

# SUPREME COURT OF QUEENSLAND

CITATION: *Mango Boulevard P/L v Spencer & Ors* [2008] QCA 392

PARTIES: **MANGO BOULEVARD PTY LTD** ACN 101 544 601  
(plaintiff/first respondent)  
v  
**RICHARD WILLIAM SPENCER**  
(first defendant/not a party to the appeal)  
**SILVANA PEROVICH**  
(second defendant/not a party to the appeal)  
**KINSELLA HEIGHTS DEVELOPMENTS PTY LTD**  
ACN 100 373 368  
(third defendant/not a party to the appeal)  
**MIO ART PTY LTD** ACN 121 010 875  
(fourth defendant/appellant)  
**PAUL DESMOND SWEENEY AND TERRY GRANT  
VAN DER VELDE AS TRUSTEES OF THE ESTATE  
OF RICHARD WILLIAM SPENCER**  
(fifth defendant/not a party to the appeal)  
**PAUL DESMOND SWEENEY AND TERRY GRANT  
VAN DER VELDE AS TRUSTEES OF THE ESTATE  
OF SILVANA PEROVICH**  
(sixth defendant/not a party to the appeal)

FILE NO/S: Appeal No 3514 of 2008  
SC No 1999 of 2006

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 5 December 2008

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: McMurdo P, Muir JA and Mackenzie J  
Joint reasons for judgment of Muir JA and Mackenzie J;  
separate reasons of McMurdo P, concurring as to the order  
made

ORDER: **Appellant pay the respondent's costs of and incidental to  
the appeal, including any costs thrown away by  
amendments to the appellant's initial outline of argument,  
on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE  
GENERAL RULE – ORDER FOR COSTS ON  
INDEMNITY BASIS – where the respondent was successful

in the substantive appeal – where the respondent was given leave to argue that costs incurred by the respondent relating to the late amendment of the appellant’s case should be assessed on the indemnity basis – whether it is an appropriate case for costs to be assessed on the indemnity basis

*Mango Boulevard P/L v Spencer & Ors* [2008] QCA 274, cited

*Martinovic v Chief Executive, Queensland Transport* [2005] 1 Qd R 502; [2005] QCA 055, considered

*Colgate Palmolive v Cussons* (1993) 46 FCR 225; [1993] FCA 536, considered

COUNSEL: P J Davis SC, with D Keane, for the appellant  
J K Bond SC, with T R Bradley, for the first respondent

SOLICITORS: Boyd Legal for the appellant  
Minter Ellison for the first respondent

- [1] **McMURDO P:** The substantive appeal in this matter, *Mango Boulevard P/L v Spencer & Ors*<sup>1</sup> was heard before Muir JA, Mackenzie AJA and Douglas J on 1 September 2008. On 12 September 2008, I formally delivered the judgment of the Court dismissing the appeal with costs. The respondent successfully applied before me to set aside the costs aspect of the order so as to permit it to deliver written submissions in support of its contention that it should have part of its costs of the appeal assessed on an indemnity basis. It filed written submissions in the registry to that effect later that day. The appellant has made submissions resisting the respondent's contentions.
- [2] Since judgment in the substantive appeal was given, for reasons that have emerged subsequently, Douglas J has considered it prudent to recuse himself from the Court determining the respondent's costs application. For that reason, the Court for the purposes of the costs application will comprise Muir JA, Mackenzie J and me.
- [3] I have considered the parties' submissions in respect of the costs application and perused the judgment in the substantive appeal and the original and amended written submissions of the appellant and respondent in that appeal. I agree with the reasons of Muir JA and Mackenzie J for ordering the appellant to pay the respondent's costs of and incidental to the appeal, including any costs thrown away by amendments to the appellant's initial outline of argument, on the standard basis.
- [4] **MUIR JA AND MACKENZIE J:** On 12 September 2008, the appellant's appeal was dismissed and with costs. When judgment was delivered, the respondent obtained leave to argue that the respondent should have its costs thrown away by the late amendment of the appellant's case on the appeal and the abandonment of appeal grounds, assessed on an indemnity basis.
- [5] The appellant delivered a revised outline of argument on the last working day before the appeal which abandoned many of the arguments advanced in the original outline.

