

# SUPREME COURT OF QUEENSLAND

CITATION: *Gold Coast Commerce Club Inc & Anor v Body Corporate for Surfers Plaza Resort Community Titles Scheme 6388 (No 2)* [2008] QSC 349

PARTIES: **GOLD COAST COMMERCE CLUB INCORPORATED**  
(first plaintiff)  
**CRESTDEN PTY LTD**  
(second plaintiff)  
**v**  
**BODY CORPORATE FOR SURFERS PLAZA RESORT COMMUNITY TITLES SCHEME 6388**  
(defendant)

FILE NO/S: BS 3451 of 2006

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 20, 21, 24, 27, 28, 29 October 2008

JUDGE: Dutney J

ORDER: 

1. **There will be no orders in relation to costs of the action**
2. **Each party has leave to appeal on the question of costs**

CATCHWORDS: COSTS – ASSESSMENT – where judgment for the second plaintiff – whether costs should be awarded

COUNSEL: Mr A Morris QC with Mr C Wilkins for the plaintiffs  
Mr T Carmody SC with Ms C Heyworth-Smith for the defendant

SOLICITORS: Porter Davies Lawyers for the plaintiffs  
Hynes Lawyers for the defendant

[1] On 10 December 2008 I gave judgment for the second plaintiff against the defendant in the action in the sum of \$50,613.49 for the claim and \$30,115 for interest. The claim was otherwise dismissed.

- [2] Since judgment was delivered, both parties have delivered written submissions in relation to costs. Both parties seek their costs of the action.
- [3] The action was heard over six days between 20 and 29 October 2008. The action was adjourned early on 21 October until 24 October because the defendant's witnesses were unavailable. It seems to me that prima facie, any costs thrown away by reason of this adjournment should be paid by the defendant.
- [4] The sittings on 21 and 24 October 2008 occupied less than half a day each because of the unavailability of the defendant's witnesses. Again, any extra costs occasioned by these short sitting days should be paid by the defendant. It was also necessary to adjourn early on 20 and 27 October for the same reason. In all, approximately one and a half days of sitting time was lost because of the absence of the defendant's witnesses.
- [5] Ultimately the judgment I delivered, while giving a monetary sum to the plaintiff, was against the plaintiff in relation to the main claims made. These other claims were for ejectment and an injunction denying the defendant access to the car park.
- [6] Leaving aside the time wasted as a result of the defendant's delay, the trial occupied four and a half days, of which one day was devoted to addresses. Thus, there were three and a half days of evidence. The evidence relating to the new leases occupied roughly half of that time. If the plaintiffs were to be entitled to the costs associated with the issue of the new leases plus the one and a half days of time wasted, that would represent about half of the costs of the action.
- [7] Adopting this "issues" approach to costs, and awarding the wasted time to the plaintiffs, the defendant would also be entitled to approximately half of its costs of the action.
- [8] In the circumstances, and since both sides were represented by senior and junior counsel, I will make no order as to costs. That may or may not be fair. I have no basis for determining the relative preparation costs of either side.
- [9] The plaintiffs sought costs on the indemnity basis. Clause 1(s) of the registered Lot 5 lease provides for payment of costs incurred enforcing the lease on an indemnity basis.
- [10] The only claim which falls into the enforcement category identified by clause 1 (s) of the lease was the claim for rates which was barely contested and occupied minimal time. It could also have been brought in the District Court. I do not think it appropriate to award indemnity costs in those circumstances. In any case the plaintiffs are advantaged by getting half their preparation costs as well as costs for hearing time wasted. This compensates the defendant for any indemnity costs not awarded.
- [11] The result of this action has been the maintenance of the status quo which each side sought to alter in its favour. Neither side has effectively "won".
- [12] In deciding what costs order to make, I have treated the plaintiffs as if their interests were identical. Of course, they are different. They were, however, commonly represented and their rights inter se changed over the course of the action. There is no practical reason to distinguish between them.

- [13] I do not know whether any appeal has been or will be lodged against the principal judgment. But, in any event, this costs order has an element of arbitrariness about it. Thus, it seems appropriate to give each party leave to appeal in relation to costs should they wish to do so.