SUPREME COURT OF QUEENSLAND

CITATION:	*Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337
PARTIES:	**LEONARDUS GERARDUS SMITS** (Respondent/Appellant) **v** **DOROTHY TABONE** (Applicant/Respondent) **BLUE COAST YEPPOON PTY LTD** (ACN 124 579 059) (Respondent/Appellant) **v** **DOROTHY TABONE** (Applicant/Respondent)
FILE NO:	Appeal No 2651 of 2007 Appeal No 4208 of 2007 SC No 223 of 2007 SC No 86 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	12 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	21 September 2007
JUDGES:	Muir JA, Cullinane and Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**a) The appeals are dismissed** **b) The respondent's costs of both appeals are to be paid by the appellant, Leonardus Gerardus Smits on an indemnity basis**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – where the appellants agreed and gave notice to the respondent that the two appeals to be heard should be dismissed – where the respondent rejected the appellants' offer to pay the respondent's costs of the appeals on a standard basis – whether costs on an indemnity basis should be ordered

Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd (1992) 30 NSWLR 359, considered
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225, considered
Di Carlo v Dubois & Ors [2002] QCA 225, cited
Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd (1995) 36 NSWLR 242, considered
Riches v Hogben [1985] 2 Qd R. 292, cited
Rosniak v Government Insurance Office (1997) 41 NSWLR 608, considered
Smits v Tabone and Blue Coast Yeppoon Pty Ltd v Tabone [2007] QCA 172, cited

COUNSEL: M D Martin for the appellants
J B Sweeney for the respondent

SOLICITORS: Morgan Conley for the appellants
Rees R & Sydney Jones for the respondents

[1] **MUIR JA:** I agree with the reasons of Cullinane J and with his proposed orders.

[2] **CULLINANE J:** In this matter the two appeals (CA No 2651/07 and CA No 4208/07) are to be heard together as the result of an order made on 30 May 2007. The two appeals are to be dismissed by consent.

[3] On 10 September 2007 approximately one week before the matters were to be heard the appellants gave notice to the respondent that they did not intend to pursue the appeals. An offer was made by the appellants at that time to pay the respondent's costs of the appeals on a standard basis. The respondent rejected the offer contending that she should receive her costs on an indemnity basis.

[4] It is this issue which remains for determination by this Court.

[5] Each appeal lies from an order by the central Judge ordering the removal of a caveat over the same parcel of land, namely Lot 1 on SP186802, Parish of Yeppoon, County of Livingstone, Title Reference 50629570.

[6] The first caveat was lodged by the appellant Smits (in appeal CA No 2651/07) on 9 February 2007 and in that caveat the interest claimed was "an equitable interest as purchaser of an estate in fee simple". This caveat was ordered to be removed by His Honour on 5 March 2007 and the appellant Smits was ordered to pay the respondent's costs on a standard basis.

[7] The second caveat was lodged on 2 March 2007 by the appellant, Blue Coast Yeppoon Pty Ltd (CN No 4208/07) and the interest claimed was:

> "an equitable interest as purchaser of an estate in fee simple or alternatively an equitable interest created by the registered proprietor's conduct."

[8] On 14 May 2007 his Honour ordered that this caveat be removed and ordered the appellant Blue Coast Yeppoon Pty Ltd to pay the costs of the respondent on an indemnity basis.

[9] The appellants unsuccessfully sought a stay of the orders pending the appeal.

[10] The appellant Smits is the sole director and shareholder of the appellant Blue Coast Yeppoon Pty Ltd. It would seem that the company was incorporated by Smits between the time of the first caveat being lodged and the second caveat being lodged.

[11] Smits is described as a retired solicitor and a developer.

[12] The claims advanced by the appellants by way of resistance to each application to remove the caveats were identical.

[13] In September 2005, the respondent's late father (who was then the registered proprietor of the land) entered into a contract to sell the land to a company (Capricornia Blue Pty Ltd) for a price of $4.372 million. This company was controlled by or associated with one Hogbin.

