SUPREME COURT OF QUEENSLAND

CITATION:	*Courtney v Chalfen* [2021] QCA 25
PARTIES:	**SIMON CHRISTOPHER COURTNEY** (appellant) **v** **ELEANOR SOPHIE CHALFEN** (respondent)
FILE NO/S:	Appeal No 7938 of 2020 SC No 2178 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 195 (Williams J)
DELIVERED ON:	19 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2020
JUDGES:	Morrison and Philippides and Mullins JJA
ORDERS:	**1. On Appeal No 7938 of 2020, the appellant is to pay the respondent's costs of and incidental to the appeal on the standard basis.** **2. On the application filed on 27 July 2020, the applicant is to pay the respondent's costs of and incidental to the application, to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – APPEALS AS TO COSTS – OTHER MATTERS – whether separately determined issues dealt with in the principal judgment should be treated as an "event" – whether an order was a final order for the purpose of costs – whether conduct was sufficient to warrant an order for costs on an indemnity basis *Uniform Civil Procedure Rules* 1999 (Qld), r 126, r 684
COUNSEL:	The appellant appeared on his own behalf N H Ferrett QC for the respondent
SOLICITORS:	The appellant appeared on his own behalf HopgoodGanim Lawyers for the respondent

[1] **MORRISON JA:** On 18 December 2020 the Court delivered its reasons for striking out the appellant's application filed on 27 July 2020, and dismissing his

appeal.[1] The question of costs on each of the appeal and application was not dealt with at that time as the respondent had sought to be heard on that issue. As a consequence, the parties were directed to file submissions on the question of costs of the appeal and application. They have done so and those issues can now be resolved.

Costs of the appeal

[2] The respondent proposes merely that the costs of the appeal should follow the event, and on the standard basis. Prima facie, that would normally be the outcome given that the appeal failed. However, the appellant contends that each of what he contends were separately determined issues dealt with in the principal judgment should be treated as an "event" for the purposes of determining where the costs should lie.

[3] In my view, that approach is misconceived.

[4] The general rule is that costs follow the event and that should only be departed upon in the event of special or exceptional circumstances.[2] The underlying rationale of that approach is that costs are not awarded to punish an unsuccessful party, but as a means of indemnifying the successful party.[3]

[5] This Court has endorsed the principles that: (i) ordinarily costs follow the event; (ii) costs can be awarded under r 684 *UCPR* on discrete issues if they are definable and severable and they occupied a substantial proportion of the trial or hearing;[4] (ii) there must be special or exceptional circumstances to warrant depriving a successful party of its costs; and (iv) the mere fact that the successful party has been unsuccessful on some issues will ordinarily not be sufficient to do so.[5]

[6] As was pointed out in the reasons given on the main judgment, the appeal raised three central issues, all concerned with one ground of appeal, namely was there error on the part of the learned primary judge in ordering a stay of the proceedings. The third of the issues was whether the learned primary judge erred in applying the "clearly inappropriate forum" test in determining that the Queensland proceedings should be stayed.[6] In that respect, if that issue was determined against the appellant, and the stay therefore sustained, other issues were rendered otiose.[7]

[7] Within the appeal there were a number of contentions as to why the learned primary judge had erred when ordering the stay. However, none of them were severable issues which occupied some particular identifiable portion of the hearing.

[8] It is true to say that one argument pressed by the appellant had some success. That is, whether there had been an error by taking into account whether it was unlikely

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1 *Courtney v Chalfen* [2020] QCA 294 (the "principal judgment").
2 See, for example, *BHP Coal Pty Ltd v O & K Orenstein & Kopple AG (No 2)* [2009] QSC 64.
3 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67].
4 *BHP Coal* at [6]-[8]; *Tabtill Pty Ltd v Creswick* [2011] QCA 381.
5 *Allianz Australia Insurance Ltd v Swainson* [2011] QCA 179 at [4]-[5]; *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 164 at [8]; *Day v Humphrey* [2018] QCA 321 at [11]; and *Nursing and Midwifery Board of Australia v HSK* [2019] QCA 272 at [7]. See also: *Baboolal v Fairfax Digital Australia and New Zealand Pty Ltd (No 2)* [2015] QSC 203 at [2]; *Harcombe v Thorne* [2016] QSC 78 at [4]; and *Lee v Abedian* [2017] QSC 22 at [28].
6 Principal judgment at [35].
7 Principal judgment at [36].

that leave would have been granted, had it been applied for, under r 126 *UCPR*.[8] However, on this point, as with others that have been urged as separate issues which should be treated as an event in the appellant's submissions on costs, they are but aspects of arguments all on the central issue of whether the stay was rightly granted. They are not, in my view, severable issues definable as events for the purposes of assessing costs.

[9] There is no basis, therefore, to reach the conclusion that special circumstances have been shown which should deprive the successful respondent of its costs.

[10] The appellant must pay those costs on the standard basis.

The application filed 27 July 2020

[11] This application was one filed by the appellant within Appeal No 7938 of 2020, challenging orders made by the learned primary judge on 24 July 2020. Those orders varied orders made earlier on 26 June 2020.

[12] As was pointed out in the principal judgment,[9] no appeal had been brought in respect of the impugned orders. This Court ultimately determined that the application should be dismissed as incompetent.[10] Further, it was held that the appellant's challenge, based as it was upon the proposition that the order made on 26 June 2020 was a final order which could not be varied, was plainly wrong. On its proper construction it was not a final order,[11] and was made with the intention of permitting the respondent to pursue an order for costs.

[13] Importantly, it was held that the appellant (a legal practitioner admitted to practice in Queensland) was aware that the question of costs had not been argued, let alone determined, at the time the orders were made on 26 June 2020. There was no reasonable basis to contend that the order was a final order. In that respect the Court held that the characterisation of those orders by the appellant was disingenuous, which is to say, lacking in the candour one might expect of a legal practitioner before this Court.

[14] Thus the proper characterisation of the application is that it was: (i) an incompetent application, (ii) pursued in the face of knowledge that the order challenged did not reflect an intention to deal with costs, (iii) because the appellant knew that the issue had not been dealt with. That conduct is sufficient to warrant an order for costs on the indemnity basis.[12]

[15] I propose the following orders:

1. On Appeal No 7938 of 2020, the appellant is to pay the respondent's costs of and incidental to the appeal on the standard basis.

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8 Principal judgment at [50].
9 Principal judgment at [65].
10 Principal judgment at [73]-[75].
11 Principal judgment at [78].
12 *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, [1993] FCA 801 at [24]; *Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277 at 279-280; *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo* [2013] QCA 305 at [21]-[22]; *Legal Services Commissioner v Bone* [2014] QCA 179 at [67]-[70].

2. On the application filed on 27 July 2020, the applicant is to pay the respondent's costs of and incidental to the application, to be assessed on the indemnity basis.

[16] **PHILIPPIDES JA:** I agree with Morrison JA.

[17] **MULLINS JA:** I agree with Morrison JA.