

# SUPREME COURT OF QUEENSLAND

CITATION: *Rushbrook v Chalmers & ors* [2015] QSC 145

PARTIES: **SUELLEN BASETT RUSHBROOK**  
(Plaintiff)  
v  
**LUKE BENJAMIN CHALMERS**  
(First Defendant)  
**LYNETTE LINDSEY ANNE CHALMERS**  
(Second Defendant)  
**LUKE LYN PROPERTIES PTY LTD (ACN 154 674 736)**  
**AS TRUSTEE OF THE CHALMERS FAMILY TRUST**  
(Third Defendant)  
**CORNERSTONE PROPERTY & DEVELOPMENT**  
**PTY LTD (ACN 150 870 867)**  
(Fourth Defendant)  
**THE BASE AT CHINCHILLA PTY LTD (ACN 154 785**  
**654)**  
(Fifth Defendant)  
**THE BASE (AUS) PTY LTD (ACN 157 781 318)**  
(Sixth Defendant)

FILE NO/S: Brisbane No 5424 of 2012

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 4 June 2015

DELIVERED AT: Brisbane

HEARING DATE: 19 May 2015

JUDGE: Boddice J

ORDER: **1. Leave to discontinue the application filed 30 April 2015.**  
**2. No order as to costs.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DISCONTINUANCE – where the Plaintiff made an application for leave to discontinue proceedings against the Defendant – where leave to discontinue was not opposed by the Second and Third Defendants – whether leave to discontinue proceedings should be granted

PROCEDURE – COSTS – RECOVERY OF COSTS -

where the Plaintiff sought an order that the Second Defendant and the Second Defendant's solicitor on the record pay costs on an indemnity basis – where the Second and Third Defendant sought an order that the Plaintiff pay costs on a standard basis – factors in the exercise of the court's discretion to award costs – what order as to costs should be made

Uniform *Civil Procedure Rules 1999* (Qld) rr 304(2), 307(1), 307(2), 681(1)

*Oshlack v Richmond River Council* (1998) 193 CLR 72

COUNSEL: L Coyte (non-legal representative) for the Plaintiff  
 No appearances for the First, Fourth, Fifth and Sixth Defendants  
 B L Sandford (sol) for the Second and Third Defendants

SOLICITORS: Leonard Coyte (non-legal representative) for the Plaintiff  
 Lillas & Loel Lawyers for the Second and Third Defendants

## **Parties**

- [1] The Plaintiff is a retired real estate agent and finance broker.
- [2] The First and Second Defendants are a husband and wife. The First Defendant was declared bankrupt on 15 August 2014.
- [3] The Third Defendant is a company which acts as trustee of the First and Second Defendants' family trust. The First and Second Defendants were the sole directors and shareholders of the Third Defendant, until the date the First Defendant was declared bankrupt. Since that date, the Second Defendant has been the sole director of the Third Defendant.
- [4] The Fourth Defendant is a company which has ceased trading and has no substantial assets.
- [5] The Fifth Defendant was a company that was de-registered on 11 May 2014.
- [6] The Sixth Defendant was a company that was de-registered on 8 September 2014.
- [7] As a consequence of the financial status of the First, Fourth, Fifth and Sixth Defendants, the only parties active in these proceedings were the Plaintiff and the Second and Third Defendants.
- [8] The proceedings relate to a property at Lot 5 on RP 852957, County Lytton, Parish Chinchilla ("Chinchilla Property"). The Third Defendant and another company purchased the Chinchilla Property as tenants in common in equal shares. The solicitors for the Second and Third Defendants hold a mortgage over the Chinchilla Property.

