

SUPREME COURT OF QUEENSLAND

CITATION: *McIntosh & Anor as Trustees of the Estate of Camm (A Bankrupt) v Linke Nominees P/L (No 2)* [2008] QSC 80

PARTIES: **LACHLAN MCINTOSH AND JOHN PARK as trustees of the Estate of GARY STIRLING CAMM (A BANKRUPT)**
(plaintiffs)
v
LINKE NOMINEES PTY LTD (ACN 005 860 944)
(first defendant)
ROBERT CLIVE LINKE
(second defendant)

FILE NO/S: BS4537 of 2007

DIVISION: Trial Division

PROCEEDING: Costs order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 April 2008

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2008

JUDGE: Dutney J

ORDER: **1. That the second defendant pay the plaintiffs' costs of and incidental to the action to be assessed on an indemnity basis;**
2. That the second defendant pay the first defendant's costs of and incidental to the action to be assessed on the standard basis;
3. That the plaintiffs pay the defendants' costs reserved by Mackenzie J on 29 October 2007 to be assessed on the standard basis.

CATCHWORDS: COSTS – ASSESSMENT – whether earlier costs order should be altered

COUNSEL: Mr G Bigmore QC with Mr J Ribbands for the plaintiff
Mr M Amerena with Mr J Fenton for the first and second defendants

SOLICITORS: Rogers Matheson Clark Lawyers for the plaintiff
Broadley Rees Lawyers for the first and second defendants

- [1] When judgment in this matter was handed down on 7 April 2008, parties requested an opportunity to make submissions on the question of costs. Written submissions were received from both parties.
- [2] Having read and considered those submissions, I propose to make the following orders in relation to costs:
 1. That the second defendant pay the plaintiffs' costs of and incidental to the action to be assessed on an indemnity basis;
 2. That the second defendant pay the first defendant's costs of and incidental to the action to be assessed on the standard basis;
 3. That the plaintiffs pay the defendants' costs reserved by Mackenzie J on 29 October 2007 to be assessed on the standard basis.
- [3] I should deal first with the order concerning the reserved costs.
- [4] I accept the submissions of the defendants that the adjournment of the trial before Mackenzie J on 29 October 2007 was brought about as a result of the unpreparedness of the plaintiffs, not only in relation to the availability of witnesses but also by reason of the late delivery of an amended reply on 25 October 2007. The appropriate order is that the costs wasted as a result should be paid by the plaintiffs.
- [5] The reserved costs in relation to the applications for summary judgment should follow the orders in the trial.
- [6] In this case, the plaintiffs have succeeded against the second defendant. Notwithstanding the submissions made on behalf of the second defendant that the contractual provision entitling the plaintiffs to indemnity costs should be restricted to the entry of judgment, I am satisfied that the order should include all of the costs of the trial.
- [7] In this case, the trial was brought about as a consequence of the denial of liability of the second defendant. The intention of the indemnity costs clause in the deed executed by the second defendant was that the plaintiffs should not be put to expense by reason of any failure of the defendants to comply with the provisions of the document. It would seem to me to be an absurd proposition that having made such an agreement the second defendant could put it at naught merely by running an unmeritorious defence. Consequently, it seems to me, that having made an agreement in the terms that it was made, the second defendant should pay the plaintiff's costs of the trial on an indemnity basis.
- [8] Notwithstanding the preliminary views expressed by me in the judgment delivered on 7 April 2008 it seems to me that the plaintiffs should not be liable for the costs of the first defendant. The first defendant's involvement in the action were brought about by the execution of the deed on its behalf by the second defendant and by the second defendant's express warranty of authority to enter into that deed on the first defendant's behalf.
- [9] In those circumstances it seems to me to be reasonable for the plaintiffs to have joined the first defendant to the action.
- [10] I do not believe that it was unreasonable of the plaintiffs to have maintained the action against the first defendant in circumstances where the two defendants raised a plethora of common issues and were commonly represented. The additional costs

over and above the costs of the second defendant defending the action alone would, in my view, have been minimal.

- [11] I am satisfied on the evidence that the second defendant has the capacity to pay the first defendant's costs if called upon to do so and that the first defendant will not be out of pocket for its standard basis costs should it choose to enforce the order which I have made.