SUPREME COURT OF QUEENSLAND

CITATION:	*Feyen v Charlton & Ors (No 2)* [2016] QSC 138
PARTIES:	**ROBERT FEYEN** (Applicant) **v** **GREG CHARLTON** **MEGAN HARWOOD** **TREVOR HARWOOD** **GREG GRAHAM** **CAROL GRAHAM** **JOHN HARTLEY** **STEVE URCH** **QUEENSLAND SAPPHIRE MINING ASSOCIATION** (Respondents)
FILE NO/S:	S25/2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	20 June 2016
DELIVERED AT:	Rockhampton
HEARING DATE:	Heard on the papers
JUDGE:	McMeekin J
ORDERS:	**1. Declare that the decision of the management committee that the nomination of Mr Robert Feyen for election to the management committee at the 2015 annual general meeting was void was in breach of the rules of the Queensland Sapphire Miners Association Inc.** **2. Declare that the failure of the management committee to inform the members of the Queensland Sapphire Miners Association Inc at the 2015 annual general meeting that Robert Feyen had been duly nominated**

for election to the committee was in breach of the rules of the Queensland Sapphire Miners Association Inc.

3. **Order that at the 2016 annual general meeting and prior to any vote for election of the management committee being taken the President of the Queensland Sapphire Miners Association Inc., or that person for the time being acting in his place, or the chair of the meeting if the President has vacated the office, read to the members attending each of the aforesaid declarations.**

4. **Order that the Queensland Sapphire Miners Association Inc. pay the applicant's costs limited to the cost of filing of the application and the costs of and incidental to the hearing on 23 May 2016 on the indemnity basis.**

CATCHWORDS: PROCEDURE – COSTS – RECOVERY OF COSTS – where the applicant was partially successful – where the applicant seeks costs on indemnity basis due to respondents alleged deceptive conduct – where the applicant seeks that seven of the respondents be required to contribute personally to a portion of the costs – whether costs should follow the event – whether costs should be awarded on indemnity basis – whether the respondents should be severally liable for costs

Associations Incorporation Act 1981 (Qld) s 73
Uniform Civil Procedure Rules 1999 (Qld) r 681, r 703

Colgate Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Di Carlo v Dubois [2002] QCA 225, cited
Feyen v Charlton & Ors [2016] QSC 122, cited
Plante & Anore v James [2011] QCA 109, cited
Quinn Villages Pty Ltd v Mulherin [2006] QCA 500, cited

COUNSEL: No appearance for the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Grant & Simpson for the applicant

[1] **MCMEEKIN J:** In a decision of 7 June 2016 I found in favour of the applicant, Mr Feyen.[1] I declined to make the orders he sought that the Queensland Sapphire Mining Association Inc (QSMA) be required to conduct a further election of committee members within 30 days. I then proposed, subject to further submissions, to make the following orders:

> Declare that the decision of the management committee that the nomination of Mr Robert Feyen for election to the management committee at the 2015 annual general meeting was void was in breach of the rules of the Queensland Sapphire Miners Association Inc.
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> Declare that the failure of the management committee to inform the members of the Queensland Sapphire Miners Association Inc at the 2015 annual general meeting that Robert Feyen had been duly nominated for election to the committee was in breach of the rules of the Queensland Sapphire Miners Association Inc.
>
> Order that at the 2016 annual general meeting, and prior to any vote for election of the management committee being taken, the President of the Queensland Sapphire Miners Association Inc., or that person for the time being acting in his place, or the chair of the meeting if the President has vacated the office, read to the members attending each of the aforesaid declarations.

[2] Each party was directed to make such further written submissions on costs and as to the orders that ought to be made in light of the reasons. Those submissions have now been received.

The orders

[3] The applicant's submissions adopt and agree with the proposed orders.

[4] The respondents' submissions do not refer, at least in terms, to those proposed orders, let alone demonstrate why the orders should not be made. The only submission, made in broad terms, is that it is not for the Court but the members to determine the nominees and members of the management committee at the next AGM. The point of the submission is unclear. The proposed orders do not presume to have that effect. The orders proposed will hopefully have the effect that at the 2016 AGM Mr Feyen will be in as good a position as can now be achieved as he would have been in had his nomination gone forward at the 2015 AGM. Whether he is nominated to the committee or not, the stand that he has taken will have been vindicated and the members attending will be made aware of that, and that he had wished to stand in 2015.

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[1] *Feyen v Charlton & Ors* [2016] QSC 122

[5] In the circumstances, no good reason having been advanced against them, the orders proposed will be made.

Costs

[6] Any order as to costs relates to costs reserved at the first hearing of the matter on 1 February 2016 and the final hearing on 23 May 2016. At the second hearing on 18 April 2016 the applicant was ordered to pay the respondent's costs thrown away by adjournment of the day's hearing. That order will stand.

[7] The general rule is that costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise (r 681 *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR)). Indemnity costs can be awarded in the discretion of the court (r 703 UCPR).