## **Proceeding**

- [9] The Plaintiff claimed the First and Second Defendants were in a partnership with the Plaintiff, as a consequence of which the Plaintiff was entitled to an interest in the Chinchilla Property. The Second and Third Defendants denied the existence of any such partnership. They allege the Plaintiff's only role in the purchase of the Chinchilla Property was as a financier, and the Plaintiff was not entitled to any interest in the Chinchilla Property.
- [10] The proceeding did not proceed to trial. After judgment had been delivered in another matter, involving many of the same parties<sup>1</sup>, the Plaintiff emailed the Second and Third Defendants' solicitor attaching what she called a "Notice of Discontinuance".
- [11] As the Defendants had filed a Defence, the Plaintiff could only discontinue these proceedings with the leave of the court, or with the consent of the other parties.<sup>2</sup> On 10 March 2015, the Second and Third Defendants' solicitor emailed the Plaintiff, advising if the Plaintiff sought to discontinue the proceedings against the Defendants, she would have to apply to the court for leave.
- [12] On 30 April 2015, the Plaintiff applied to the court for leave to discontinue the proceedings against the Defendants. The Plaintiff's stated reason for the application was the financial collapse, or imminent financial collapse, of each of the Defendants.

## **Submissions**

- [13] The Plaintiff submitted leave to discontinue ought to be given, as it was reasonable for her not to pursue the proceeding when there was little prospect of any judgment or costs order in her favour being met by the defendants. The Plaintiff further submitted the Second Defendant and the Second Defendant's solicitor on the record should be ordered to pay the Plaintiff's costs in the proceeding, on an indemnity basis.
- [14] The Second and Third Defendants did not oppose the Plaintiff being given leave to discontinue these proceedings, but submitted the Court should make an order the Plaintiff pay the Second and Third Defendants' costs of the proceeding, on a standard basis. The other Defendants did not make submissions as to whether the Court should give the Plaintiff leave to discontinue these proceedings, or as to what orders the Court should make as to costs.

## **Law and discussion**

### *Should leave to discontinue the proceedings be granted?*

- [15] Whilst the Court's discretion to grant or refuse leave is unfettered, a central consideration in the exercise of that discretion is whether the granting of leave will cause injustice to

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<sup>1</sup> *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd & Anor* [2014] QSC 265; *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd and anor* [2015] QSC 6.

<sup>2</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 304(2).

the other party or parties. The applicable principles were enunciated by Graham J in *Covell Matthews & Partners v French Wools Ltd*:

“The principles to be culled from these cases are ... that the court will, normally, at any rate, allow a Plaintiff to discontinue if he wants to, provided no injustice will be caused to the Defendant. It is not desirable that a Plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the Defendant.”<sup>3</sup>

- [16] Given the undesirability of compelling the Plaintiff to litigate against her will, in circumstances where there is good reason to believe further continuation of the proceeding will only result in additional costs with no real prospect of recovery of those costs should the plaintiff succeed, it is appropriate, in the exercise of my discretion, to grant the plaintiff leave to discontinue the proceedings.

*Should costs be awarded?*

- [17] In the case of proceedings discontinued without leave, the discontinuing party is liable to pay the costs of the party or parties to whom that discontinuance relates, up to the date of the discontinuance, and the costs of any other party or parties caused by that discontinuance.<sup>4</sup> However, if the party discontinues with the leave of the court, the court may make any order for costs it considers appropriate.<sup>5</sup>
- [18] Relevant factors in the exercise of that discretion include the circumstances of the grant of leave, the conduct of the parties, and the fact the Defendant was required to defend proceedings the Plaintiff chose not to pursue to finality. A further relevant factor is that costs are being determined in circumstances where there has been no hearing of the proceeding on its merits.
- [19] The applicable principles for the exercise of a Court’s power to order costs in such circumstances were considered by McHugh J in *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin*:<sup>6</sup>

“Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they

<sup>3</sup> (1977) 1 WLR 876 at 879.

<sup>4</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 307(1).

<sup>5</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 307(2).