[14] In August 2006, an agreement was entered into between Hogbin and the appellant Smits for the sale by Hogbin to Smits of the whole of the issued capital of Capricornia Blue Pty Ltd, such sale to be completed at the time of completion of the contract to sell the land.

[15] Subsequently the appellant Smits through his solicitor commenced negotiations with the respondent who was by then the registered proprietor. Smits sought to purchase the land directly from the respondent. This was done in anticipation of the earlier contract not being completed.

[16] To this end the appellant Smits made an offer to purchase the land for $4 million.

[17] Capricornia Blue Pty Ltd did not complete the contract for the purchase of the land and it was terminated on 6 December 2006. Similarly the contract for the sale of shares did not proceed.

[18] There was a conversation between the appellant Smits and one Deaves the solicitor for the respondent on 28 November 2006 to which I will return shortly.

[19] On the same date that the two contracts failed to settle the appellant Smits delivered a second offer to purchase the land for $4 million accompanied by a cheque of $25,000. In this contract the purchaser is shown as Blue Coast Yeppoon Pty Ltd but it does not appear that this company was incorporated until some significant time later.

[20] There is correspondence passing between the appellant Smits and the solicitor for the respondent in which the appellant sought the respondent's response to the offer that he had made and was informed that the respondent did not wish to discuss the sale of the land until the new year. This correspondence occurred in the first part of December 2006.

[21] Further enquiries were made by the solicitors for the appellant Smits and by him personally to the solicitors for the respondent throughout January. The response of the solicitor for the respondent on each occasion was that he held no instructions from his client with respect to the contract which the appellant Smits had delivered.

[22] By a facsimile transmission of 22 January 2007 the appellant Smits complained to the solicitor for the respondent of the lack of response to the offer which he had made and amongst a number of other things stated:

> "I have offered to agree to any reasonable commercial terms required by your client and have objected to nothing ---
> I remain bona fide, hard done by and ready and willing to buy and settle on a purchase of your client's property on commercial terms favourable to her, with absolutely clear cut legal conditions and immediate settlement. What else could she possibly want? If she wants me to buy it in my own name I will do that to show my bona fides."

[23] By letter of 30 January 2007 the solicitors for the appellants wrote to the respondent in the following terms:

> "We refer to the above and are instructed to make an offer for your client's land in the amount of $4.6 million.
>
> As you are aware you hold a cheque from our client in the amount of $25,000.
>
> If your client requires a further amount by way of deposit would you please advise so we may take instructions from our client about making payment of such larger amount.
>
> The basis upon which our client is proposing settlement is unconditional in ten (10) business days.
>
> If these terms are satisfactory to your client would you please prepare a contract for immediate execution."

[24] The respondent's solicitors replied on the same day rejecting the offer and making a counter offer for a substantially greater sum.

[25] As I have said the appellant Smits deposed that he had a conversation with Deaves the solicitor for the respondent on 28 November 2006. Included in the conversation he deposed to is the following:

> "Deaves: 'That is correct, but my client cannot enter into a new contract with you unless the contract with Hogbin comes to an end.'

Myself: 'I can understand that she does not want to be seen to be undermining the Hogbin Contract or going behind his back. I understand that any contract would be conditional upon termination of the Hogbin contract, but I can execute the new contract and you can hold it in escrow if that helps. I have got no idea what your client's relationship is with Hogbin, but I have been seriously misled by Hogbin on the lot density and other matters. I do not think that he has the financial capacity to settle. He is expecting me to provide all the settlement money, but I have been advised that I have no obligation to provide it under the Share Sale Agreement under which I purchased all the shares in Capricornia Blue. So my preference is not to go down that path if I can re-purchase the property from your client. But I will settle the Hogbin deal if there is no other way I can get the property.'

Deaves: 'You do not have to concern yourself about Hogbin or others because Mrs Tabone will only act in accordance with my advice. I will put it all in front of my client, but I cannot see any problem in her going ahead with you if the sale to Hogbin is not completed and the price is right.'

