SUPREME COURT OF QUEENSLAND

CITATION:	*Curtis, Coolee and Palmshell P/L v Veverka & Ors* [2002] QSC 297
PARTIES:	**JOHN DAVID CURTIS, PAUL EDWARD COOLEE AND PALMSHELL PTY LTD** (ACN 089 351 646) (applicants) **v** **MICHAEL VEVERKA** (first respondent) **ALLAN SPENCE PHILIPS** (second respondent) **JUMBO CORPORATION LTD** (ACN 009 189 128) (third respondent)
FILE NO:	S8311 of 2001
DIVISION:	Trial
PROCEEDING:	Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30-31 May 2002
JUDGE:	Muir J
ORDER:	**That the applicants pay the respondents' costs of the hearing to be assessed on the standard basis.**
CATCHWORDS:	COSTS – RESERVED COSTS *Corporations Act* 2001 s 232 *Uniform Civil Procedure Rules* r 689 *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries* [1951] 1 All ER 873 *Colgate-Palmolive K v Cussons Pty Ltd* (1993) 46 FCR 225 *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 *Oshlack v Richmond River Council* (1988) 193 CLR 72 *Verna Trading v New India Assurance* [1991] 1 VR 129 *Ritter v Godfrey* [1920] 2 KB 47
COUNSEL:	G Beacham for the applicants P E Hack SC for the respondents
SOLICITORS:	Macrossans Lawyers for the applicants Shand Taylor for the respondents

[1] When giving reasons for judgment in this matter I acceded to an application by the respondents' counsel that the parties be permitted to deliver written submissions on costs. These reasons address the parties' submissions.

[2] Practices or guidelines have developed in courts of general jurisdiction concerning the exercise of discretion regarding costs. In *Oshlack v Richmond River Council*[1] it was said that there is "a general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary".[2]

[3] That rule or concept is enshrined in Rule 689 of the *Uniform Civil Procedure Rules* which provides –

> "(1) Costs of a proceeding are in the discretion of the court but follow the event, unless the court considers another order is more appropriate."

[4] McHugh J, with whose reasons Brennan CJ expressed general agreement, said in *Oshlack*:[3]

> "By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. A successful litigant is generally entitled to an award of costs."

[5] At p 97 his Honour went on to explain the rationale for such a principle, saying:

> "The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. (*Latoudis* (1990) 170 CLR 534 at 543, per Mason CJ; at 562-563, per Toohey J; at 566-567, per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.) If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation."

[6] Mr Beacham for the applicants submits that the normal rules should be departed from because, amongst other things, the dispute arose out of a refusal by the respondents to provide a breakdown of the cost of IT services provided by Jumbo. When one was provided after the application was brought, it was not provided in a form which the applicants ought reasonably to have accepted. Furthermore, Mr Beacham relies on the findings against the respondents in relation to the value of the IT services provided and on the substantial body of evidence and submissions devoted to that aspect of the hearing (on which he submits the respondents were generally successful). He submits that the only issue on which the respondents succeeded was on the conclusion to be drawn from other findings that the respondents' conduct did not contravene s 232 of the *Corporations Act* 2001. In

---

1 (1988) 193 CLR 72 at 86, per Gaudron and Gummow JJ.

2 *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477.

3 At 96.

summary, it is submitted that the respondents' conduct gave rise to the litigation, caused it to be protracted and that the respondents were not successful on any pleaded basis. He submits that the respondents should pay the applicant's costs limited to the issue of the valuation of Jumbo's IT contribution.

[7] Mr Hack SC for the respondents submits that the respondents, having been successful, should be given their costs. He asserts that the applicants set out to prove the following two propositions and failed -

- That the value of the work performed by Jumbo in building the website was significantly less than $100,000; and

- That the conduct of Jumbo, to which Mr Phillips and Mr Veverka were parties, constituted oppression.

He also submits that the costs should be assessed on an indemnity basis because "… the proceedings were commenced or continued for some ulterior motive".[4]

[8] This latter submission is not supported by the findings. I observed in the course of my reasons that –

> "I consider it probable that it suited the applicants' negotiating stance to avoid forcing appropriate consideration of the subject dispute at a meeting or meetings of the board of directors. As events unfolded the issue seemed to the applicants to hold out the most promise as one which might support oppression proceedings or a credible threat of such proceeding."

[9] I was not satisfied, however, that the applicants did not genuinely want the further information which they were seeking.

[10] It is also correct, in my view, that the applicants enjoyed a substantial measure of success on the trial. The respondents adopted an erroneous construction of cl 2.2(b) and, once an issue was raised about the value of the services provided by Jumbo, encouraged the litigation by failing to provide evidence as to the value of the relevant services which the applicants ought reasonably to have accepted. The evidence provided in relation to the value of the services had the unsatisfactory aspects identified in my reasons of 24 June and the question was determined on the balance of probabilities after a number of witnesses had given rather imprecise and vague evidence.

[11] Mr Beachham submitted that the applicants be awarded the costs. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries*[5] Devlin J stated the general principle to be applied when considering when a successful party should be deprived of costs in these terms –

> "No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not be deprived of his costs, or, at any rate,

---

4 See *Colgate-Palmolive K v Cussons Pty Ltd* (1993) 46 FCR 225 at 233.

5 [1951] 1 All ER 873

> made to pay the costs of the other side, unless he has been guilty of some sort of misconduct."

Such "misconduct" was held by McHugh J in *Oshlack v Richmond River Council*[6] to mean "misconduct relating to the litigation, or the circumstances leading up to the litigation".

[12] Misconduct in this context includes actions connected with the institution or conduct of litigation calculated to occasion unnecessary litigation and expense. It may also include actions which induce in a plaintiff's mind the reasonable belief that there is no valid defence to a claim or the goading of a plaintiff into litigation on which the plaintiff would not have embarked but for conduct of a reprehensible kind on the part of the defendant.[7]

[13] Whilst there may be an arguable case for awarding the costs of an issue to the applicants, I consider that the interests of the parties are better served by an order which limits the complexity and costs of assessment whilst recognising that the respondents have succeeded overall.

[14] Accordingly, I propose to order that the applicants pay the respondents' costs of the hearing on 30-31 May 2002 to be assessed on the standard basis but that there be no other order as to costs. The respondents, in their written submissions, sought leave to appeal against a costs order should their application not be successful. The application arguably was premature as it could not address these reasons or the order made. I do not propose to grant leave or encourage an application for leave but the respondents are free to bring an application for leave and to make an application (foreshadowed by them) to have the originating proceedings struck out, if they so desire.

---

6 (1988) 193 CLR 72 at 97.

7 Cf *Ritter v Godfrey* [1920] 2 KB 47 and *Verna Trading v New India Assurance* [1991] 1 VR 129