SUPREME COURT OF QUEENSLAND

CITATION:	*Barclay & Anor v Oliver Hume South East Queensland Pty Ltd* [2016] QSC 160
PARTIES:	**KYM LOUISE BARCLAY** (first applicant) **GALLERY HOMES PTY LTD** ACN 151 101 914 (second applicant) **v** **OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD** ACN 128 863 230 (respondent)
FILE NO:	SC No 5568 of 2016
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	18 July 2016 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2016
JUDGES:	Atkinson J
ORDERS:	**As per the applicants' draft, initialled by Atkinson J and placed with the file.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DISCONTINUANCE AND WITHDRAWAL – where the applicants seek to discontinue an originating application – where r 304(3) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that if there is more than one applicant, an applicant may only discontinue with the court's leave or the consent of the other parties – whether the applicants require leave to discontinue the originating application PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – DISCONTINUANCE OF OR WITHDRAWAL FROM PROCEEDINGS – where the respondent sought an undertaking from the first applicant that she not dispose of or deal with four properties that she owned pending the determination of the respondent's claim and statement of claim – where the respondent's claim and statement of claim did not claim any equitable interest in the properties – where the respondent later filed an amended claim

and statement of claim, purporting to amend its original claim, without leave – where, prior to being served with the respondent's amended pleadings, the applicants filed an originating application seeking the removal of caveats over the properties – where the first applicant was overseas when the respondent's amended pleadings, which did make a claim to the properties, were served – where, once instructions were able to be obtained from the first applicant, the applicants sought to discontinue their originating application – whether, in the circumstances, the applicants acted reasonably in commencing and maintaining the proceedings up to the point of seeking discontinuance

Uniform Civil Procedure Rules 1999 (Qld), r 304, r 307

Arita Petavrakis v Hirst & Co. & Anor [2001] QSC 224

COUNSEL:	K W Wylie for the applicants P Hackett for the respondent
SOLICITORS:	Warlow Scott Lawyers for the applicants Holman Webb Lawyers for the respondent

[1] **ATKINSON J**: The applicants wish to discontinue an originating application which they filed in this court on 6 June 2016. The respondent does not oppose the originating application being discontinued but has not consented to it being discontinued because there is a dispute between the parties as to costs. The first question to be determined by me is whether or not the applicants require leave to discontinue the originating application.

[2] It is apparent that the rule that applies is r 304(3) of the *Uniform Civil Procedure Rules* 1999 (Qld). It appears that originally both parties were of the view that r 304(1) applies, that is that an applicant may discontinue a proceeding which has been started by application before it has been served with the first affidavit in reply from a respondent. Indeed, that view was repeated in the respondent's submissions today. However, r 304(3) provides that if there is more than one applicant, an applicant may only discontinue with the court's leave or the consent of the other parties. As I have already said, there was not consent to the discontinuance, so the court's leave is required. I will give that leave.

[3] Then, it is a question of whether or not there is a discretion as to who should pay the costs. If r 307(1) applies, then the party who discontinues is liable to pay the costs. If, however, r 307(2) applies, then the court may make the order for costs that it considers appropriate.

[4] Rule 307(2) applies if a party discontinues with the court's leave. That is the subrule appropriate to these circumstances and so the court may make the order for costs that it considers appropriate.

[5] The applicants argue that the appropriate costs order is that each party bear their own costs of the proceedings. On the other hand, the respondent seeks the dismissal of the application for leave to discontinue and seeks an order that the first and second applicants pay the respondent's costs of the application to discontinue on an indemnity basis. That is the respondent's position as has been explained to me by Mr Hackett of counsel; that

position is not obvious on the face of the respondent's proposed draft order, nevertheless I accept that that it what the respondent intends.

[6] The legal test that it appears I should apply is that set out by White J, as her Honour then was, in *Arita Petavrakis v Hirst & Co. & Anor* [2001] QSC 224, where her Honour said at [9]:

> "It is neither appropriate nor possible to decide contested factual issues in an application of this kind and the costs of attempting to do so in a trial would be a scandalous waste of resources which, at least the husband and wife, do not have. However, a number of the cases make clear that it is appropriate for a court when deciding what should happen to the costs when it is unnecessary to make any other orders to determine whether an applicant acted reasonably in commencing and thereafter maintaining proceedings which the applicant no longer wishes to progress…"

[7] So the question I have to determine is whether or not the applicants in this case acted reasonably in commencing and maintaining the proceedings to the point where they wished to discontinue them with the leave of the court. The circumstances in which this originating application was filed are set out in affidavits filed with regard to the originating application and affidavits filed by leave today.

[8] It appears that the respondent filed a claim and statement of claim against, *inter alia*, the first applicant, seeking various relief and making various claims, but not making a claim for any equitable interest in various properties owned by the first applicant. It appears that the plaintiff, being the respondent to this action, then sought an undertaking that the second defendant, being the first applicant, not dispose of or deal with four properties at Coomera pending the determination of the claim and statement of claim. In its correspondence to the second defendant, on 22 March 2016, the plaintiff threatened to bring an application in the form seeking a Mareva injunction unless such an undertaking was given.

[9] The solicitors for the first applicant pointed out on 29 March 2016 that there was no claim against those properties in the claim or statement of claim nor any suggestion that the assets would be dissipated and that, accordingly, the first applicant declined to give such an undertaking.

[10] It appears that a response by the plaintiff's solicitors on 7 April 2016 was to say that any application for Mareva orders would set out the facts on which it was based in affidavit material. Again, on 19 April 2016, the first applicant's solicitors pointed out that there was nothing in the claim or statement of claim which dealt with the question of the undertaking and, again, pointed out there was nothing in the claim or statement of claim which claimed an equitable interest in those properties. Rather than file an application for leave to amend the claim, what the solicitors for the plaintiff did, on 26 April 2016, was to file an amended statement of claim making such a claim and purporting to amend the claim, I note without leave.

[11] It appears that on 2 June 2016, the fact that an amended statement of claim had been filed came to the attention of the solicitors for the first applicant, although the amended statement of claim had not been served. On 6 June 2016, the applicants in this matter, who had still not been served with the amended statement of claim, filed an originating application to remove the caveats. Then, on 8 June 2016, that application was served and, later in the day, the amended statement of claim was served.

[12] It appears that the first applicant was overseas and it was not possible properly to get instructions from her. It appears to me that once instructions were properly able to be taken, it was determined that the appropriate thing to do, now that the amended statement of claim had been served making the claim which, for some time, as the first applicant's solicitors have pointed out, had not been made, was to discontinue the originating application. It did not at first occur to the applicants that they needed leave but they subsequently realised that they did.

[13] It does appear to me that it was reasonable for the applicants, in the circumstances, to commence proceedings to have the caveats removed and, therefore, it would be unreasonable to require the applicants to pay the costs of the respondent of the originating application or, indeed, the costs of this application, let alone on an indemnity basis. What I am minded to do is to grant the orders sought by the applicants. I am not convinced it is necessary, for the reasons given by Mr Hackett, to make the orders sought in paragraph 2 of their draft orders, although it might be of some comfort to those persons who have been subpoenaed if the order was made.

[14] I will make the order as per the draft handed up by the applicants which I will initial and place with the file.