SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer v Gold Coast Publications Pty Ltd & Anor; Palmer v McCarthy* [2013] QSC 352
PARTIES:	**In Supreme Court No 703 of 2012:** **CLIVE FREDERICK PALMER** (plaintiff) **v** **GOLD COAST PUBLICATIONS PTY LTD** ACN 009 696 511 (first defendant) **MARK PANGALLO** (second defendant) **In Supreme Court No 705 of 2013:** **CLIVE FREDERICK PALMER** (plaintiff) **v** **SHAUN EDWARDS MCCARTHY** (defendant)
FILE NOS:	SC No 703 of 2012 SC No 705 of 2012
DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2013; 2 December 2013
JUDGE:	Atkinson J
ORDERS:	**In each proceeding:** 1. **The plaintiff's claim is dismissed;** 2. **The plaintiff pay the defendants' costs of and incidental to the proceeding to be assessed on an indemnity basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS –

DISCONTINUANCE – where the plaintiff brought claims against the defendants for defamation – whether the plaintiff should be given conditional leave to discontinue the proceedings under r 304(2) of the *Uniform Civil Procedure Rules* 1999 (Qld)

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – ALTERNATIVE DISPUTE RESOLUTION AND OTHER MATTERS BEFORE TRIAL – where the plaintiff brought claims against the defendants for defamation – where the plaintiff was in default of court orders – where the defendants applied for orders to be made under r 371(2) or r 374(5) of the UCPR – whether the proceedings should be dismissed

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the plaintiff brought claims against the defendants for defamation – where there were unexplained lengthy delays in the litigation attributable to the plaintiff's inaction – where the plaintiff did not comply with orders of the court – where the plaintiff sought to abandon his claims altogether without explanation – where the plaintiff attempted to delist the applications – whether an award of indemnity costs against the plaintiff is appropriate

Defamation Act 2005 (Qld), s 34, s 35(1)
Practice Direction 17 of 2012
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 304(2), r 681, r 371(2), r 374(5)

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353, cited
Di Carlo v Dubois & Ors [2002] QCA 225, cited
Ingot Capital Investment & Ors v Macquarie Equity Capital Markets & Ors (No 7)(2008) 65 ACSR 324; [2008] NSWSC 199, cited
LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo [2013] QCA 305, followed
Macarthur Coal Limited and Anor v MCG Coal Holdings Pty Ltd and Ors [2012] QSC 125, cited
Ross v Hallam [2011] QCA 92, cited

COUNSEL: B S Bolton for the plaintiff
R J Anderson for the defendant

SOLICITORS: HopgoodGanim for the plaintiff
Bennett & Philp for the defendants

[1] The two questions for determination in this case are, first, should the plaintiff be given conditional leave to discontinue or should his actions be dismissed and, secondly, are the defendants entitled to costs on a standard or an indemnity basis.

The claims

[2] Each of these matters concern a claim by the plaintiff, Clive Frederick Palmer, for defamation. The claims were filed on 27 January 2012 by Hickey Lawyers.

[3] The claim against the defendants Gold Coast Publications Pty Ltd ("Gold Coast Publications") and Mark Pangallo (SC No 703 of 2012) was for $250,000 compensatory damages[1] and aggravated compensatory damages of $9,750,000.[2] The plaintiff's claim was about an article by the second defendant, Mr Pangallo, published in the *Gold Coast Bulletin*, a newspaper published by the first defendant on 3 December 2011. The claim concerned two complaints. One was the content of an article published under the headlines "Palmer's Penalty" and "Palmer Slammed Over Dishonourable Dealings". Those headlines were on page 1 of the newspaper as was a photograph of the plaintiff. However he claimed that his photograph appeared directly above another headline "Jail For Love Rat". That was the subject of the second complaint.

[4] The content of the newspaper article complained of included the following:

> "Mr McCarthy was scathing in his criticism of the club and its owner, billionaire Clive Palmer";
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> - "The dishonourable dealings of Gold Coast United and its billionaire owner Clive Palmer have been laid bare with the release of explosive details following a hearing into the A-League club's sacking of German midfielder Peter Perchtold."
> - "The language used by Mr McCarthy is a damning reflection of the club and Mr Palmer, who he accused of bullying Perchtold into signing a one year contract by attempting to 'flex superior bargaining muscle' so as to make the German succumb to 'unconscionable pressure' "; and
> - “Mr McCarthy was critical of the dealings of United and Mr Palmer in particular. 'The club, or specifically the person responsible for this decision, clearly acted dishonourably, showing utter contempt for the principles underpinning the law of contract'."

