

SUPREME COURT OF QUEENSLAND

CITATION: *Young & Ors v Hoger & Ors* [2002] QSC 013

PARTIES: **WILLIAM IAN YOUNG, DELICE YOUNG, GARY ALAN GRANT, EVELYN JEAN GRANT and LAKE MAPLE PTY LTD**
(plaintiffs)
ELVIN JOHN HOGER
(first defendant)
MERLE EDITH HOGER
(second defendant)
STATE OF QUEENSLAND
(third party)

FILE NO/S: SC 8689 of 1998

DIVISION: Trial Division

PROCEEDING: Claim for indemnity costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgement delivered 06 December 2000
Further order delivered 01 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 19 July 2000 – 27 July 2000

JUDGE: Douglas J

FURTHER ORDER: **That costs are to follow the event and be assessed on the standard basis.**

CATCHWORDS: CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE – EXCEPTIONS – FRAUD OR FORGERY – COSTS – indemnity costs.

Land Title Act 1994, s 188B(1)
Real Property Act 1861, s 127
Supreme Court Act 1995
Uniform Civil Procedure Rules 1999, r 689, r 703, r 704

Young v Hoger [2001] QCA 453 23 October 2001
Cox v Bourne (1897) 8 QLJ 66
Keddell v Regarose Pty Ltd [1995] 1 Qd R 172

COUNSEL: D J Campbell for first defendant (applicant)
R J Douglas SC with him B J Clarke for third party (respondent)

SOLICITORS: J J Riba & Company Solicitors for first defendant (applicant)
C W Lohe, Crown Solicitor, for third party (respondent)

- [1] **Douglas J:** In this matter I gave judgment on 6 December 2000; [2000] QSC 455 wherein I found, *inter alia*, that Mortgage No 702569150 registered over land described as Lot 2 on RP 152209 in the County of Canning, Parish of Mooloola, was registered by the fraud of the second defendant, Merle Edith Hoger.
- [2] I made other findings against the plaintiffs because of the conduct of their solicitor which findings were reversed on appeal: *Young v Hoger* [2001] QCA 453; 23 October 2001.
- [3] At the original hearing the action by the first defendant, Elvin Hoger (“Mr Hoger”) against the third party, State of Queensland, was not heard and determined. It was left aside pending the outcome of the actions between the plaintiff and the defendant, and the first defendant and the second defendant. It has now been remitted back by the Court of Appeal to the Trial Division for determination.
- [4] In those proceedings Mr Hoger seeks an order as to the amount of compensation to be paid by the State pursuant to s 188B(1) of the *Land Title Act* 1994 (“the Act”). That section relevantly says:
- “For s 188 or 188A, a claimant may apply to the Supreme Court for an order –
- (a) about the amount of compensation to be paid by the State; or
(b) directing the registrar to take stated action.”
- [5] Section 188 of the Act says:
- “(1) This section applies if a person (“the claimant”) is deprived of a lot or an interest in a lot, because of –
- (a) the fraud of another person ...;
- (2) The claimant is entitled to compensation from the State for the deprivation.”
- [6] The claimant is of course Mr Hoger. He was deprived of an interest in a Lot because of the fraud of his wife, Merle Edith Hoger.
- [7] The parties have agreed that the compensation to which Mr Hoger is entitled is the sum of \$206,527.29, which sum includes \$12,266.96 interest to 29 November 2001.
- [8] The only matter before me now is a claim by Mr Hoger that he is entitled to indemnity costs. In this regard counsel for Mr Hoger pointed to s 127 of the *Real Property Act* 1861 which is the precursor of the present *Land Title Act* provisions. That section permitted a Supreme Court Judge to give a certificate for payment from the Assurance Fund from the Treasurer of the Colony of “the amount of such damages and costs”. Under s 127, when an action was commenced against the registrar as nominal defendant or judgment had been obtained against the defendant, but had not been satisfied, the costs of the action could be recovered from the

Assurance Fund. It was submitted that the word “costs” included all expenses of litigation necessarily incurred in establishing the plaintiff’s claim for damages relying upon *Cox v Bourne* (1897) 8 Q LJ 66 at 69-70.

- [9] Reference is also made to *Keddell v Regarose Pty Ltd* [1995] 1 Qd R 172, in particular in a passage which appears at p 178 as follows:

“Subject to the rules as to remoteness of damage and a plaintiff’s duty to mitigate his loss, a party defrauded is entitled to ‘... to be put, so far as possible, in the position he would have been in’ if the fraud had not occurred: *Gould v Vaggelas* (1985) 175 CLR 215 at 220. This is consistent with ‘... underlying principle ... that damages in the law of tort are essentially restitutionary, being designed to ensure that the plaintiff is restored, so far as money can do it, to his former position by compensating him for the loss sustained, no less and no more’ per McPherson J (as His Honour then was) in *Davidson v J S Gilbert Fabrications Pty Ltd* [1986] 1 Qd R 1 at 4.”

- [10] The submission as then made that the same principles should be applied, namely that in assessing compensation Mr Hoger should be placed in the same position as if the fraudulent actions had not occurred. It must be remembered, though, that the remarks of their Honours in that case dealt only with the principles of assessment of compensation in circumstances similar to this case.
- [11] In the *Uniform Civil Procedure Rules 1999 (UCPR)* r 704 prescribes in sub rules 2 and 3 the occasions when costs may be ordered to be assessed on an indemnity basis in most cases. Those sub rules of course do not impact upon the wide discretion granted in sub rule 1 of the Rule.
- [12] In respect of costs it was submitted for the State of Queensland that:
- (a) the costs of the third party proceedings do not form part of the plaintiff’s loss damage or compensation caused by the deprivation of his interest, but rather merely the costs of the proceeding (being the third party proceeding) as the vehicle by which that entitlement was sought to be enforced; and
 - (b) Section 48 of the *Supreme Court Act 1995* adequately provides for post-judgment interest, but in any event no immediately loss is pointed to.
- [13] The second submission was made with respect to a submission that an order should be made for post-judgment interest, the provisions of s 48 not being adequate.
- [14] There is no doubt that costs of a proceeding are in the discretion of the court (*UCPR* r 689), and that the ordinary rule is that the cost of a proceeding are assessed on the standard basis (*UCPR* r 703). I have already referred to the power, (*UCPR* r 704), to assess costs on an indemnity basis. In this case there is nothing pointed to by me in my judgment, by the Court of Appeal, nor by Mr Hoger which suggests any inimical conduct on the part of the State which could attract assessment of costs of the third party proceedings on an indemnity basis. The proceedings were legitimately defended on the footing that there was a contest as to whether Mr

Hoger had in fact suffered any loss. Mr Hoger's contest of the mortgagee's claim, and indeed my findings at first instance, evidence that.

- [15] By analogy, if Mr Hoger were to be ordered to be entitled to indemnity costs in this action, it could be contended that in any claim provided for at either common law or statute where A was entitled to sue B for damages for a breach of duty (for example any ordinary motor vehicle or workplace claim) the plaintiff, without regard to the *UCPR*, would be always entitled to an indemnity costs order because the proceeding was only brought to enforce the claim.
- [16] In my view, except in a special case, costs should, in cases such as this, follow the event and be assessed on the standard basis.