SUPREME COURT OF QUEENSLAND

CITATION:	*Parry v Kennedy & Anor* [2014] QCA 239
PARTIES:	**ALAN CHARLES PARRY** (appellant) **v** **BRUCE JAMES KENNEDY** (respondent) **BARBARA MARJORY HUNT** (respondent)
FILE NO/S:	Appeal No 3715 of 2014 SC No 1268 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	24 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2014
JUDGES:	Fraser JA and Applegarth and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondents' costs of the appeal to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – EVIDENCE – where the appellant was served with a subpoena requiring him to give evidence at a trial – where the appellant applied under r 417 of the UCPR for an order that the respondents pay his costs in complying with that subpoena, claiming $45,000 – where the primary judge awarded the appellant $800 – where the appellant argues his claim for higher costs was justified by him seeking legal advice about legal professional privilege – whether the primary judge erred in finding the reasonable costs in complying with subpoena amounted to $800 PROCEDURE – COSTS – APPEAL AS TO COSTS – DISCRETION – where the appellant claimed $45,000 in his application under r 417 of the UCPR – where the primary judge awarded him $800, and ordered he pay the respondents'

	costs of the application – where the appellant argued his application was successful and so he should not have been ordered to pay the respondents' costs – whether the primary judge erred in exercising her discretion as to costs
	Uniform Civil Procedures Rules 1999 (Qld), r 417
COUNSEL:	J W Lee with D F Galton for the appellant T W Quinn for the respondents
SOLICITORS:	Griffiths Parry Lawyers for the appellant Broadley Rees Hogan Lawyers for the respondents

FRASER JA: The appellant applied in the trial division, pursuant to r 417 of the *Uniform Civil Procedure Rules* 1999 (Qld), for an order that the respondents pay the appellant "$45,000 (or as otherwise assessed)" as reimbursement of loss and expense incurred by the appellant in complying with a subpoena served on 18 December 2013 requiring the appellant to give evidence at a trial set down for 3 March 2014. The application was heard on 17 March 2014. After hearing argument, the primary judge gave reasons in which her Honour concluded that the appellant's reasonable costs of complying with the subpoena amounted to $800.00. The primary judge then invited submissions about costs before making formal orders. On 24 March 2014, the primary judge gave reasons for her Honour's conclusion that the appellant should be ordered to pay the respondents' costs of the application. Her Honour ordered that the respondents pay the appellant the sum of $800 and that the appellant pay the respondents' costs of the application.

The appellant is a solicitor. The bulk of the costs of complying with the subpoena which he claimed were legal costs of obtaining advice from his firm and from senior and junior counsel. The appellant's evidence and a submission made by his counsel to the primary judge were to the effect that the legal advice related only to a concern by the appellant that, when he gave evidence at the trial, he might be required to claim legal professional privilege. The primary judge concluded that it was not reasonable for an experienced solicitor to seek independent legal advice about his obligations in that respect in the particular circumstances. In so concluding, the primary judge referred essentially to three findings, namely, that the issues at the trial would be relatively confined, that the appellant was an experienced solicitor, and that the legal rule applicable when a solicitor was

required to give evidence which might raise a question about her client's legal professional privilege was a simple one.

The gravamen of the appeal against the substantive order in the application is that the primary judge erred in not finding that the appellant had properly sought the independent legal advice. The appellant did not challenge the primary judge's finding that the trial would concern only narrow issues. That was appropriate. The proposed trial was of the respondents' application against Mr and Mrs Griffiths for contempt of an undertaking given by Mrs Griffiths that, until the determination of an estate action, she would not further encumber certain land. After that undertaking was given, the respondents succeeded at the trial of the estate action. They obtained an order entitling them to a significant portion of the land. In the contempt application, the respondents alleged that, four days after judgment was reserved in the estate proceeding, Mr Griffiths aided Mrs Griffiths in breaching her undertaking by borrowing $300,000 upon the security of an existing mortgage over the land. The appellant had acted for Mrs Griffiths or for both Mr and Mrs Griffiths in the estate litigation. That litigation may have been complex but there is no basis for thinking that there would have been any particular complexity in the contempt trial, at least so far as concerns the evidence to be given by the appellant. Indeed, an affidavit which was drawn to our attention shows that, in July of 2013, the respondents' solicitor advised the appellant that the evidence sought to be adduced from him concerned the relevant bank transactions, the undertaking, and any advice given to Mr or Mrs Griffiths or counsel.

The appellant did challenge the primary judge's finding that the appellant was an experienced solicitor. In this and other respects, the appellant's arguments in his outlines of submissions were misdirected because they assumed that the primary judge's reasons for the substantial rejection of the application could be found only in the transcript of the hearing. In fact, as the appellant acknowledged before us, the primary judge gave separate reasons for the substantive order in the application at 2.30 pm on 17 March 2014, after the hearing had concluded in the morning. The primary judge also gave separate reasons for

the costs order. The appellant's attempt to construct reasons by reference to remarks made by the primary judge in the course of the hearing was misguided. On the present point, the primary judge's reasons were undoubtedly accurate. The primary judge was told from the Bar table that the appellant was admitted as a solicitor in 1979, that he was a director of the company which runs the firm, that he had been a "founding partner" of the firm, and that, whilst he mostly did property and commercial work rather than conducting litigation, he was the solicitor who ran the estate litigation. The primary judge was certainly entitled to assume, as her Honour did, that the appellant was competent to run the estate litigation and that he was competent to understand what a privileged occasion was. This finding was a relevant consideration.

