DISTRICT COURT OF QUEENSLAND

CITATION:	*Grealy v State of Queensland* [2022] QDC 231
PARTIES:	**PAUL GREALY** (plaintiff) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO:	2513 of 2021
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	17 October 2022
DELIVERED AT:	Brisbane
HEARING DATE:	27-28 September 2022
JUDGE:	Rosengren DCJ
ORDERS:	**The order of the court is that Shine Lawyers pay 85% of Mr Dwyer's costs of the application filed on 26 September 2022 to be assessed on the indemnity basis**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM GENERAL RULE – PARTIAL SUCCESS - where the general rule is that costs follow the event – where the plaintiff was successful in relation to a redrafted subpoena – where r 684 UCPR allows a court to make an order for costs of a particular question or part of a proceeding – whether there are any special or exceptional circumstances to enliven r 684 PROCEDURE – COSTS – DEPARTING FROM GENERAL RULE – INDEMNITY COSTS – whether there was some special or unusual feature of the application that justified a departure from the usual rule that the costs be ordered on the standard basis – whether there should be an order for costs on the indemnity basis PROCEDURE – COSTS – DEPARTING FROM GENERAL RULE – SOLICITORS – power to order solicitors to pay costs of application – failure to give reasonable or proper attention to the relevant law and facts – where subpoena issued close to the trial – whether the solicitors for the plaintiff ought to pay the costs of the application

Uniform Civil Procedure Rules 1999 (Qld) rr 5, 242, 243, 244, 245, 246, 247, 248, 249, 416, 467, 679, 681, 690

Alborn v Stephens [2010] QCA 58
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225
Elliott Harvey Securities v Raynel & Anor [2015] QSC 212
Gitsham, Edwards & Jensen v Suncorp Metway Insurance Ltd [2002] QCA 416
Johnston & Anor v Herrod & Ors [2012] QCA 361
Kennedy v Wallace [2004] 136 FCR 114
Levey v Bishop Paul Bernard Bird [2020] VSC 615
Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149 (No 2) [2016] QSC 65
LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toiga & Ors [2013] QCA 305
Mac Wealth Holdings Pte Ltd v Integrated Green Energy Amsterdam BV [2020] NSWSC 351
Myers v Elman [1940] AC 282
Patonga Beach Holdings Pty Ltd v Lyons [2009] NSWSC 869
Pratten v Pratten [2005] QCA 213
Re Ansett Australia Holdings Ltd [1998] 1 Qd R 116
Smits v Tabone and Blue Coast Yeppoon Pty Ltd v Tabone [2007] QCA 337
State Mercantile Pty Ltd (No 2) v Oracle Telecom Pty Ltd [2017] QDC 60
Steindl Nomimees Pty Ltd v Laghaifar [2003] QCA 157
St Gregory's Armenian School Inc, Re [2020] NSWSC 785
Todrell Pty Ltd v Finch & Ors [2007] QSC 386
White Industries (Qld) Pty Ltd v Flower & Hart (a firm) (1998) 156 ALR 169

COUNSEL: ME Eliadis for the plaintiff
JE Murdoch KC and A Mellick for the defendant
R Treston KC and SP Colditz for the non-party applicant

SOLICITORS: Shine Lawyers for the plaintiff
Crown Law for the defendant
Crown Law for the non-party applicant

Introduction

[1] This litigation involves a claim for personal injuries against the State of Queensland. The plaintiff was detained at the Brisbane Youth Detention Centre ('the BYDC') between June and September 2004. It is alleged that he was sexually abused by an unidentified custodial officer on two separate occasions in a toilet while the officer was purporting to undertake a search of him. It is admitted by the defendant that it was responsible for the daily operation, administration and management of the BYDC, and for the safe custody and well-being of the children detained there. It is alleged in the statement of claim the custodial officer was an employee, servant or agent of the

defendant and that it was negligent and is also vicariously liable for the intentional torts committed by the custodial officer. The trial was set down to commence for four days on 27 September 2022. Both liability and quantum remain in issue.