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<sup>1</sup> [2008] QCA 274.

- [6] The respondent's supplementary submissions on the appeal included the following:

"It is evident that Mio Art's conduct of the appeal up to the time it revised its submissions was itself an abuse of process. Mio Art made serious allegations of misconduct against Mango which were not run below, for which there was no evidentiary foundation and which it has now abandoned at the last minute. It advanced factual allegations which had no foundation, which required detailed consideration and refutation and then, at the last minute, abandoned the arguments based on that flawed foundation. And then it conducted itself such that Mango only received its real argument on the last working day before the appeal."

- [7] The respondent submitted in its original submissions on the appeal:

"From an inaccurate factual base, [the appellant] advances a miscellany of arguments, many of which were not run below and for which there is no evidentiary foundation; some of which are scandalous and should never have been advanced at all; and only a few of which are properly open to be argued on this appeal. Unfortunately, and just as it did below, this conduct necessitates careful and detailed analysis of matters with which it should not have been necessary to trouble this Court at all."

- [8] In support of its contention that indemnity costs should be ordered, the respondent relies on the following passage from the reasons of Jerrard JA (with whom White J agreed) in *Martinovic v Chief Executive, Queensland Transport*:<sup>2</sup>

"That conduct, conveniently summarised in the judgment of Badger(y)-Parker J in *Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277 at 279-280, includes the following:- misconduct that causes loss of time to the court and to other parties; making allegations which ought never to have been made, or unduly prolonging a case by groundless contentions; commencing or continuing an action for some ulterior motive, or with wilful disregard of the known facts or the clear law in circumstances where the applicant, properly advised, should have known there was no chance of success; and abusing the process of the court, in the sense that the court's time, and the litigants' money, has been wasted on totally frivolous and thoroughly unjustified proceedings. Badger(y)-Parker J provided citations from both *Colgate-Palmolive Pty Ltd v Cussons* and the cases cited therein, and from other judgments, supporting those examples."

- [9] The respondent argues that the appellant, by its conduct prior to narrowing its case, involved the respondent in unnecessary and wasted expenditure. One aspect of the wasted expenditure was the preparation of a voluminous appeal record, much of which was not required.
- [10] There is controversy concerning the evidentiary foundation or lack thereof of facts which provide the basis, or part of the basis, for the respondent's submissions that

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<sup>2</sup> [2005] 1 Qd R 502 at para [22].

the abandoned grounds lacked evidentiary foundation. It is not possible, in the absence of detailed argument on the facts, to determine where the merits of the competing contentions lie. And it is not sensible or desirable that further costs be incurred through another lengthy hearing. The parties, no doubt being of a similar view, have not sought another hearing.

- [11] The abandonment of most of the grounds in the notice of appeal most probably reflects counsels' assessment of their prospects of success. There is no reason on the material before this Court to conclude that counsels' assessment was ill-founded. But it has not been demonstrated that the appellant's conduct comes within the scope of that conduct discussed in *Colgate Palmolive v Cussons*<sup>3</sup>, and in the passage from the reasons in *Martinovic* quoted earlier, as meriting a departure from the normal costs order.
- [12] There is another relevant consideration. As a general proposition, Appellate Courts are wary of penalising parties for the abandonment of grounds of appeal. It is of benefit to the administration of justice and, often to the parties themselves, that before the hearing of an appeal takes place, the grounds of appeal and the arguments in relation to them be reassessed with a view to ensuring the most effective and efficient presentation of the case. That process may result in the abandonment of grounds considered, on further reflection, to be unsustainable or marginal. At times, a decision may be taken to abandon a ground thought to be arguable because to advance it may detract from other arguments believed to have greater prospects of success. Caution must be exercised before orders are made which would deter parties and their advocates from acting in this way.
- [13] The appropriate course is to order that the appellant pay the respondent's costs of and incidental to the appeal, including any costs thrown away by amendments to the appellant's initial outline of argument, on the standard basis.

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<sup>3</sup> (1993) 46 FCR 225 at 233, 234.