In relation to the third finding, the primary judge described the applicable rule succinctly as being that "the privilege belongs to the client or clients… not the solicitor" and that the appellant, as the solicitor, "had no independent interest in maintaining or waiving the legal professional privilege", but was dependent upon the attitude of his client. The primary judge also noted that the clients were to be represented at the trial. In the appellant's outline of submissions and again in oral argument, he submitted that the primary judge did not take into account that the law of privilege was complicated and that the appellant found himself in a position "redolent with complications, justifying and requiring the obtaining of external independent advice…". However, there was no circumstance identified in the evidence before the primary judge which indicated the existence of any such complication in this case. Indeed, at the hearing before the primary judge, the appellant's counsel, while submitting that the applicable law was complicated enough to warrant the appellant seeking independent advice, accepted that the legal advice obtained by the appellant related only to issues of privilege, that the privilege belonged to the client, that the client would be legally represented at the contempt trial, and that the appellant's position was no more complicated than that he needed merely to inquire of his client whether he could rely upon his client's counsel to take objections to questions asked of the appellant.

The appellant argued in his submission in reply in this Court that, upon the primary judge's approach, the appellant would not have the benefit of independent advice as to

whether he was obliged to respond to questions or take objection and would be unrepresented. That is of no particular significance in a case in which the appellant's former client or clients, the only person or persons entitled to claim the privilege, would be present and represented by solicitor and counsel at the trial. Upon the evidence in this case, there was no suggestion that the appellant might wish to claim some personal privilege or immunity from answering questions, so it is entirely unsurprising that he would not be represented at the trial.

The appellant also referred to the circumstances that the appellant had instructed counsel in the estate litigation, that he had not acted in the estate litigation for Mr Griffiths, that Mr Griffiths was a respondent to the contempt proceeding, that the appellant was concerned about the gravity of the consequences of the contempt proceedings, and that Mr and Mrs Griffiths were not represented at the hearing of the application under r 417. Those circumstances are not material to the question of whether the primary judge erred in finding that it was not reasonable for the appellant to seek independent advice about his compliance with the subpoena served upon him. That conclusion was plainly open to the primary judge. I am not persuaded that there was any error in it.

The second ground of appeal is that the primary judge erred in failing to properly consider the evidence as to the loss incurred in complying with the subpoena. I was unable to detect any support for this ground of appeal in the argument. In any event, there is nothing in it.

The third ground of appeal is that the primary judge's discretion miscarried in relation to the amount – that is to say, the finding that the respondents should pay the appellant $800 – and that this was insufficient. This was a discretionary decision which was plainly open to the primary judge.

The fourth ground of appeal, numbered as 3B, is that the primary judge "erred in failing to refer the recovery of costs and loss incurred in complying with the subpoena to be assessed." It was of course necessary, however, for the primary judge to deal with the

question litigated before her Honour whether any amount should be awarded for the costs of the legal advice.

Those appear to be the only grounds which relate to the primary question concerning what amount should be awarded. I have formed the conclusion that there is no substance in any of the grounds of appeal. There is no basis for interfering with the discretionary decision by the primary judge. For that reason, I would dismiss the appeal insofar as it concerns that aspect.

As to the second part of the appeal, concerning costs, the appellant argued that there was nothing in the primary judge's reasons to indicate a circumstance which disentitled the appellant to recover costs, much less that the appellant should be ordered to pay the respondents' costs. The argument was put in a number of different ways, but it did not effectively grapple with the circumstance that the appellant lost on the only substantial issue which was litigated. Her Honour was entitled to consider that the application, brought as it was by a senior solicitor who had practiced in litigation, was lacking in merit. So much was reflected, as her Honour thought, in the discrepancy between the amount nominated in the application and the amount awarded. I note that the amount awarded appears to be a little less than two per cent of the amount nominated. In these circumstances, it was open, in the exercise of the discretion, for her Honour to order the appellant to pay the respondents' costs. I have listened carefully to what has been said on behalf of the appellant in challenging the costs order and, again, am unpersuaded that there was any error which would justify appellate interference.

Before concluding, I should add that there was one matter which was agitated in the submissions of both parties which I have not mentioned. There is a question whether the appellant required leave to bring this appeal, or at least to bring this appeal insofar as it related to the costs order, pursuant to the provisions of s 64 of the *Supreme Court of Queensland Act* 1991 (Qld). Since I have concluded that there is no merit in the appeal in any event, I prefer not to deal with the leave question.

For the reasons I have given, I would dismiss the appeal.

APPLEGARTH J: I agree with the reasons given by the learned Presiding Judge and with the orders proposed by his Honour.

BODDICE J: I agree with the reasons and the proposed orders.

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FRASER JA: The appellant acknowledges that he cannot oppose an order for costs in favour of the respondents but does contest the application that those costs should be assessed on the indemnity basis. The Court is of the view that costs should be assessed on the indemnity basis, primarily because it is apparent from the appellant's outlines of submissions that the appeal was mounted on the false basis that the only reasons given by the primary judge were to be derived from remarks made by her Honour in the course of argument. The appellant was represented at the hearing in the trial division, in which the primary judge gave separate and comprehensive reasons in the afternoon, after having heard argument in the morning. This fundamental mistake made by the appellant in bringing the appeal was persisted in, even though the respondents' written submissions drew attention to it, even though the transcript of the hearing referred to the fact that a judgment was given in the afternoon, and even though the separate reasons were themselves contained in the appeal book. In these circumstances and having regard also to the general lack of merit in the appeal, the Court has concluded, as I have mentioned, that it is appropriate that the costs should be assessed on the indemnity basis. Accordingly, the order is that the appellant pay the respondents' costs of the appeal, to be assessed on the indemnity basis.