[2] On 19 September 2022, William Dwyer, the General Manager of the Queensland Government Insurance Fund ('QGIF') was served with a subpoena issued in this proceeding, at the request of the plaintiff. Relevantly, it requested the production of 10 categories of documents. Mr Dwyer is not a party to the proceeding. The return date for the subpoena was the first day of the trial. By application filed on 26 September 2022, Mr Dwyer applied for orders, including pursuant to r 416 of the *Uniform Civil Procedure Rules* 1999 (Qld) ('the UCPR'), that the subpoena be set aside, either in its entirety or to the extent that it required the production of the documents listed in the schedule to the subpoena.

[3] I heard the application on the return date, being the first day of the trial. Mr Dwyer was cross-examined. After the conclusion of his cross-examination, counsel for the plaintiff informed the court that the plaintiff was abandoning the request for the production of nine of the ten categories listed in the schedule to the subpoena and redrafted the remaining category, the effect of which was to significantly reduce and clarify the documents referred to in that category. Mr Dwyer continued pressing the application to have the redrafted subpoena set aside. On the following day, being 28 September 2022, I delivered an *ex tempore* judgment, the effect of which was to order Mr Dwyer to produce the documents the subject of the redrafted subpoena.

[4] This leaves for determination the question of the costs of the application. It was submitted on behalf of the plaintiff that the appropriate order is that there be no order as to costs. It was contended on behalf of Mr Dwyer that orders ought to be made requiring Shine Lawyers to pay the costs on an indemnity basis. In light of this submission, counsel for the plaintiff requested the opportunity to provide written submissions, which were forwarded to my associate the following day.

History of the proceedings

[5] The claim in the substantive proceedings was filed on 27 September 2021. Pleadings closed with the filing of the reply on 10 November 2021.

[6] On 12 July 2022, the solicitors for the plaintiff filed an application for the court to dispense with the signature of the defendant on the request for trial date. This application was said to be made pursuant to r 467 of the UCPR. Subsection (4)(f) provides that a matter is ready for trial, if as far as the party is concerned, the proceeding is in all respects ready for trial. A supporting affidavit was filed on 26 July 2022. Annexed to the affidavit is an email from the solicitors for the plaintiff to Crown Law indicating that they disagreed that serving a request for trial date was premature. The parties ultimately consented to the matter being listed for trial and both parties confirmed that it was ready for trial.

[7] On 16 August 2022, the matter was set down for hearing for four days commencing 27 September 2022.

[8] At the instigation of the court, the matter was listed for a pre-trial mention on 16 September 2022. Counsel for the plaintiff made an oral application to adjourn the trial.

Several reasons were proffered in circumstances where there was no material placed before the court in support of the application. The reasons included that:

(i) despite the matter having been set down for hearing a month earlier, counsel for the plaintiff had only very recently conferred with the plaintiff;
(ii) the plaintiff was an inmate in an adult correctional facility and there had been problems with the audio-visual connection, making it challenging for counsel for the plaintiff to confer with him;
(iii) a view of the BYDC may have been required and it would be inappropriate for the plaintiff as a current inmate of an adult correctional facility to be attending the BYDC;
(iv) the plaintiff would personally incur significant costs in being produced to court in the order of "*thousands of dollars*" per day, given that this is a civil and not a criminal proceeding; and
(v) the plaintiff would be "*shackled*" and wearing prison garments which raised the question of possible prejudice and would have psychological effects on the plaintiff.

[9] The oral application was opposed by the defendant. It was refused on the basis that:

(i) since COVID-19 audio-visual links to prison facilities were regularly being used without incident and consideration could be given to conferring with the plaintiff in person, given that the trial was not commencing until 27 September 2022;
(ii) there was no evidence before the court to determine whether a view would be desirable, in circumstances where defence counsel informed the court that it would be unnecessary as there are photographs depicting the relevant areas of the BYDC the subject of the litigation;
(iii) there was no evidence before the court that the plaintiff would be personally required to incur "*thousands of dollars*" each day in attending court for the hearing; and
(iv) prisoners commonly appear before courts and whether or not the plaintiff was "*shackled*" and/or dressed in prison attire would not influence a determination of the real issues in dispute, where the hearing was before a judge and not a jury.