<sup>6</sup> (1997) 186 CLR 622 at 624-625.

had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the Defendant has acted unreasonably in exercising or refusing to exercise a power and that the Plaintiff had no reasonable alternative but to commence a litigation. Thus, for example, in *R v Gold Coast City Council; Ex parte Raysun Pty Ltd*, the Full Court of the Supreme Court of Queensland gave a prosecutor seeking mandamus the costs of the proceedings up to the date when the Respondent Council notified the prosecutor that it would give the prosecutor the relief that it sought. The Full Court said that the prosecutor had reasonable ground for complaint in respect of the attitude taken by the Respondent in failing to consider the application by the prosecutor for approval of road and drainage plans.

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *South East Queensland Electricity Board v Australian Telecommunications Commission* where his Honour ordered the Respondent to pay 80 per cent of the Applicant's taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.”

- [20] The relevant considerations in the exercise of the discretion to determine costs, in circumstances where a party has discontinued, have been recently considered in *Ibrahim v PERI Australia Pty Ltd*.<sup>7</sup>

“Although ...the principles that are to be derived ..., in circumstances where a court is requested to make a costs order, when proceedings have not been heard to termination include the following: ...whether a party acted reasonably in commencing the proceedings; whether a party had been successful in obtaining interlocutory relief; whether the party sued had acted reasonably; whether the responding party had acted reasonably in defending the proceedings; whether the proceedings terminated after interlocutory relief had been granted; and further, whether the primary judge was satisfied that the party seeking to terminate the proceedings prior to a full hearing had almost a certain chance of success.”

- [21] The exceptions to the general rule “focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion.”<sup>8</sup>

<sup>7</sup> [2013] NSWCA 328 at [17].

<sup>8</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [69].

[22] Factors which would weigh in favour of the Second and Third Defendants' application for an order for costs against the Plaintiff include:

1. the Plaintiff in these proceedings was also a defendant in BS 2849/13, the trial of which was heard by Jackson J from 10 – 12 June 2014;
2. the Plaintiff did not attend that trial (she says she was unaware of the trial date);
3. the Plaintiff's solicitors attended the first day of the trial to seek the leave of the court to withdraw (with Jackson J granting such leave);
4. the Plaintiff has not attended any reviews of this matter in person, although Leonard Coyte has appeared by telephone and in person as her representative;
5. the Plaintiff filed the Notice of Discontinuance late in the proceedings; and
6. the Second and Third Defendants incurred considerable expense in defending proceedings which the Plaintiff has chosen, at a late stage, not to pursue.

[23] However, the circumstances which led to the plaintiff's application for leave to discontinue are relevant. Those circumstances include:

1. the Plaintiff was substantially successful in one other proceeding between substantially the same parties but apparently has not recovered any of the costs ordered in her favour;<sup>9</sup>
2. the Plaintiff's application for leave to discontinue the proceedings was made based on the Defendants' dire financial situations and the lack of available funds to meet any judgment in the plaintiff's favour, including any order for costs.

[24] In considering the competing circumstances, it is also significant the Second and Third Defendants refused to consent to a discontinuance, which the Plaintiff proposed from at least 5 March 2015.

[25] Balancing all of those factors, I am satisfied the appropriate order, in the exercise of my discretion, is that there should be no order as to costs. The plaintiff's application for discontinuance was made in a timely and reasonable fashion. The decision to not pursue the application to final hearing was based on sound commercial consideration having regard to the unlikelihood of the plaintiff recovering any judgment in her favour, including an order for costs. It would not be just, in those circumstances for the second and third defendants to receive the benefit of costs orders in their favour.

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<sup>9</sup> See *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd & Anor* [2014] QSC 265; *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd and anor* [2015] QSC 6.

- [26] However, as the application has not proceeded to a final hearing, it would also not be just, in the exercise of my discretion, to give the plaintiff the benefit of an order for costs in her favour, either against the second or third defendants, or their solicitors.

**Orders**

1. Leave is granted to discontinue the application filed 30 April 2015.
2. No order as to costs.