Myself: 'Well if your client is not going to insist on getting three lots back, I am quite prepared to pay the price under the Hogbin Contract, which I have added up to about $4.6M. I have a facility with Suncorp for $6 million, which you can confirm directly with my Bank Manager Ron Taylor in Brisbane. You can call him on 3362 1953 (which Deaves noted) and I can settle within 10 days. I intend to use a new shelf company, but if that is a problem just tell me because I am quite prepared to buy the land in my own name if that is what your client wants. I will agree to satisfy any reasonable requirements your client might have.'

Deaves: 'Yes that is the price under the Hogbin Contract. Leo, I will get back to your solicitor after I have met next week with Mrs Tabone.'

It was on the basis of those discussions that I deposed on 28 February, 2007, in paragraph 36, that during my meeting with Deaves on 28 November, 2006, Deaves said words to me to the effect that I (or my corporate nominee) would be the successful purchaser of Lot 1 from Mrs Tabone subject to agreement upon price with Mrs Tabone as the other contractual matters were not contentious. The price was also confirmed to Hogbin on 29 January 2007 as stated in paragraph 41 of my Affidavit on 28 February 2007."

[26] Smits deposes to a conversation on 29 January 2007 with Hogbin in which he claims Hogbin advised him that the respondent had "accepted my purchase

price of $4.6 million and that the replacement contract would be executed at my company within the next week."

[27] The final sentence refers to the conversation with Hogbin.

[28] He swears in each of his affidavits filed in the two separate proceedings that:

> "During my meeting with Deaves on 28 November 2006 (referred to above) Deaves said words to me to the effect that I (or my corporate nominee) would be the successful purchaser of Lot 1 from Mrs Tabone subject to agreement upon price with Mrs Tabone as the other contractual matters were not contentious. The price was fixed on 29 January 2007."

[29] On the first application the respondent contended before his Honour that an oral agreement for the sale of the land had been reached. This argument it would seem was based upon the proposition that Hogbin conveyed an offer by the respondent to the appellant Smits to sell the land for $4.6 million and the letter from the solicitors for the appellant Smits dated 30 January 2007 constituted an acceptance of it. This of course was against the background of the conversation with Deaves and the correspondence set out above.

[30] His Honour disposed of this argument in the following way:

> "It seems to me that there really is no arguable basis upon which either fact can be asserted. Firstly, it is not alleged that Mr Hogbin was his agent, either for the registered proprietor or Mr Smits, in the discussions he had with the registered proprietor. The conversation thus seems to me to amount to no more than a discussion between the registered proprietor and a third party that she would be prepared to sell the land at that price.
>
> The letter of 30 January 2007 does not, on its face, purport to be an acceptance of an offer, but rather constitutes an offer to buy the land for a particular price."

[31] It should be noted that there was no evidence of any kind that Hogbin had any authority to act on behalf of the respondent. Nor was it at any time pleaded or contended on the applications before the Central Judge that Hogbin had such authority. This much was acknowledged by counsel who appeared for the appellants on the application for a stay. See *Smits v Tabone and Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 172, per Jerrard JA paragraph [18].

[32] The alternative claim raised on the first application was that an estoppel arose as a result of the conduct of the respondent thus creating an equitable interest in the land. Reliance was placed upon the judgment of McPherson J in *Riches v Hogben* [1985] 2 Qd R. 292.

[33] The basis for this contribution was the conversation with the solicitor for the respondent on 28 November 2006. His Honour dealt with this matter briefly:

> "Here, however, there appears to be no arguable basis for any underlying contract at all. So anything done by the respondent could only have been done on the basis that the applicant would

> negotiate with him concerning price with the prospect that if some agreement could be reached a contract might be entered into. It seems to me that no such estoppel can arise in those circumstances ---."

[34] The same evidence was relied upon on the second application. His Honour disposed of the matter briefly by observing that the same reasons for the removal of the caveat which had led him to make the first order applied equally to the second caveat. The only difference was the corporate caveator.

[35] Counsel for the appellants before us was inclined to accept that it was appropriate for his Honour to have ordered indemnity costs on the second application and did not robustly challenge the proposition that in that event a similar order ought to be made in the case of the appeal in respect of the second caveat.