[10] The parties were informed that I would be on leave the following week and would not be available until Monday 26 September 2022, if there were any further applications to be made before me. By email dated 20 September 2022, my associate informed the parties that if any applications needed to be made in my absence, Jarro DCJ would be available to hear them. No further applications were made on behalf of the plaintiff.

The subpoena

[11] By email dated 16 September 2022, the solicitors for the plaintiff informed Crown Law that they intended to serve the subpoena on Mr Dwyer and asked whether there was any impediment to it being served on Crown Law as distinct from Mr Dwyer personally. Crown Law confirmed that this would be acceptable.

[12] The subpoena was issued and served on 19 September 2022 ('the original subpoena'). It was returnable before the Court on the first day of the trial, being 27 September 2022. It required that Mr Dwyer produce the documents described in the schedule and attend for the purpose of giving evidence. The schedule detailed the following 10 categories:

A. Every document relating to a complaint, allegation, claim or investigation,

including internal investigations, of sexual abuse committed by, or alleged to be committed by a detention centre officer, against a young person or young persons detained at Brisbane Youth Detention Centre (including every document relating to or containing details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has paid compensation, damages and/or costs to the claimant)

B. *Every document relating to a complaint, allegation, claim or investigation, including internal investigations, of sexual abuse committed by, or alleged to be committed by a detention centre officer, against a young person or young persons, in a toilet, or toilet block while detained at Brisbane Youth Detention Centre (including every document relating to or containing details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has paid compensation, damages and/or costs to the claimant)*

C. *Every document relating to a complaint, allegation, claim or investigation, including internal investigations, of sexual abuse committed by, or alleged to be committed by a detention centre officer, against a young person or young persons detained at Brisbane Youth Detention Centre in circumstances where they were escorted from the Education Unit (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and*
the total number of each such claims in respect of which the State of Queensland has paid compensation, damages and/or costs to the claimant)

D. *Every document relating to a complaint, allegation, claim or investigation, including internal investigations of sexual abuse committed by, or alleged to be committed by any other person employed by the Defendant, against a young person*
or young persons detained at Brisbane Youth Detention Centre (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has paid compensation, damages and/or costs to the claimant)

E. *Every document relating to a complaint, allegation, claim or investigation, including internal investigations of sexual abuse committed by, or alleged to be committed by any other person employed by the Defendant, against a young person*
or young persons in a toilet, or toilet block while detained at Brisbane Youth Detention Centre (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has paid compensation, damages and/or costs to the claimant)

F. *Every document relating to a complaint, allegation, claim or investigation, including internal investigations of sexual abuse committed by, or alleged to be committed by any other person employed by the Defendant, against a young person*

or young persons detained at Brisbane Youth Detention Centre in circumstances where they were escorted from the Education Unit (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has paid compensation, damages and/or costs to the claimant)

G. *Every document relating to any application for Redress pursuant to the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 in respect of any allegation of sexual abuse committed by a detention centre officer, against a young*
person or young persons detained at Brisbane Youth Detention Centre (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has made a Redress payment to the claimant)

H. *Every document relating to any application for Redress pursuant to the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 in respect of any allegation of sexual abuse committed by any other person employed by the Defendant, against a young person or young persons detained at Brisbane Youth Detention Centre (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and the total number of each such claims in respect of which the State of Queensland has made a Redress payment to the claimant)*

I. *Every document relating to any application for Redress pursuant to the Forde Redress Scheme in respect of any allegation of sexual abuse committed by a detention centre officer, against a young person or young persons detained at Brisbane Youth Detention Centre (including every document relating to or containing the details of the total number of each such claims of sexual abuse, and*
the total number of each such claims in respect of which the State of Queensland has made a Redress payment)