[8] While not entirely clear the purport of the respondents' submission, I think, is that the respondents should receive the costs of the first hearing on the indemnity basis (as "the whole of the costs associated with the first return date were thrown away") and receive the costs of the final hearing on the standard basis or that there be no order as to costs, as "in a very real sense Mr Feyen has not achieved what he sought."

[9] The applicant submits that costs should be awarded on an indemnity basis because of the deceptive conduct of the committee members. The applicant also seeks the committee members be required to personally pay a portion of the costs.

[10] Three issues then must be determined:

(a) Who was the successful party?

(b) Should costs be on the indemnity basis?

(c) Should the respondents Greg Charlton, Megan Harwood, Trevor Harwood, Greg Graham, Carol Graham, John Hartley and Steve Urch be required to contribute personally to the payment of costs?

[11] As to the first of those issues and the respondents' submission that the applicant has not been successful, there are several relevant observations. The first is that while the applicant has not been successful in obtaining the relief that he primarily sought, declarations of the kind that I now intend to make were his alternative form of relief. Secondly, he was not denied that primary relief because of any want of evidence justifying it. As I indicated in the principal judgment, had the matter been heard last September I would have entertained ordering a new election of the management committee.[2] Thirdly, the only matter eventually litigated was that of the validity of the election of committee members. The respondents not only comprehensively failed in

[2] See [91]

their defense of their conduct of that election but endeavored to justify that conduct by improper means. As mentioned in the primary judgment, s 73(2)(c) of the *Associations Incorporation Act* 1981 (Qld) was engaged – the respondents' conduct was "unreasonable or improper" and by reason of that they had "been responsible for the making of an application, or [have] added to the cost of the proceedings."[3]

[12] There is no doubt that the applicant was the relevantly successful party.

[13] However there is force in the respondents' submission that there was some wasting of time and resources because of the applicant's ignorance of the limited nature of the relief that this Court could provide. As mentioned in the previous judgment[4] the matter was before me several times through the year. Mr Feyen was unrepresented until the most recent and final hearing. His lack of knowledge of the limited nature of the jurisdiction and the oversight that the Court exercises meant that most of his initial complaints were not justiciable. He sought remedies that he could not achieve in this forum. However that deficiency in no way disentitles him from having his costs paid to the extent that they were properly incurred. His application was appropriately limited once legal advice was obtained. The applicant is entitled to his costs limited however to the cost of filing his application and the costs of and incidental to the final hearing.

[14] In the normal course I might have exercised my discretion to protect the respondents from the effects of the need for two hearings rather than one. However they have very much brought upon themselves the need for the application at all. I do not accept that they have acted in good faith throughout. In my judgment it is proper to signify the Court's disapproval of that conduct by denying them a costs order in respect of the first days' hearing.

[15] It is that lack of good faith which is the basis of the applicant's claim for indemnity costs. Paragraphs 74 and 75 of my previous judgment are relevant here:

> [74] It is difficult to avoid the conclusion that the minutes in their present form were prepared at a time when the committee, or at least the secretary, was preparing a defence to the claims made by Mr Feyen.
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> [75] I am conscious of course that the committee members are volunteers and that they no doubt have the best interests of QSMA at heart. However it appears to me that they permitted their antipathy towards Mr Feyen to influence their judgement and have sought to subsequently justify their actions by recourse to a deceptive stratagem and to rules that were of no concern to them at the time.

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[3] See [81]
[4] See [3]

[16] The principles applicable to the awarding of costs on the indemnity basis have been discussed in cases such as *Di Carlo v Dubois*[5]; *Quinn Villages Pty Ltd v Mulherin*[6]; and *Colgate-Palmolive Company v Cussons Pty Ltd*[7]. Effectively special or unusual circumstances and some evidence of unreasonable conduct by the party in the bringing or the defending of an action is required. Such an order should not be seen as too readily available.

[17] In my view the misconduct to which I have referred justifies the making of the order on the indemnity basis. The deceptive stratagem I referred to effectively caused the dispute and hence the incurring of the costs. It should never have occurred.

[18] As to the third issue – requiring the respondents to contribute personally to the payment of costs for their part in the deceptive conduct – the usual course is that respondents are jointly and severally liable to pay an award of costs. The applicant seeks that each of the committee members be made liable for a tenth of the costs.

[19] I am not sure that the committee members were properly parties to the application. Certainly the relief sought and obtained could have been achieved without them. I am inclined to think that they are in a position akin to those of non-parties sought to be made liable for the costs of litigation. It is true that their conduct very much precipitated the application but they are in this position because of their acceptance of voluntary positions on the committee. Non-party costs orders are regarded as exceptional and only to be made where the interests of justice clearly warrant such an order.[8]

[20] Further there is the practical difficulty of pursuing each respondent for a fraction of the costs.

[21] In all the circumstances I consider that the interests of justice are sufficiently met if the order be against the Association.

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[5] [2002] QCA 225
[6] [2006] QCA 500
[7] (1993) 46 FCR 225 at 232 per Sheppard J
[8] *Plante & Anore v James* [2011] QCA 109 [4]