[36] The appellants had instituted proceedings against the respondent (and others) on 2 April 2007. The statement of claim largely reflected the claims set out in the caveat.

[37] However amendments have been made to the statement of claim which have the consequence that the claims in the caveats are no longer advanced in the pleadings.

[38] Judgment is currently reserved on an application to strike out the appellant's pleadings and for summary judgment.

[39] Counsel for the respondent relied upon correspondence to which reference has already been made in these reasons as being totally irreconcilable with the claims made in support of the caveats.

[40] The correspondence which passed between the parties or their solicitors in December and January clearly proceeded upon the basis that there had been no response to the offer of the appellants to purchase the land from the respondent and culminated in an offer to purchase the land for a greater sum which was expressly rejected.

[41] In addition we were taken to a letter from the solicitors for the appellants to the solicitors for Hogbin and the company, Capricornia Blue Pty Ltd of 4 December 2006. In the proceedings against the respondent it is alleged that the appellant Smits acted to his detriment by taking no steps to ensure that the contract for the sale of the land to Capricornia Blue Pty Ltd was completed. The letter relates that the appellant Smits was not in a position to settle the contract because of an absence of finance.

[42] The normal order for costs is on the standard basis and some special reason is required for any departure from that.

[43] Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 discussed the subject generally and identified categories of cases in which it

would be appropriate to make such an order. These categories were not meant to be exhaustive:

> "Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in Fountain and also by Gummow J in Thors v Weekes (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in Tetijo); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in Ragata) or in wilful disregard of known facts or clearly established law (Woodward J in Fountain and French J in J-Corp (supra)); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davis J in Ragata); an imprudent refusal of an offer to compromise (eg Messiter v Hutchinson (1987) 10 NSWLR 525; Maitland Hospital v Fisher (No 2) (1992) 27 NSWLR 721 at 724 (Court of Appeal); Crisp v Kent (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) and an award of costs of an indemnity basis against a contemnor (eg Megarry V-C in EMI Records (supra)). Other categories of cases are to be found in the reports."

[44] In *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608, the New South Wales Court of Appeal sounded a cautious note at 616:

> "… the Court requires some evidence of unreasonable conduct, albeit that it need not rise as high or vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule-maker."

[45] In *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359, Powell J expressed the view that an order for indemnity costs was warranted where in effect the proceedings had no reasonable prospect of success.

[46] Rolfe A/JA (as he then was) in *Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242 at 273 after reviewing the authorities said:

> "In my opinion the authorities support the proposition that where a party persists in a hopeless case, that justifies, for all the reasons given, the making of an order for costs on an indemnity basis."

[47] See also cases such as *Di Carlo v Dubois & Ors* [2002] QCA 225.

[48] Here in my view the appellants advanced a case which was wholly without any arguable merit.

[49] In so far as the case was based upon a contract it must have been obvious that in the absence of any authority on the part of Hogbin to convey an offer by the respondent no such claim could be made. No attempt was made to allege or to contend that Hogbin had any such authority.

[50] In so far as it was based upon alleged conduct on the part of the respondent giving rise to an expectation no conduct of any kind by the respondent was alleged except an indication by her solicitor that negotiations concerning price might be entered into.

[51] The contemporary documents provided no support for, and indeed contradicted the arguments advanced.

[52] The second caveat on the same grounds after the removal of the first suggests some ulterior motive.

[53] It is not however necessary to go this far. The advancement of plainly untenable claims by way of resistance to the applications to remove the caveats and the persistence in those claims by way of appeal to this Court call for, in my view, the award of costs on an indemnity basis.

[54] It was conceded before us that any order for costs should be made against the appellant Smits in both cases.

[55] The orders I would make are the following:

a. The appeals are dismissed.

b. The respondent's costs of both appeals are to be paid by the appellant, Leonardus Gerardus Smits on an indemnity basis.

[56] **LYONS J:** I agree with the reasons of Cullinane J and the orders he proposes. The appellants advanced a case which was wholly without any arguable merit and the appellants' continued resistance to the applications to remove the caveats by advancing untenable arguments calls for an award of costs on an indemnity basis.