J. *Every document relating to any application for Redress pursuant to the Forde Redress Scheme in respect of any allegation of sexual abuse committed by any other person employed by the Defendant, against a young person or young persons*
detained at Brisbane Youth Detention Centre (including every document relating to or containing the details of the total number of each such claims of sexual abuse,
and the total number of each such claims in respect of which the State of Queensland has made a Redress payment)

[13] By email dated 21 September 2022, Crown Law informed the plaintiff's solicitors that it considered that the original subpoena was too broad in scope and it was expected that instructions would be received to apply to set it aside on the return date of 27 September 2022. The plaintiff's solicitors were invited to formally withdraw the subpoena, failing which material would be prepared to set it aside, with an application

for the costs to be paid by the plaintiff.

[14] Later that day, the solicitors for the plaintiff responded to this email. It referred to a without prejudice letter dated 20 September 2022, which is not before the court. Further, it requested the solicitors for Mr Dwyer to set out the classes of documents referred to in the original subpoena that were so broad as to make it impossible or unreasonable for Mr Dwyer to comply with it. An example was provided to the effect that it may have been that QGIF did not administer applications for Redress as referred to in paragraphs G, H, I and J of the schedule. Solicitors for the plaintiff expressed surprise that QGIF did not have documents summarising the matters referred to in paragraphs 2 & 3 of the without prejudice letter. The email went on to say that the solicitors would be aghast if a model litigant would conduct the claim in such a way as to give the courts the impression that the plaintiff was the only person who had made allegations of sexual abuse perpetrated by detention centre officers against children detained in the BYDC, both before and after the period that the plaintiff was detained there. The plaintiff's solicitors considered it would be helpful to refer Mr Dwyer's solicitors to the model litigant principles.

[15] On that evening, the solicitors for Mr Dwyer emailed the plaintiff's solicitors explaining that the issues in relation to the original subpoena were numerous and that steps had been taken to brief separate counsel to those briefed for the trial, and that the position remained that the documents requested were so broad that an application would be made to set it aside. An invitation was made again to formally withdraw it. The plaintiff's solicitors were put on notice that material was being drawn to set aside the original subpoena and that the application would proceed on the return date. It was envisaged that the material would be served on them two days later, on Friday 23 September 2022, in circumstances where the day prior to this was a public holiday. On 22 September 2022, the plaintiff's solicitors emailed the solicitors for Mr Dwyer indicating that they looked forward to receiving the materials so that they could better understand the position.

[16] At approximately 6pm on Friday 23 September 2022, the sworn but unfiled affidavit of Mr Dwyer was forwarded to the plaintiff's solicitors. It stated that if the original subpoena was withdrawn obviating the need for the application to be heard, there would be no costs consequences. On the Monday morning of 26 September 2022, the solicitors for the plaintiff served a sealed copy of the affidavit of Ms Carlson, that was relied on for the purposes of the application. It was said that the advice of counsel was being sought. A few hours later, by a further email, the solicitors for the plaintiff confirmed that the application to set aside the original subpoena would be opposed and that Mr Dwyer would be required for cross-examination. The sealed application to set it aside and the supporting affidavit of Mr Dwyer were served on the plaintiff's solicitors later that day.

[17] In the course of the hearing of the application on 27 September 2022, counsel for the plaintiff informed the court that he would be redrawing the subpoena to read as follows ('the redrafted subpoena'):

A. Every Part 1 Notices of Claim in the 750 files as identified by Mr Dwyer of the Queensland Government Insurance Fund on 27 September 2022 containing an allegation of sexual abuse committed by, or alleged to be committed by a detention centre officer employed by the Defendant, against a young person or young persons detained at Brisbane Youth Detention Centre.

Costs of the application

[18] Costs may be awarded to a person who makes a successful application for a subpoena to be set aside.[1] Rule 417 of the UCPR provides that Mr Dwyer could have applied for the court to order the plaintiff pay an amount of reasonable losses or expenses incurred in complying with the subpoena. This may include the costs of seeking legal advice on any objection to it.[2] This means that if the application to set aside the subpoena had not been made, Mr Dwyer would have been entitled to make an application for an amount to be paid by the plaintiff reflecting the expenses incurred in complying with the subpoena.

