

# SUPREME COURT OF QUEENSLAND

CITATION: *Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd & Anor* [2021] QCA 60

PARTIES: **CHAPEL OF ANGELS PTY LTD TRADING AS  
CHAPEL OF ANGELS**  
ACN 154 327 867  
(applicant)  
v  
**HENNESSY BUILDING PTY LTD TRADING AS  
HENNESSY BUILDING ACN 117 587 998 IN ITS OWN  
CAPACITY AND AS TRUSTEE FOR THE HENNESSY  
FAMILY TRUST ABN 45 515 151 376**  
(first respondent)  
**JOHN PAUL HENNESSY**  
(second respondent)

FILE NO/S: Appeal No 4767 of 2019  
DC No 4124 of 2014

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time – Further Order

ORIGINATING COURT: District Court at Brisbane – [2018] QDC 218; [2018] QDC 248 (Porter QC DCJ)

DELIVERED ON: 1 April 2021

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser and Philippides and McMurdo JJA

ORDER: **The applicant is to pay the respondents’ costs of the application for an extension of time to be assessed on the indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – APPEALS AS TO COSTS – INDEMNITY COSTS – HOPELESS CASES – where the applicant made an application to the Court of Appeal for an extension of time to appeal – where that application was refused with costs – where the respondents’ made an application for their costs of that application to be assessed on an indemnity basis from 28 October 2019 – where the respondents sent to the applicant an offer to settle the proposed appeal on 28 October 2019 that was expressed to be made without prejudice, save as to costs – where the applicant rejected the respondents’ offer to settle – where the respondents rely on that offer to settle in their application for costs to be assessed on an in indemnity basis – where the

respondents rely on the circumstance that, when considering that offer, the applicant had the benefit of Morrison JA's reasons in *Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd & Anor* (2019) 2 QR 334 – where the applicant opposes the respondents' application for costs to be assessed on an indemnity basis on the ground that consideration of the applicant's application for special leave to appeal to the High Court from the Court of Appeal's decision would reveal that there had been substance in its application to the Court of Appeal for an extension of time – whether in all the circumstances the respondents' costs of the application for an extension of time to appeal should be assessed on an indemnity basis

*Australian Building Insurance Services Pty Ltd v CGU Insurance Ltd* [2020] QCA 256, cited  
*Bulsey & Anor v State of Queensland* [2016] QCA 158, cited  
*Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd* (2019) 2 QR 334; [2019] QCA 229, cited  
*J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23, cited

COUNSEL: No appearance for the applicant  
 P A Travis for the respondents

SOLICITORS: Ohlson's Lawyers and Barristers for the applicant  
 Axia Litigation Lawyers for the respondents

- [1] **FRASER JA:** The applicant's application for an extension of time within which to appeal from a decision in the District Court was refused with costs.<sup>1</sup> The Court's reasons for that decision set out the background against which the present issue arises and it is not necessary to set that out again in these reasons.
- [2] After the Court's reasons were published, the respondents applied for leave to make submissions seeking an order that their costs should be assessed on the indemnity basis from 28 October 2019, when the respondents sent to the applicant an offer to settle the proposed appeal that was expressed to be made without prejudice, save as to costs. The applicant opposed the respondents' application. The main ground of the applicant's opposition to an assessment of the costs on the indemnity basis was its contention that consideration of its application for special leave to appeal to the High Court from the Court's decision would reveal that there had been substance in its application to the Court of Appeal for an extension of time. On 4 March 2021 the application for special leave to appeal was dismissed with costs.
- [3] The respondents rely both upon their offer and the circumstance that, when considering that offer, the applicant had the benefit of Morrison JA's reasons for an interlocutory decision in the appeal.<sup>2</sup> Morrison JA made three observations that are relevant in this respect: first, the applicant initially had made a deliberate decision not to appeal from the decision in the District Court; secondly, the proposed appeal

<sup>1</sup> *Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd & Anor* [2020] QCA 229.

<sup>2</sup> *Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd & Anor* (2019) 2 QR 334.

raised matters that were not agitated at trial; and, thirdly, the applicant's prospects of success did not look promising.

- [4] The matters mentioned by Morrison JA proved to be significant factors in the Court's decision to refuse the application for an extension of time. At the hearing of the application for an extension of time the applicant advanced a manifestly weak argument in relation to the first matter. As to the second matter, at that hearing the applicant did not contradict the respondents' submission that the proposed appeal raised matters that were not agitated at the trial. The reasons published for the Court's decision to refuse the extension of time refer to uncontroversial legal principles that should have made it seem most unlikely that the applicant could persuade the Court to allow the applicant to pursue on appeal the numerous points it did seek to pursue despite not having litigated them at the trial in the District Court. As to the third matter, Morrison JA's assessment of the applicant's prospect was vindicated by the result. More significantly for present purposes, upon an objective analysis of the applicant's arguments they did not supply a substantial basis for doubting Morrison JA's assessment that the appeal did not appear to be promising.
- [5] The respondents' offer of 28 October 2019 was in the following terms:
- “2. Chapel of Angels consents to the monies paid into court for security for costs in the District Court Proceedings (being \$40,000) and the monies paid into court for security for costs in the appeal (being \$43,805.00) being immediately released to the Respondents with these amounts being deducted off the amount ultimately assessed by the costs assessor for the costs orders in the District Court Proceedings;
  3. Chapel of [Angels] pays the outlays incurred to date by the Respondents in the appeal.
  4. Each party otherwise bears their own costs of the appeal.”
- [6] An affidavit by the solicitor for the respondent who has the conduct of this matter establishes that there was no reasonable prospect that the release of the two sums mentioned in paragraph 2 might result in an overpayment to the respondents. The effect of paragraphs 3 and 4 is that acceptance of the offer would have been significantly more beneficial for the applicant than any costs order likely to be made upon a refusal, after a hearing, of the application for an extension of time. The applicant had a reasonable time to decide whether or not to accept the respondents' offer, that offer being open for acceptance for a period of 14 days from the date of the letter, which was sent after the applicant had commenced its application for leave to appeal. That letter also stated that if the offer was rejected or otherwise not acceptable the respondents would be referring to the letter in support of an application for indemnity costs at the conclusion of the appeal.
- [7] The combination of circumstances described in the preceding paragraphs justify the conclusion that the applicant acted imprudently or unreasonably in not accepting the respondents' offer to settle the applicant's proceedings in this Court. Conduct of that character is one of the matters which may justify an order for costs to be

assessed on the indemnity basis.<sup>3</sup> In the circumstances of this case it is appropriate to make such an order.

[8] The order is that the applicant is to pay the respondents' costs of the application for an extension of time to be assessed on the indemnity basis.

[9] **PHILIPPIDES JA:** I agree.

[10] **McMURDO JA:** I agree with Fraser JA.

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<sup>3</sup> See *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23 at [5] – [6]; *Bulsey & Anor v State of Queensland* [2016] QCA 158 at [73]; *Australian Building Insurance Services Pty Ltd v CGU Insurance Ltd* [2020] QCA 256 at [4].