERSON JA**: I agree with the order proposed by Muir JA and with the reasons given by his Honour.

[28] **APPLEGARTH J:** I agree with the reasons of Muir JA and with the order proposed by his Honour.