[19] Chapter 17A of the UCPR deals with the costs of applications. The term "party" for the purposes of that chapter, is defined in r 679 to include "a person not a party to a proceeding by or to whom assessed costs of the proceeding are payable". Accordingly, even though Mr Dwyer is not a party to the proceeding, if he is considered to have been successful in this application, he is entitled to the benefit of the general rule provided for in r 681(1), namely that costs follow the event unless the court considers otherwise.[3] It will be necessary to consider the scope of the original subpoena when considering the costs of the application.

[20] The approach has generally been that a party having succeeded to a significant extent in relation to an application, should receive its costs of the application.[4] However, r 684 enables the court to make an order for costs of a particular question in, or a particular part of, a proceeding and by r 684(2), a court may declare what percentage of the costs of the proceeding is attributable to that question or part. Ordinarily, the fact that a successful party fails on particular issues does not have the consequence that the party is inevitably, or even, perhaps, normally deprived of some of its costs.[5] In other words, the general rule remains that costs should follow the event. The question is whether there are any special or exceptional circumstances about the present case that justifies a departure from the general rule sufficient to engage r 684.

[21] Whether Mr Dwyer is entitled to the costs of the application depends on the likely success of it, when consideration is given to the documents listed in the schedule of the original subpoena. I reject the submission of the counsel for the plaintiff that "*the situation is simple. If the documents referred to in the subpoena are relevant, they are required to be produced"*. Relevance is not the sole criteria and in my view the original subpoena would have been set aside. In arriving at this conclusion, I am mindful that the defendant and Mr Dwyer are both represented by Crown Law and that Mr Dwyer and thereby QGIF would have been taken to have had some knowledge that would have assisted in complying with the subpoena.

---

[1] *Kennedy v Wallace* [2004] 136 FCR 114; *Pratten v Pratten* [2005] QCA 213.
[2] *Levey v Bishop Paul Bernard Bird* [2020] VSC 615.
[3] *State Mercantile Pty Ltd (No 2) v Oracle Telecom Pty Ltd* [2017] QDC 60.
[4] *Alborn v Stephens* [2010] QCA 58 at [8] per Muir J; *Todrell Pty Ltd v Finch and Ors* [2007] QSC 386 per Chesterman J.
[5] *Alborn v Stephens* [2010] QCA 58 at [8] per Muir J; *Todrell Pty Ltd v Finch and Ors* [2007] QSC 386 per Chesterman J.

[22] The starting point is that as the recipient of the subpoena, Mr Dwyer was required to comply with it.[6] However, the difficulty for him is that even on a sensible reading of it with reference to the circumstances as known to him, it required him as a non-party, to form a view as to the documents that were required to be produced. Further, accessing and identifying those documents which potentially responded to the original subpoena would have been an unduly onerous exercise. The principal reasons for my views in this regard are detailed below.

[23] First, each of the ten categories of documents requested commenced with "*every document relating to"*. The authorities establish that it would rarely be appropriate to use the connecting phrase 'relating to' in a subpoena.[7] This is because the nature of the connection it requires is too vague. There is nothing about the drafting of the original subpoena that would place it in that rare category. Rather, it imposed on Mr Dwyer an impossible and unfair obligation to determine the scope of the search that was required. It was objectionable in that it left open for consideration a very large volume of documents and the relevance of some of them would have been questionable.

[24] Second, given the breadth of the proposed categories in the original subpoena, responding to it was necessarily going to involve Mr Dwyer and thereby QGIF undertaking an unduly onerous and costly exercise. It was highly unlikely that in the time required, QGIF was going to have the staffing capacity and other resources to gather the voluminous electronic and paper documents caught by it. The task was never going to be a manageable one. It is of no surprise that as much was confirmed by Mr Dwyer in his affidavit filed on 26 September 2022.

