

SUPREME COURT OF QUEENSLAND

CITATION: *Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors*
(No 2) [2013] QSC 61

PARTIES: **CORNELIA HUNTER**
(plaintiff)
v
ORGANIC & NATURAL ENTERPRISE GROUP PTY LTD
ACN 103 341 288
(first defendant)
and
ALFRED FRANCIS ORPEN
(second defendant)
and
VERITAS VINCIT AUSTRALIA PTY LTD
ACN 061 024 486
(third defendant)
and
COLIN MURRAY CHENERY
(fourth defendant)
and
NARELLE LOUISE CHENERY
(fifth defendant)
and
INTELLIGENT INDUSTRIES PTY LTD
ACN 080 236 915
(sixth defendant)
and
JOHN MALCOLM HUNTER
(seventh defendant)
and
MIRONESCO PTY LTD
ACN 085 804 539
(eighth defendant)
and
AUSTRALIAN DESIGN & ENGINEERING PTY LTD
ACN 110 012 649
(ninth defendant)

FILE NO/S: BS 4124/07

DIVISION: Trial

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court of Queensland

DELIVERED ON: 18 March 2013

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Dalton J

ORDER: **Order that the plaintiff pay the costs (including any reserved costs) of the first to ninth respondents of and incidental to the proceeding on an indemnity basis to be agreed or assessed.**

APPEARANCES: Plaintiff in person
 QBM Lawyers for the second to sixth defendants
 Wrightway Legal for the seventh and eighth defendants

- [1] In this proceeding I gave judgment for the defendants against the plaintiff on 11 December 2012. The parties were given leave to make written submissions as to costs. There is no doubt that costs ought to follow the event, ie., the plaintiff ought to pay the defendants' costs of and incidental to the proceeding to be assessed or agreed. The real question for my consideration is the basis upon which those costs ought to be assessed. The defendants asked for their costs on an indemnity basis.
- [2] In *Colgate-Palmolive Pty Ltd v Cussons Pty Limited*¹ Sheppard J quoted from *Fountain Selected Meat (Sales) Pty Ltd v International Produce Merchants Pty Limited*² to the following effect:
- “Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases where ‘there is some special or unusual feature in the case to justify the court exercising its discretion in that way’... It is sometimes said that such costs can be awarded where charges of fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court’s discretion – for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties ... I believe that it is appropriate to consider awarding ‘solicitor and client’ or ‘indemnity’ costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.” (my underlining).
- [3] The jurisdiction to award indemnity costs is not circumscribed, but normally the Court will look to find some delinquency in the conduct of litigation. It is not necessary to establish some “species of fraud” but there is a discretion to award

¹ [1993] FCA 536, [16].

² [1988] FCA 202.

indemnity costs where, “for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case.”³

- [4] These cases were discussed in the Court of Appeal in *Di Carlo v Dubois & Ors.*⁴ As well the Court of Appeal cited the New South Wales Court of Appeal in *Rosniac v Government Insurance Office*⁵ to the effect that it was not necessary to find “ethically or morally delinquent” behaviour but “... 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.” Further, the Court of Appeal noted that it was important that applications for the award of indemnity costs not be seen as “too readily available ... without some further facts analogous to those mentioned in *Colgate* and the other considered decisions” – [40].
- [5] My judgment in this matter was that the claims brought by the plaintiff were baseless – reasons [100]. No person properly advised could have brought or persisted with the proceeding. I had a very clear view that Mrs Hunter did so irrationally, motivated by suspicion and inferences of conspiracy which a reasonable person in her circumstances could not have drawn – reasons [98]. I found Mrs Hunter’s construction of external events to be irrational and unrealistic – reasons [98]-[100] and [141]. Not only this, but I found that she was dishonest in giving her evidence – reasons [16]-[19]. And that she was prepared to act so as to harm the interests of the defendants in matters connected with her falling out with them – reasons [20].
- [6] Mrs Hunter had various lawyers at various stages of the proceeding, and as well acted for herself at various times during the proceeding, including at the trial. Her conduct of the proceedings was such as to incur unnecessary costs and waste time by the filing of massive and prolix documents – reasons [97]. She also attempted to postpone the trial of her case on various occasions whilst it was a supervised case. I canvassed these matters in the reasons I gave for refusing to adjourn the trial when Mrs Hunter applied for that relief immediately prior to the trial commencing.
- [7] So intricate and detailed was the distorted factual basis put forward for the claim in this matter that an interlocutory injunction was granted in May 2007, much to the detriment of the business of the first defendant and consequently, of all the defendants and indeed Mrs Hunter herself in the period between June 2007 and my discharging the injunction in December 2012. As I comment in my reasons – paragraph [7] – it required a detailed review of a considerable amount of evidence to deconstruct the unreal narrative which formed the basis of Mrs Hunter’s claim.
- [8] In all these circumstances I am satisfied that an award of indemnity costs for the entire proceeding is justified on the basis set out in the cases above: no plaintiff properly advised could have brought, or persisted with, the subject proceeding. I order that the plaintiff pay the costs (including any reserved costs) of the first to ninth respondents of and incidental to the proceeding on an indemnity basis to be agreed or assessed.

³ French J (as he was then) in *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers*, Federal Court of Australia, 19 February 1993, unreported, cited at [19] of *Colgate-Palmolive*, above.

⁴ [2002] QCA 225, [36] and [37].

⁵ (1997) 41 NSWLR 608, 616.