

SUPREME COURT OF QUEENSLAND

CITATION: *Verhagen & Anor v Millard* [2013] QCA 202

PARTIES: **PETER EDWARD ANTHONY VERHAGEN**
(first applicant)
WILLHELMINA VERHAGEN
(second applicant)
v
WAYNE STANLEY MILLARD
(respondent)

FILE NO/S: Appeal No 8129 of 2012
DC No 3647 of 2010

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil) – Further Order

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 26 July 2013

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P and Atkinson and Martin JJ
Judgment of the Court

ORDER: **The applicants pay the respondent's costs of and incidental to the application on the indemnity basis.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the applicants' application for leave to appeal judgment under s 118 *District Court of Queensland Act 1967* (Qld) was refused with costs – where both parties were granted leave to make submissions as to the respondent's proposed application for a different costs order – where the respondent subsequently applied for indemnity costs – where the respondent had not sought such an order in his written submissions or orally in Court and had not sought leave to apply for an indemnity costs order after the hearing, as required by Practice Direction 3 of 2013 – where the respondent contends that the applicants rejected a reasonable offer to settle, had no real prospect of a successful appeal, abandoned a fundamental part of their argument before the primary judge, sought to argue a point not litigated at trial and would not have brought the application had they been properly advised – where the primary judge had found in favour of the respondent – where the applicants' application

involved a small monetary amount – whether the remarkable combination of circumstances of this case support an application for costs on the indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 703, r 766(1)(d), ch 9 pt 5

Millard v Verhagen & Anor, unreported, District Court of Queensland, Tutt DCJ, DC No 1398 of 2007, 3 October 2008, related

Tector v FAI General Insurance Company Ltd [2001] 2 Qd R 463; [\[2000\] QCA 426](#), cited
Verhagen & Anor v Millard [\[2013\] QCA 122](#), related

COUNSEL: No appearance by the applicant, the applicants' submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Colwell Wright Solicitors for the applicants
Forbes Dowling Lawyers for the respondent

- [1] **THE COURT:** On 21 May 2013, this Court ordered that Mr and Mrs Verhagen's application for leave to appeal be refused with costs. Following the delivery of those orders, Fraser JA further ordered that the parties have leave to make submissions upon a proposed application by the respondent, Mr Millard, for a different costs order. Mr Millard has now applied for an order that his costs in respect of the application for leave to appeal be paid on the indemnity basis. He did not seek that order in his written submissions or orally at the appeal hearing and did not apply for leave to make such an application after the hearing as required by para 52 of Practice Direction 3 of 2013.
- [2] Mr Millard contends he is entitled to indemnity costs for the following reasons. First, his lawyers sent a letter to the Verhagens' lawyers dated 27 November 2012 offering to allow them to discontinue their application to this Court, with each party bearing their own costs. The letter stated that this was an offer made under ch 9 pt 5 *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR). The Verhagens did not accept that offer. Mr Millard also contends that the Verhagens had no real prospects of succeeding in their proposed appeal; their application did not raise matters warranting a grant of leave to appeal; they abandoned a fundamental part of their argument before the District Court judge; and they sought to argue a point not litigated at trial. Mr Millard further emphasises that their application concerned a relatively small amount, namely, a \$25,000 costs order. These matters in combination warrant an indemnity costs order in his favour because, if the Verhagens had been properly advised they should not have brought the application to this Court.
- [3] Under UCPR r 766(1)(d), this Court "may make the order as to the ... costs of an appeal it considers appropriate". For present purposes, an appeal includes an application for leave to appeal. This Court's discretion to award costs includes the power to award indemnity costs as discussed in UCPR r 703. Mr Millard rightly concedes that his offer to settle, of itself, does not justify an order for indemnity

costs. That is because ch 9 pt 5 UCPR has no application to appeals and only special or unusual features will warrant a departure from the usual order that appeal costs are assessed on the standard basis: *Tector v FAI General Insurance Company Limited*.¹ If indemnity costs were routinely ordered in appeals, this could have the unfortunate consequence of discouraging parties from pursuing appeals which may incrementally develop the law.

- [4] There are a number of unusual features of this case which support Mr Millard's application. He had the benefit of a favourable judgment from Judge Andrews and, very reasonably, he encouraged the Verhagens to abandon their unpromising appeal process by offering not to seek his costs up until 27 November 2012. The Verhagens rejected that offer. They then failed to demonstrate to this Court that their proposed grounds of appeal had real prospects of success. Of more concern, the compromise agreement they relied on was an attempt to circumvent Judge Tutt's order of 3 October 2008,² after they made a forensic decision not to appeal from that order. This offended the public policy interest in the finality and authority of court orders. The cases they relied on in their application for leave to appeal were clearly distinguishable as Judge Tutt's reasons made sufficiently clear that his Honour was rejecting their claim for indemnity costs both under the contract and mortgage and in exercising his general discretion as to awarding the costs of the action.³ The Verhagens, in pursuing their appeal rights from Judge Andrews' orders, have unreasonably put Mr Millard to further expense concerning, first, a 2008 and then a 2012 final court order in his favour. In that remarkable combination of circumstances, we are persuaded that an indemnity costs order is appropriate.
- [5] Mr Millard's omission to comply with the recently amended aspects of the Practice Direction concerning applications for costs orders does not disentitle him to that order.

FURTHER ORDER:

The applicants pay the respondent's costs of and incidental to the application on the indemnity basis.

¹ [2001] 2 Qd R 463.

² *Millard v Verhagen & Anor*, unreported, District Court of Queensland, Tutt DCJ, DC No 1398 of 2007, 3 October 2008.

³ *Verhagen & Anor v Millard* [2013] QCA 122, [15].