[25] Third, none of the categories of documents required to be produced were referable to any time frame. This meant that the request extended to documents relevant to other alleged 'abuse' type incidents that occurred well after 2004. It is arguable drafting a subpoena in this way extends beyond what would be said to be a legitimate forensic purpose.

[26] Fourth, the ten categories of documents were unnecessarily repetitive, compounding the need for Mr Dwyer to spend an unreasonable period responding to it. Also, it involved the prospect of duplication of work. The repetitive nature of it was conceded by Ms Carlson in paragraph 23 of her affidavit filed on 26 September 2022.

[27] For these reasons, I am persuaded that the original subpoena was deficiently drafted and would have been set aside, with a costs order in Mr Dwyer's favour. There was no delay in making the application to have it set aside. This is further addressed in paragraph 46 below. The shortcomings in the drafting of the original subpoena which ought to have been readily apparent at the outset, were not acknowledged on behalf of the plaintiff until after the oral hearing of the application had commenced.

[28] While I am cognisant of the need to exercise caution when depriving successful parties of some of their costs, in my view this is an appropriate case. While the redrafted subpoena very significantly confined and much more clearly defined the documents to be produced, Mr Dwyer continued to press the application to have it set aside. It was contended on his behalf that there was no power to amend and that the documents

---

[6] *Patonga Beach Holdings Pty Ltd v Lyons* [2009] NSWSC 869.

[7] *Mac Wealth Holdings Pte Ltd v Integrated Green Energy Amsterdam BV* [2020] NSWSC 351 at [4] per Ball J; *St Gregory's Armenian School Inc, Re* [2020] NSWSC 785 at [22] per Black J; *Levey v Bishop Paul Bernard Bird* [2020] VSC 615 at [38].

requested were of marginal relevance. These submissions were rejected and increased the length of the oral hearing, although not the preparation for it. The apportionment must necessarily be by a broad approach. I consider that it is in the interests of justice to reduce the costs otherwise recoverable by Mr Dwyer by 15 per cent.

Standard or indemnity basis

[29] As to the reasoning for an indemnity costs order, it is submitted on behalf of Mr Dwyer that in relation to the original subpoena:

(i) The scope of what was sought was improper and unmaintainable from the outset and was bound to be set aside.

(ii) The cross-examination of Mr Dwyer in relation to the requested documents was principally limited to questions regarding notices of claim held in the electronic records of QGIF. He was not asked in any detail about other categories of documents within the scope of what was required to be produced as set out in the schedule.

(iii) It had been open to the plaintiff to seek non-party disclosure under rr 242 to 249 of the UCPR at any time since the close of pleadings.

(iv) It was readily apparent that the subpoena required the production of documents containing sensitive and confidential information in relation to persons who are not parties to the litigation. Therefore, it ought to have been appreciated by the solicitors for the plaintiff that the request was going to involve a substantial document review task and the implementation of a regime for identifying personal details of these other persons.

[30] In determining whether indemnity costs should be ordered, the principal focus of the inquiry is on the conduct in and in respect of the litigation by the party against whom the costs order is made.[8] It is for this reason that I reject the submission of counsel for the plaintiff that if an application for indemnity costs was to be made, that it ought to have been included in the application.

[31] The applicable principles as to indemnity costs were summarised in *Colgate-Palmolive Co v Cussons Pty Ltd*[9]. There needs to be some special or unusual feature which justifies the use of the Court's discretion to make such an award.[10] The type of misconduct that would justify it include proceedings commenced or continued in wilful disregard of established facts or clearly established law, commencing proceedings for some ulterior motive, or misconduct causing the loss of time to the court and the other parties.[11]

[32] The question is whether the plaintiff's opposition to the application to set aside the original subpoena, however unpersuasive it proved to be, amounted to conduct sufficiently egregious to bring into operation the abovementioned principles.

