

# SUPREME COURT OF QUEENSLAND

CITATION: *Vision Gateway & Anor v Moretonsoft Pty Ltd & Ors* [2009]  
QCA 312

PARTIES: **VISION GATEWAY INC**  
(first plaintiff/appellant)  
**VISION GATEWAY PTY LTD**  
(second plaintiff/not a party to the appeal)  
**ASPEN CAPITAL PARTNERS LIMITED**  
(third plaintiff/appellant)  
**v**  
**MORETONSOFT PTY LTD**  
ACN 130 116 308  
(first defendant/respondent)  
**WIZARDSOFT PTY LTD**  
ACN 130 602 416  
(second defendant/respondent)  
**ROBERT ALEXANDER McFARLAND**  
(third defendant/respondent)  
**KENNETH HAROLD EDMONDS**  
(fourth defendant/not a party to the appeal)  
**ALAN BOYD**  
(fifth defendant/not a party to the appeal)  
**MURRAY CHARLES WILLSON**  
(sixth defendant/not a party to the appeal)  
**TONY FAWAZ**  
(seventh defendant/respondent)  
**CORY RUSSELL**  
(eighth defendant/respondent)  
**CHRISTOPHER CHADWICK**  
(ninth defendant/respondent)  
**MICHAEL DAVIS**  
(tenth defendant/respondent)  
**ELLIOT LARARD**  
(eleventh defendant/respondent)  
**ROGER HUANG**  
(twelfth defendant/respondent)  
**MELISSA HAGE**  
(thirteenth defendant/respondent)  
**ADAM PARNELL**  
(fourteenth defendant/respondent)  
**KANWALDEEP SANDHU**  
(fifteenth defendant/respondent)  
**MARINUS SWENNE**  
(sixteenth defendant/respondent)  
**RAFAEL VILLAR VILLAR**  
(seventeenth defendant/respondent)  
**TIN CHIN LAI**  
(eighteenth defendant/respondent)

**KWOK CHUN SO**

(nineteenth defendant/respondent)

FILE NO/S: Appeal No 4596 of 2009  
SC No 6584 of 2008

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 16 October 2009

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: McMurdo P

ORDERS: **1. The parties are granted an extension of time under the order of this Court of 7 August 2009 to file their submissions as to the appropriate costs order.**  
**2. The appellants are to pay the costs of the appeal of the first to third and seventh to nineteenth respondents on the standard basis, to be assessed if not otherwise agreed between the parties.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF THE COURT – COSTS – plaintiff/appellants successfully obtained an Anton Pillar order subject to their giving an undertaking as to damages – plaintiff/appellants had no capacity to meet that undertaking so were ordered to provide security – plaintiff/appellants could not provide adequate security so the primary judge struck out their proceedings against the defendant/respondents for want of prosecution – the plaintiff/appellants appealed against this decision – the appeal was then dismissed by consent – whether the Court should infer an ulterior motive in the plaintiff/appellants in pursuing the appeal – whether costs should be awarded on the standard or indemnity basis

*Colgate Palmolive Co & Anor v Cussons Pty Ltd* (1993) 118 ALR 248, cited

SOLICITORS: Piper Alderman Lawyers for the plaintiff/appellants  
Lillas & Loel Lawyers Pty Ltd for the defendant/respondents

[1] **McMURDO P:** This matter was mentioned before me on 7 August 2009 and the following orders were made:

- "1. Appeal dismissed by consent.
2. The money paid into court as a security for costs of the appeal is not to be dealt with until the determination of the anticipated application by the first to third and seventh to

nineteenth respondents on the condition that those respondents bring that application expeditiously.

3. The appellants and the first to third and seventh to nineteenth respondents have leave to make submissions in writing, on the basis that the matter will be dealt with on the papers, as to the appropriate order as to costs in this matter. Those submissions are to be made in accordance with the relevant practice direction."

- [2] The parties did not meet the requirements of the relevant practice direction, Supreme Court of Queensland Practice Direction 1 of 2005, para 37A, which required their submissions to be made within 10 days. They have all requested an extension of time to make those submissions.
- [3] The appellants filed their submissions in the wrong registry of the Supreme Court, on 25 August 2009. Their submissions did not reach the Court of Appeal registry until 18 September 2009. It is unclear when those submissions were served on the respondents. The appellants contend that their tardiness was because of an error in calculating the time applicable under the Practice Direction and because of their confusion as to which registry they should file in.
- [4] The respondents contend that their tardiness was because of a misapprehension as to when the submissions had to be filed and because of without prejudice negotiations with the appellants as to the appropriate costs orders which may have resolved the matter without requiring further submissions.
- [5] I am prepared to extend the time in which to file the submissions, not because of any satisfactory explanation as to the delay, but because the parties' submissions have now been prepared and the issue is straightforward and should be finally resolved.
- [6] The appellants concede that they should pay the respondents' costs but contend that the appropriate order is that costs be paid on the standard basis as there are no circumstances warranting the awarding of indemnity costs against them.
- [7] It is helpful to next set out something of the background to the appeal to which this application relates. The appellants were the plaintiffs in an action commenced in the Trial Division of this Court alleging that the defendant respondents (in the main, former employees of the appellants) left their employment and took with them commercial software which the appellants alleged had been developed at the appellants' expense. The appellants successfully obtained an Anton Pillar order in their favour which was made subject to their giving an undertaking as to damages. It seems that the appellants had no capacity to meet that undertaking and so were ordered to provide security for it. The appellants did not ultimately provide adequate security and on 3 April 2009 the primary judge struck out their proceedings against the respondents for want of prosecution. The appellants appealed to this Court against that decision, filing a notice of appeal on 1 May 2009. Four days later, the respondents brought an application for security for costs of the appeal. On 12 May 2009, they successfully obtained an order that the appellants pay into court security for the respondents' costs of the appeal. As I mentioned at the commencement of these reasons, the appeal was dismissed by consent on 7 August 2009.

- [8] The respondents make the following contentions. This Court should infer a presumed ulterior motive in the appellants in pursuing this appeal. The appeal was a tactic by the appellants to circumvent the order that they pay security for the respondents' costs in the primary proceedings in the Trial Division, the continuation of which was causing the respondents significant commercial damage. The appeal was without merit. The appellants did not progress it in a timeous way. An award of standard costs does not address the prejudice the respondents have suffered. For these reasons, an indemnity costs order is warranted: *Colgate Palmolive Co v Cussons Pty Ltd.*<sup>1</sup>
- [9] There is no question that the appellants should pay the respondents' costs of this appeal. Ordinarily, such costs are paid on the standard basis; indemnity costs are an extraordinary order. The respondents have not produced any evidence to support their contention that the bringing of this appeal was effectively an abuse of process. They have not demonstrated that this appeal, or the appellants' pursuit of it, falls within that narrow category of cases warranting an award of indemnity costs. It follows that the costs order in this appeal should be that the appellants pay the costs of the appeal of the first to third and seventh to nineteenth respondents on the standard basis, to be assessed if not otherwise agreed between the parties.

ORDER:

1. The parties are granted an extension of time under the order of this Court of 7 August 2009 to file their submissions as to the appropriate costs order.
2. The appellants are to pay the costs of the appeal of the first to third and seventh to nineteenth respondents on the standard basis, to be assessed if not otherwise agreed between the parties.

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<sup>1</sup> (1993) 118 ALR 248.