

SUPREME COURT OF QUEENSLAND

CITATION: *Robsyn Pty Ltd (in liquidation) v O'Brien (No 2)* [2012] QSC 367

PARTIES: **ROBSYN PTY LTD (in liquidation)**
(applicant)
v
PATRICIA MAY O'BRIEN AS TRUSTEE FOR THE JT & PM O'BRIEN SUPERANNUATION FUND
(respondent)

FILE NO: 637 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 23 November 2012

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Daubney J

ORDERS: **The applicant and Peter Dinoris pay the respondent's costs (including any reserved costs) of and incidental to the application, such costs to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – Where the bulk of the applicant's application was unsuccessful – where application only succeed on a limited basis which was not in contention at the hearing – whether there should be a departure from the general rule that costs follow the event – whether there should be an order for costs on the indemnity basis – whether the liquidator ought also be made liable for costs

Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors [2003] QSC 299, cited
Robsyn Pty Ltd (in liquidation) v O'Brien [2012] QSC 285, cited
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225, followed

COUNSEL: A G Martin for the applicant
M Martin for the respondent

SOLICITORS: Taylor David Lawyers for the applicant

MacDonnells Law for the respondent

- [1] The respondent enjoyed substantial success in respect of the application – see my reasons for judgment at [2012] QSC 285.
- [2] The parties have now provided their written submissions on costs.
- [3] Given that, as appears in the principal judgment:
- (a) the only element of the application on which the applicant prevailed was for the indemnity of less than \$2,000 for the ATO debt (a point which, by the time of the hearing, had become a non-issue between the parties), and
 - (b) the bulk of the argument at the hearing (over two days) was directed to the issues on which the respondent succeeded,

it is clear that the respondent ought have her costs of the application.

- [4] The only real questions are:-
- (a) whether those costs ought be recovered on the indemnity basis, and
 - (b) whether the liquidator of the applicant ought also be made liable for those costs.
- [5] The respondent sought indemnity costs, arguing that the applicant’s pursuit of legal costs incurred in the proceeding before Henry J was bound to fail, given findings which had been made by his Honour in that proceeding, and that the claim for liquidator’s remuneration was not supported by sufficient material and was, therefore, unsubstantiated. The respondent argued:
- “In all the circumstances, the Applicant’s relentless pursuit of its costs recovery without regard to the previous criticism of its conduct by this Honourable Court and without a proper evidentiary foundation warrants the making of an indemnity costs order in favour of the Respondent [sic] who have, for the third time, been put to unnecessary and substantial expense.”
- [6] In *Emanuel Management Pty Ltd (in liq) & Ors v Foster’s Brewing Group Ltd & Ors*¹, Chesterman J (as he then was) referred to *Colgate-Palmolive Co v Cussons Pty Ltd*² as the “authority to which attention is usually directed”, and noted that Sheppard J in that case had identified a number of circumstances in which it may be appropriate to make an order for indemnity costs, including:
- making allegations of fraud knowing them to be false or making irrelevant allegations of fraud;
 - misconduct that causes loss of time to the Court and the opponent;

¹ [2003] QSC 299.

² (1993) 46 FCR 225.

- commencing or continuing proceedings for some ulterior motive or in wilful disregard of known facts or clear law;
- making groundless allegations;
- an imprudent refusal of an offer to compromise.

- [7] Chesterman J, at [18], endorsed the observation by Sheppard J that:
“The question must always be whether the particular facts and circumstances ... warrant the making of an order for payment of costs other than on a party – party basis.”
- [8] The circumstances of this case are set out in the principal judgment. They reveal that the pursuit by the applicant of its claims for indemnity for the legal costs and liquidator’s remuneration was ill-advised. I do not think, however, that the conduct in pursuing those claims was so egregious or offensive in principle as to warrant the making of an order for indemnity costs.
- [9] As to the second question which now needs decision, it is quite clear that the principle issues advanced in the application by the applicant were, in fact, matters in which the liquidator personally was interested, i.e. indemnity for his own remuneration and payment of legal fees incurred on his instructions in circumstances where the Company was patently bereft of assets. It is also most unlikely that the respondent will be able to recover on any costs order made only against the Company. In those circumstances, I consider it appropriate to order that the liquidator pay the costs in the present case.³
- [10] Accordingly, it will be ordered that the applicant and Peter Dinoris pay the respondent’s costs (including any reserved costs) of and incidental to the application, such costs to be assessed on the standard basis.

³ See *Belas Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477; *Emanuel Management Pty Ltd (in liq) & Ors v Foster’s Brewing Group Ltd & Ors* (supra) at [12].