

DISTRICT COURT OF QUEENSLAND

CITATION: *Hammond v Hiscock* [2019] QDC 229

PARTIES: **NICOLETTE HAMMOND**
(Applicant)
v
FRANK SYDNEY HISCOCK and SANDRA KAY HISCOCK
(Respondents)

FILE NO: D181/19

DIVISION: Civil

PROCEEDING: Application

DELIVERED ON: 22 November 2019

DELIVERED AT: Maroochydore

HEARING DATE: 8 November 2019

JUDGE: Cash QC DCJ

ORDERS: **The respondents pay the applicant's costs of the application to be assessed on the indemnity basis.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – APPLICATION FOR COSTS ON AN INDEMNITY BASIS – where applicant and respondents were parties to a deed – where applicant alleged the respondents did not perform their obligations under the deed – where respondents belatedly agreed to an order enforcing the deed – whether circumstances exist to allow costs on the indemnity basis – whether conduct of a party was unreasonable and unnecessarily prolonged the proceedings – whether the respondent imprudently refused an offer to compromise – whether other discretionary grounds exist to justify indemnity costs.

Uniform Civil Procedure Rules 1999 (Qld) rr 681, 703

Colgate Palmolive v Cussons (1993) 46 FCR 225; 118 ALR 248; [1993] FCA 801 at [24]

Cosgrove v Johns [2000] QCA 157 at [8]-[9]

Di Carlo v Dubois [2002] QCA 225 at [37]-[38]

COUNSEL: S M Gerber for the applicant
S Brown (solicitor) for the respondents

SOLICITORS: Animus Legal for the applicant
Baldwins Lawyers for the respondents

- [1] On 21 November 2018 the applicant and the respondents entered into a deed of settlement. The deed resolved a dispute between the parties concerning encroachment by the respondents onto land owned by the applicant. The essence of the agreement was that the applicant would transfer to the respondents the affected piece of land and the respondents would pay the applicant \$5,000. The respondents were to make the necessary arrangements for the transfer and agreed to carry out their obligations under the deed as soon as reasonably possible. They did not do so. As late as 6 September 2019, and despite considerable effort on the part of the applicant's legal representatives, the respondents had not taken steps to fulfil their obligations. On 15 October 2019 the applicant filed the present application seeking enforcement of the deed and costs of the application on an indemnity basis. This step had been foreshadowed in correspondence sent by the applicant on 6 September.
- [2] The application was sent to the respondents' solicitors by email, followed by copies of the documents sent by Express Post, in mid-October 2019. It is clear the respondents' solicitors had notice of the application from at least late October. Despite this, it was not until the day before the hearing that the respondents entered an appearance. On the same day the respondents provided, by email, an outline of submissions. In it, the respondent consented to the orders sought the respondent for the performance of the deed, but contested the application for indemnity costs. At the hearing I made orders for the performance of the deed but reserved the question of costs.
- [3] Costs of proceedings, including applications, are in the discretion of the court.¹ The court has a discretion to order costs to be assessed on the indemnity basis.² The principles governing the exercise of the discretion are settled.³ As costs assessed on the standard basis remain the norm there must be some special or unusual feature that justifies departure from the ordinary practice. Circumstances that might justify indemnity costs include where the proceedings were unduly prolonged by unreasonable conduct of a party or where there has been an imprudent refusal to compromise the action.
- [4] The respondents have acted in an inexcusably dilatory manner. Had they completed their obligations under the deed in a timely way there would have been no need for the present application at all. The application was foreshadowed at least twice. This did not prompt action by the respondent. Even after the application had been filed the respondents did not accept the inevitable, that they were bound by the deed, until the day before the hearing. In these circumstances I conclude the unreasonable conduct by the respondents has unnecessarily prolonged the proceedings. The applicant offered to settle the matter on a fixed costs basis, but this offer was made only two days before the hearing. The respondents did not reply to that offer. While courtesy suggests a response was appropriate, it does not follow that the respondents should have accepted the fixed costs proposed by the applicant. I do not consider the implicit rejection of the offer to settle a matter that justifies departure from the ordinary practice.

¹ *Uniform Civil Procedure Rules 1999* (Qld) r 681.

² *Uniform Civil Procedure Rules 1999* (Qld) r 703.

³ *Colgate Palmolive v Cussons* (1993) 46 FCR 225; 118 ALR 248; [1993] FCA 801 at [24]; *Cosgrove v Johns* [2000] QCA 157 at [8]-[9]; *Di Carlo v Dubois* [2002] QCA 225 at [37]-[38].

- [5] At the hearing of this matter Mr Brown for the respondents conceded it was appropriate to make orders for the enforcement of the deed. He offered no real excuse for the conduct of the respondents. Mr Brown resisted an order for indemnity costs on three bases: the respondents were not in breach of a court order, the amount claimed by the applicant is excessive and they co-operated by not opposing the orders in the end.
- [6] That the respondent was not in breach of a court order is irrelevant. It does nothing to address the reality that the applicant had to employ the assistance of the court to enforce the deed the respondents' had agreed to perform. The suggestion the amount claimed is excessive, even if true, does not assist the respondents. Only "costs reasonably incurred and of a reasonable amount" will be allowed.⁴ Finally, the lateness of the resolution of the dispute is a reason for, rather than against, awarding indemnity costs.
- [7] Having considered the matters set out above it is in my view appropriate to depart from the usual order and to instead order costs of the application to be assessed on the indemnity basis.

Order

- [8] The respondents pay the applicants' costs of the application to be assessed on the indemnity basis.

⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 703(3).