[5] In the separate action against Shaun McCarthy (SC No 705 of 2012), Mr Palmer again sought $250,000 general compensatory damages and $9,750,000 aggravated compensatory damages. The publication by Mr McCarthy which was complained of by Mr Palmer was that on 28 November 2011, Mr McCarthy published the following statements in the reasons for final determination of the grievance lodged by Peter Perchtold in the grievance committee in the Football Federation of Australia:

> "I accept the player's submission that the conduct of the club was 'particularly egregious'. The club, or specifically, the person responsible for this decision, clearly acted dishonourably, showing

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[1] The maximum allowed under s 35(1) of the *Defamation Act* 2005.

[2] But see s 34 of the *Defamation Act* which provides that there must be "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded."

> utter contempt for the principles underpinning the law of contract. Notions of fairness appear to have played no part in the decision making process of the club. It is relevant that no cogent reasons have been given by the club for the breach of contract. While insights can be gleaned from the emails passing between Mr Bleiberg to the player, these documents only demonstrate that there was no reason at law, and in fact, no reason other than the club's financial self interest, for breaching the contract. This appears to be a case of the club attempting to bully the player into compromising his clear legal rights and entitlements. It seems to me that the club sought to exploit the perceived vulnerability of the player by flexing its superior bargaining muscle in the hope that the player's inferior financial position would influence him to bow to the club's unconscionable pressure."

[6] Mr Palmer alleged that that publication concerned him.

[7] A notice of defence was filed in the proceedings against McCarthy by Kennedys lawyers from Sydney. Bennett & Philp Lawyers acted as town agents for Kennedys. That defence was filed on 27 February 2012. A notice of defence was filed in the proceedings against Gold Coast Publications and Pangallo on 23 March 2012 by Bennett & Philp Lawyers.

The progress of the litigation

[8] In a civil proceeding in the court, parties are subject to the implied undertaking to the court and the other parties found in r 5(3) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') to proceed in an expeditious way. In order to give effect to that undertaking the parties are subject to Practice Direction No. 17 of 2012 (PD 17/2012) which deals with case flow management in the Brisbane registry of the Supreme Court. The case flow management system sets timelines by which proceedings should progress to specific stages, for example from close of pleadings to filing of a request for trial date, and monitors the progress of proceedings against these time lines. PD 17/2012 is based on an expectation that ordinarily proceedings will be ready for trial or otherwise resolved within 180 days of the filing of the defence. The plaintiff had taken no steps at all after the defence was filed in each matter and no request for trial date had been filed 180 days after the date of the filing of the notice of intention to defend so case flow intervention notices were sent to the parties.

[9] An order was made on a case flow review of SC No 703 of 2012 on 13 December 2012. It covered such matters as the dates for the filing of pleadings, the delivery of requests for particulars, and the provision of further and better particulars, when the defendants were to file and serve any application to strike out all or part of the plaintiff's statement of claim, disclosure, expert reports and a conclave of experts and finally a date by which the request for trial date be filed, which was 26 July 2013, or the matter be deemed resolved. Paragraph 1 of the order required the plaintiff to file and serve any amended claim and statement of claim on or before 4.00pm on 29 January 2013. That did not occur.

[10] On 26 February 2013 the plaintiff, Mr Palmer, filed notices dated 22 February 2013 that he was acting in person in both proceedings.

[11] On 22 February 2013, both proceedings were listed for case flow review. In each of them the plaintiff, Mr Palmer, was represented by Shirley Morgan who described herself as an in-house lawyer for the plaintiff. New dates were fixed for compliance with the orders made on 13 December 2012 in SC No 703 of 2012 and directions were given in the McCarthy matter (SC No 705 of 2012).