[33] I do not accept the submission on behalf of Mr Dwyer to the effect that the plaintiff could have requested non-party disclosure as an alternative to the subpoena. While

---

[8] *Johnston & Anor v Herrod & Ors* [2012] QCA 361at [11] per Muir JA.
[9] (1993) 46 FCR 225.
[10] *LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toiga & Ors* [2013] QCA 305.
[11] *Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149 (No 2)* [2016] QSC 65; *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337 at [45] per Cullinane J.

there might be other options to obtain documents, such as by non-party disclosure, this does not deny the plaintiff the right to use the legitimate tool of a subpoena, provided it is not deployed in an oppressive or improper manner.

[34] Having said this, it is difficult to see why the pursuit of the opposition to Mr Dwyer's application to set aside the original subpoena should not be characterised as unreasonable. It ought to have been recognised that it was doomed to failure. For the reasons set out above, the original subpoena was formulated in a way that was objectionable and the documents requested in the categories overreached in a manner that was oppressive and unduly burdensome. Then continuing to oppose the application to set it aside, was conduct which should be regarded as proceeding in wilful disregard of the known facts and clearly established law. In my view it amounts to conduct that was so unreasonable that it justifies an order for indemnity costs.

Conduct of the plaintiff's solicitors

[35] As to the reasoning for an order for the defendant's costs to be paid by Shine Lawyers, it is submitted on behalf of Mr Dwyer that:

(i) There were no prospects of success in relation to the original subpoena.
(ii) The issuing and then service of the original subpoena should never have been delayed on the part of Shine Lawyers until 19 September 2022.

[36] The power to award costs personally against solicitors derives from r 690 of the UCPR. It relevantly provides that a solicitor may be required to repay costs ordered to be paid by their client, if the costs were incurred by the delay, misconduct or negligence of the solicitor. The power should be exercised sparingly and only in clear cases.[12]

[37] In *Myers v Elman*[13] Lord Wright said the following:

> "The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger C.B. in *Stephens v. Hill*. … The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. … It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct

[12] *Re Ansett Australia Holdings Ltd* [1998] 1 Qd R 116*; Gitsham, Edwards & Jensen v Suncorp Metway Insurance Ltd* [2002] QCA 416.
[13] [1940] AC 282 at 319.

> complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action."

[38] In *Steindl Nomimees Pty Ltd v Laghaifar*[14], Davies J (with whom Williams JA and Philippedes J agreed), considered that the jurisdiction to order costs against an unsuccessful party's solicitors was enlivened when the solicitors had unreasonably initiated or maintained a proceeding, even on instructions, which was unarguable and therefore was bound to fail. This is not to be considered with the benefit of hindsight.

[39] White J made the following observations in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*[15]:

> "This analysis of the cases makes it clear that the jurisdiction to order costs against an unsuccessful party's solicitors is enlivened when they have unreasonably initiated or continued an action when it had no or substantially no prospects of success but such unreasonableness must relate to reasons unconnected with success in the litigation or to an otherwise ulterior purpose or to a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice. Further, the cases establish the proposition that it is a relevant serious dereliction of duty or misconduct not to give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success."

[40] In *Elliott Harvey Securities v Raynel & Anor*[16], indemnity costs were ordered against a party's solicitors in circumstances where an application to set aside a statutory demand pursuant to s 459G of the *Corporations Act* 2001 (Cth) was unreasonably continued. This was despite it not having been served within the permissible time, resulting in the application having no worthwhile prospects of success. Bond J found that the application was doomed to failure and that continuing with it should be regarded as proceeding in wilful disregard of the known facts or clearly established law.

[41] The findings in paragraph 34 above means that the first part of the test in *White Industries* is satisfied. Shine Lawyers in the circumstances in which they were placed, unreasonably continued opposing the application to set the original subpoena aside, when it ought to have been evident that there was no reasonable prospect of success on account of established law.

[42] As to the second part of the test in *White Industries,* the question is whether the unreasonableness involved in Shine Lawyers continuing to oppose the application which had no prospects of success related "…to a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice". In my view, it did. There are a few reasons for this.

