

SUPREME COURT OF QUEENSLAND

CITATION: *Joelco Pty Ltd v Balanced Securities Limited* [2009] QSC 304

PARTIES: **JOELCO PTY LTD**
ACN: 056 036 054
(plaintiff)
v
BALANCED SECURITIES LIMITED
ACN: 083 514 685
(defendant)

FILE NO/S: BS No 10656 of 2008

DIVISION: Trial Division

PROCEEDING: Application on the papers

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 26 August 2009

JUDGE: Chief Justice

ORDER: **That paragraph 2 of the orders made on 26 August 2009 be amended to substitute the word “indemnity” for the word “standard”.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – award of indemnity costs
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225, considered

COUNSEL: M Byrne for the plaintiff
P A Travis for the defendant

SOLICITORS: Lawrence & Associates for the plaintiff
Elliott May Lawyers for the defendant

- [1] **CHIEF JUSTICE:** On 26 August 2009 I gave judgment in this proceeding, dismissing the plaintiff’s claim and ordering the plaintiff to pay the defendant’s costs to be assessed on the standard basis. I reserved liberty to apply in relation to

the costs order. The defendant now seeks an order that those costs be assessed on the indemnity basis. The defendant's Counsel relied on submissions dated 2 September 2009. The plaintiff made no response to those submissions.

- [2] The first basis for the defendant's application is cl 5.2 of the loan instrument, the so-called "Facility Agreement", which provides that the borrower must pay the lender on demand:

“(a) The sum of all costs, expenses and outgoings of the lender of and incidental to:

...

- (ii) any actual or contemplated enforcement of this agreement or the securities, or the actual or contemplated exercise, preservation, review or consideration of any rights, powers or remedies under this agreement or the securities in relation to the mortgaged property. This includes legal costs and expenses on a full indemnity basis...:

- [3] I accept the defendant's submission that "since the legal costs and expenses of the defendant are 'of and incidental to' the enforcement of the Facility Agreement (in this case, by the plaintiff) or the 'preservation, review or consideration of any rights, powers or remedies under' the Facility Agreement, as required to be undertaken by the lender in defence of this proceeding", the court should exercise its discretion by ordering that the plaintiff pay the defendant's costs on the indemnity basis.

- [4] Counsel for the defendant advanced the additional basis that the plaintiff's claims were "hopeless and bound to fail", referring to the analysis in such cases as *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225. While in my obvious view the plaintiff's position was weak, I would not go so far as to say it was completely hopeless.

- [5] The third ground advanced for an order for indemnity costs is the plaintiff's rejection of two offers to settle, on 22 June 2009 for \$65,000 and costs, and on 4 August 2009 for \$150,000 and costs. Since the defendant succeeded entirely at trial, the plaintiff's rejection would, taken alone, warrant indemnity costs from 29 June 2009, when (within time) the first offer was rejected, and standard costs up until that date.
- [6] However the first basis advanced for the defendant warrants an order for indemnity costs in respect of the whole proceeding.
- [7] There will therefore be an order that paragraph 2 of the orders made on 26 August 2009 be amended to substitute the word "indemnity" for the word "standard".