[12] On 27 February 2013, Ms Morgan, describing herself as Legal Counsel, on the letterhead of Mineralogy Pty Ltd, wrote to my associate (without copying the letter to the other parties or their representatives) saying that as I had, whilst a junior barrister, acted for the plaintiff, and companies associated with him, and had previously declared that in open court, "it may have been appropriate for a similar declaration to have been made" in connection with the present matters. No objection was or ever had been taken by the plaintiff to my hearing matters involving him or his companies. I had acted as a barrister for a company or companies associated with Mr Palmer for a period in about 1990.

[13] The matter was thereupon listed at the next case flow review on 22 March 2013 so that the defendants could be made aware of that correspondence and given the opportunity to take instructions as to whether they had any objection to my hearing the matter.

[14] On 25 March 2013 Bennett & Philp wrote to my associate with a copy to Ms Morgan confirming that their clients had no objection to my continued involvement in this matter. On 2 April 2013 a senior associate from Kennedys sent an email to my associate with a copy to Ms Morgan and the solicitor from Bennett & Philp who had appeared for Mr McCarthy on 22 March 2013 confirming that Mr McCarthy had no issue with my continued involvement in these proceedings.

[15] After the failure by the plaintiff to comply with case flow directions made on 22 February 2013 the two proceedings were listed for further case flow review on 31 May 2013. The parties were advised of that listing by the case flow manager. On that date the defendants read an affidavit by Mark Jones, solicitor in the employ of Bennett & Philp who were acting for the defendants. Mr Jones exhibited, *inter alia*, a letter sent to the plaintiff on 21 May 2013 by facsimile transmission referring to the fact that the directions had not been complied with and asking if the plaintiff intended to proceed with his claim. If so, then the defendants required him to provide an answer to their request for further and better particulars as had been previously ordered or if the plaintiff intended not to proceed with the claims to file and serve a notice of discontinuance. Paragraph 4 of the order made on 22 February 2013 in SC No 703 of 2012 had required the plaintiff to serve answers to any requests for further and better particulars by 26 April 2013.

[16] When the proceeding came on for case flow review on 31 May 2013 there was no appearance on behalf of the plaintiff. The defendants sought orders that the proceedings be deemed resolved and that the plaintiff pay the defendants' costs of the case flow review on 31 May 2013 and the defendants' costs of and incidental to the proceedings. In the McCarthy matter (SC No 705 of 2012) the order made on 22 February 2013 required the parties to sign and file a request for trial date by 31 May 2013 or the matter would be deemed resolved. This was a self-executing order and in accordance with it on 31 May 2013 upon the failure of the plaintiff to file a request for trial date or to attend on the case flow management review date the proceedings were deemed resolved. The plaintiff was ordered to pay the defendant's

costs of the case flow review on that date and their application for an order that the plaintiff pay the defendant's costs of and incidental to the proceedings was listed for 14 June 2013. The court also ordered that the proceedings SC No 703 of 2013 be deemed resolved because of the plaintiff's non-compliance with directions given and his non-appearance. The plaintiff was ordered to pay the defendants' costs in respect of the case flow review on 31 May 2013 and that the application for an order that the plaintiff pay the defendant's costs of and incidental to the proceedings was listed for 14 June 2013.

[17] On 6 June 2013 the defendants' solicitor sent a letter by facsimile transmission to the plaintiff informing him of the orders which had been made on 31 May 2013 and of the further hearing on 14 June 2013, the hearing date of the application for costs.

[18] On 13 June 2013, the plaintiff filed a notice of appointment of the solicitors HopgoodGanim in each of the proceedings. When the matters came on for hearing on 14 June 2013 I made orders by consent that the application for an order that the plaintiff pay the defendant's costs of and incidental to the proceedings be adjourned to 8 July 2013 and that the plaintiff file and serve its application to reactivate the matter and any affidavits in support by 28 June 2013.

[19] The applications to reactivate the proceedings were filed in matter SC No 705 of 2012 on 1 July 2013 and in matter SC No 703 of 2012 on 2 July 2013. Each of them was accompanied by an affidavit affirmed by a partner from HopgoodGanim. All of the applications came on for hearing on 16 July 2013. The applications were strongly contested and were not able to be determined within the time set aside for them and so had to be adjourned part heard. Each application was adjourned to 2 December 2013. The plaintiff was ordered to pay the defendants' costs of the hearing on 16 July 2013 with costs otherwise reserved. It was ordered that no document be filed in either proceeding prior to the determination of the applications without my leave having been first obtained. That was because each matter was deemed resolved which effectively meant that the proceedings were in abeyance and no step could be taken unless and until the matter was reactivated by order of the court.