[43] First, the unreasonableness by Shine Lawyers related to the firm's failure "…to give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success". This was not a case requiring the solicitors to sit in judgement on the reliability of witnesses. The request on behalf of the plaintiff for a subpoena in the form issued was always liable to be set aside. It ought to have been obvious to the solicitors. No attempt was made prior to the hearing to narrow the scope

---

[14] [2003] QCA 157 at [24].
[15] (1998) 156 ALR 169 at 239.
[16] [2015] QSC 212.

of it, even after the affidavit of Mr Dwyer was provided to them. The request for a subpoena in such a form, and the resistance to the application to set it aside by advancing untenable arguments call for, in my view, an order for costs against Shine Lawyers personally.

[44] Second, the chronology of this matter reveals that the timing by Shine Lawyers of the request for the subpoena to be issued amounted to a serious dereliction of duty. Pursuant to r 5 of the UCPR, the parties have an implied obligation to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". That aim was hardly promoted here. The request for the original subpoena to be issued was made after an application had been made by Shine Lawyers to dispense with the defendant's signature on the request for trial date and only five business days prior to the commencement of the trial. This was even though it had been confirmed by Shine Lawyers that from the plaintiff's perspective, the proceeding was in all respects ready for trial. Clearly it was not.

[45] Third, even if the subpoena had been properly drafted, because of the lateness of the request, it would have almost certainly resulted in an adjournment of the trial. The return date was the first day of the trial. It ought to have been obvious to Shine Lawyers that confidentiality issues were likely to arise, as to the production of documents giving identifying personal information in respect of other persons unrelated to this litigation. While confidentiality is not of itself a reason to set aside a subpoena, it is a claim that would properly have been made after the subpoena has been answered, and after there was an application by the plaintiff to inspect the documents. This is most likely to have been addressed by the implementation of a confidentiality regime, requiring the redaction of parts of those documents. This would have undoubtedly been a time-consuming exercise necessitating an adjournment of the trial.

[46] Fourth, I do not accept the submission made by counsel for the plaintiff that Mr Dwyer could have requested that his application be heard prior to the first day of the trial. It overlooks the fact that this was the return date specified in the original subpoena. Further, there were only four business days between the service of it and the first day of the trial. In that time, Shine Lawyers were advised that because there were numerous issues with the subpoena, counsel needed to be briefed. It is hardly surprising that time was required to consider the terms of the original subpoena, the potential documents that fell within its scope and whether an application ought to be made to set it aside. There was then the preparation of the affidavit material and the submissions for the hearing of the application. In short, there was no delay in either making the application or having it heard.

[47] Fifth, Shine Lawyers knew within two days of the service of the original subpoena, that it was likely that an application would be made on the return date to set it aside, with the reason being that it was "*so broad in scope*". Given the obvious shortcomings in the drafting of it, it is perhaps not surprising that the solicitors for Mr Dwyer did not expand on this in their ongoing communications with Shine Lawyers. Instead of turning their mind to this issue, Shine Lawyers saw fit to remind Mr Dwyer of the model litigant principles. The purported reasons for this were misguided. Even after Mr Dwyer's affidavit had been served on Shine Lawyers, a further invitation was made for the subpoena to be withdrawn with no adverse consequences as to costs. This invitation was declined and confirmation was provided that the application would be opposed.

[48] Sixth, I am not persuaded that it was only after Mr Dwyer was cross-examined that it became clear that the redrafted subpoena in a narrower and less ambiguous form was appropriate. While in evidence, Mr Dwyer confirmed that QGIF did not hold any records relevant to the *National Redress Scheme for International Child Sex Abuse* or the *Forde Redress Scheme*, this had already been deposed to in paragraph 17 of his affidavit. Otherwise, for reasons which are not readily apparent, the questions in cross-examination principally focused on the notices of claim, despite the breadth of the documents that had been requested in the original subpoena.

[49] The abovementioned matters justify an order for costs against Shine Lawyers.