[20] On 17 September 2013 my associate received a letter from HopgoodGanim, solicitors for the plaintiff, saying they had been instructed to write to her in the following terms on behalf of Mr Palmer and his related companies. The letter referred to the fact that I had once acted for Mr Palmer and/or his related companies when I was a barrister and said "With reference to that professional relationship, our client requests that her Honour recuses herself from sitting as judge of any current or future proceeding before the Supreme Court to which our client and/or any of his related companies is a party." My associate informed the parties that the application for recusal would be heard on the adjourned date, that is 2 December 2013.

[21] Subsequent to that letter in an unrelated matter wherein HopgoodGanim acted for one of Mr Palmer's companies I was asked by those solicitors and the solicitors for another party to make an order by consent. My associate enquired whether Mr Palmer had any objection to my making orders in matters involving one of his companies, and my associate was told that he did not.

[22] On 22 November 2013 my associate received a letter which was copied to counsel for the defendants saying that they were writing to inform the court and the other

parties that Mr Palmer had instructed that he did not intend to proceed any further with the applications and asking if an appearance was nevertheless required.

[23] Given that the defendants' application for costs was still outstanding, an appearance was still required if the plaintiff wished to be heard.

[24] The plaintiff's legal representatives sent a copy of their letter to my associate dated 22 November 2013 to the solicitors for the defendants. On 25 November 2013 the defendants' legal representatives wrote to my associate with a copy to the plaintiff's legal representatives asking that both matters remain listed for 2 December 2013 as they wished to be heard in respect of the issue of costs. On 29 November 2013 the defendants' legal representatives wrote to the plaintiff's legal representatives informing them that they had instructions to seek formal orders that the proceedings be dismissed and that the plaintiff be ordered to pay the defendants' costs of the action including the costs of the plaintiff's application for the reinstatement of the proceedings and that they would be seeking an order that the costs be assessed on an indemnity basis.

The defendant's submissions

[25] The defendants submitted that the special circumstances which justified an order for indemnity costs in these proceedings were that the proceedings had been characterised by significant delay, all of which was attributable to the plaintiff or his agents; the fact that the end of the proceedings resulted from the abandonment of an application to reinstate proceedings that had been deemed resolved - in other words that the plaintiff was already in default of the orders of the court - and had now abandoned his proceedings; and the circumstances which saw the plaintiff seek to delist this application without having first consulted the defendants. A further reason was the chronology presented by the plaintiff at the hearing showed that he had rejected a without prejudice offer in each proceeding made a year earlier by the defendants that the proceedings be discontinued on the basis that each party bear its own costs.

[26] The defendants also sought to have the proceedings dismissed pursuant to r 371(2)(e) or r 374(5)(a). That would, they argued, better protect the defendants from the potential for the plaintiff to commence another action based on the same factual matrix but for a different cause of action such as a trade practices action or an action for injurious falsehood.

The plaintiff's submissions

[27] The plaintiff submitted that he had now offered to discontinue each of the proceedings on the basis that there be no order as to costs but had separately offered to pay the defendants' standard costs of and incidental to the two proceedings, those costs to be assessed unless otherwise agreed. The plaintiff argued that no formal application to dismiss either of the two proceedings had been made and that if orders dismissing the proceedings were to be made those orders should only be made on proper material and on proper notice to the plaintiff. He should be given leave by the court to discontinue proceedings under r 304(2) of the UCPR.

[28] As to costs the plaintiff referred to a number of costs orders on a standard basis that had already been made against him. He submitted that his conduct of the proceedings did not provide any basis for an order for indemnity costs being made

against him. He submitted that the defendants' argument appeared to be that although there would be no trial, the plaintiff's claim was bound to fail and the plaintiff's conduct in prosecuting the proceedings was so unreasonable as to warrant indemnity costs. He submitted that it was clear from authorities such as *Macarthur Coal Limited and Anor v MCG Coal Holdings Pty Ltd and Ors*[3] and *Ross v Hallam*[4] that such an argument provided no basis for an order for indemnity costs. He submitted that the defendants could have pursued a summary judgment application or applied for some other summary relief such as striking out the plaintiff's pleading. However they chose not to do so but now wanted all of their costs on an indemnity basis because they now said there was no case which required a trial. Accordingly the plaintiff submitted any application by the defendants for indemnity costs should fail.

Discussion

[29] The plaintiff's argument as to indemnity costs set out the reasons why he proposed an argument which might be put by the defendants should fail. However that was not the argument put by the defendants. It is not appropriate for the court to determine whether or not the plaintiff could have succeeded in his action as there has been no trial of the matter, although the plaintiff's claims for almost $10million in aggravated damages in each proceeding would appear unarguably incapable of being awarded in these circumstances given the requirements of s 34 of the *Defamation Act.*

[30] The applicable principles for the awarding of indemnity costs were most recently referred to by Boddice J in *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo*[5] where his Honour, with whom Holmes JA and Philip McMurdo J agreed, held:

> "The applicable principles for the awarding of indemnity costs were usefully summarised by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*.[6] However those principles operate as a guide to the exercise of the relevant discretion. They do not define all of the circumstances in which the discretion is to be exercised and do not limit the width of that discretion.[7] Further the categories in which the discretion to award costs may be exercised are not closed.[8]
>
> Whilst the awarding of costs on an indemnity basis will always ultimately depend upon the exercise of a discretion in the particular circumstances of each individual case, the justification for an award of indemnity costs continues to require some special or unusual feature of the particular case. As was observed by Basten JA in *Chaina v Alvaro Homes Pty Ltd*,[9] the general rule remains that costs should be assessed on a party and party basis, and the standard to be applied in awarding indemnity costs ought not 'be allowed to

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3 [2012] QSC 125.
4 [2011] QCA 92.
5 [2013] QCA 305 at [21]-[22].
6 (1993) 46 FCR 225 at 232-234.
7 *Ingot Capital Investment & Ors v Macquarie Equity Capital Markets & Ors (No 7)* [2008] NSWSC 199 at [26].
8 *Di Carlo v Dubois & Ors* [2002] QCA 225 at [37].
9 [2008] NSWCA 353 at [113].

> diminish to the extent that an unsuccessful party will be at risk of an order for costs assessed on an indemnity basis, absent some blameworthy conduct on its part'."

[31] The discretion as to costs is found in r 681. That discretion must be exercised judicially. There were special or unusual circumstances in this case which suggested that an award of indemnity costs against the plaintiff was the appropriate order. The first was the unexplained lengthy delays in the litigation attributable to the plaintiff's inaction, the second was his noncompliance with orders made by the court, the third was that the plaintiff sought to abandon his claims altogether without explanation, the fourth was the plaintiff's attempt to have the hearing delisted without having consulted the defendants. This was particularly egregious given that the defendants' application for costs was first made on 31 May 2013 and was adjourned to allow the plaintiff to be heard. The blameworthy conduct of this litigation makes an order for indemnity costs against the plaintiff the appropriate order.

[32] In addition, the defendants made an offer to the plaintiff in each proceeding which was not accepted and the plaintiff has not achieved a better result.

[33] The remaining question is how these proceedings should be ended. Paragraph 7.2 of PD 17/2012 warns a party in default that an order may be made under r 371(2) or r 374(5) on the application of a party or at the judge's own initiative. In this case the plaintiff was given notice in writing by the defendants that they would be seeking formal orders that these proceedings be dismissed. The factors that persuade me that dismissal is more appropriate than merely giving leave to the plaintiff to discontinue are the same as those which incline me to the view that the plaintiff should pay costs on an indemnity basis.

[34] Additionally, it obviates the risk about which the defendants have expressed concern that the plaintiff might commence new proceedings against some or all of the defendants based on a similar factual matrix.

Conclusion

[35] I therefore conclude that the plaintiff's claims in SC No 703 of 2012 and SC No 705 of 2012 should be dismissed and the plaintiff should be ordered to pay the defendants' costs of and incidental to the proceedings to be assessed on an indemnity basis.