SUPREME COURT OF QUEENSLAND

CITATION:	*Quinlan v ERM Power Ltd & Ors (No 2)* [2021] QSC 51
PARTIES:	**KENT MATTHEW QUINLAN** (Plaintiff) **v** **ERM POWER LIMITED ACN 122 259 23** (First Defendant) **PHILIP MATTHEW ST BAKER** (Third Defendant) **TREVOR CHARLES ST BAKER** (Fourth Defendant) **ANTHONY GEORGE BELLAS** (Fifth Defendant) **ANTONINO MARIO IANNELLO** (Sixth Defendant) **MARTIN ROGER GREENBERG** (Seventh Defendant) **JAMES BRETT LOCHRAN HEADING** (Eighth Defendant) **JONATHAN HUGH STRETCH** (Ninth Defendant) **JULIEANNE MARGARET ALROE** (Tenth Defendant) **ALBERT GOLLER** (Eleventh Defendant) **GEORGANNE MARIE HODGES** (Twelfth Defendant) **PHILIP ANDREW DAVIS** (Thirteenth Defendant)
FILE NO/S:	BS No 6601 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	18 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Bowskill J
ORDERS:	**The plaintiff, first defendant, third to seventh and ninth to thirteenth defendants bear their own costs of the applications filed on 29 September 2020.**
CATCHWORDS:	COMMUNICATIONS LAW – WHISTLEBLOWER PROTECTION AND PUBLIC INTEREST DISCLOSURE LEGISLATION — determination of costs of the strike out applications – where s 1317AH of the *Corporations Act* 2001

(Cth) provides that a claimant in a proceeding in relation to a matter arising under s 1317AE of the Act must not be ordered to pay costs incurred by another party to the proceedings, except in accordance with s 1317AH(3) – where one of the exceptions is where the court is satisfied the claimant's unreasonable act or omission caused the other party to incur the costs – whether the plaintiff's opposition to the strike out applications amounted to an unreasonable act or omission, such that the court should make an order that he pay part of the defendants' costs

Corporations Act 2001 (Cth), s 1317AH

Australian and International Pilots Association v Qantas Airways Ltd (No 3) (2007) 162 FCR 392; [2007] FCA 879
*Construction, Forestry, Mining and Energy Union & Ors v Clar*ke (2008) 170 FCR 574; [2008] FCAFC 143
Stanley v Service to Youth Council Inc (No 3) (2014) 225 FCR 357; [2014] FCA 716

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D O'Brien QC and A Nicholas for the third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth defendants/applicants
Jamal, N (*sol*) for the eighth defendant

SOLICITORS: Sterling Law for the plaintiff/respondent
Clayton Utz for the first defendant/applicant
Carter Newell for the third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth defendants/applicants
Wotton & Kearney for the eighth defendant

[1] On 26 February 2021, I delivered my reasons for judgment in relation to the strike out applications brought by the first defendant (**ERM**) and the third to seventh and ninth to thirteenth defendants (the **natural person defendants**): *Quinlan v ERM Power Pty Ltd & Ors* [2021] QSC 35.

[2] Directions were made on that day for the filing of brief submissions in relation to the costs of the applications, following which I would determine the issue on the papers. The requirement to be brief was not complied with by ERM and, to an even greater extent, the plaintiff, who delivered excessively long submissions. My reasons will be brief.

[3] Section 1317AH of the *Corporations Act* 2001 (Cth) provides:

> "**1317AH Costs only if proceedings instituted vexatiously etc.**
>
> (1) This section applies to a proceeding (including an appeal) in a court in relation to a matter arising under section 1317AE in which a person (the ***claimant***) is seeking an order under subsection 1317AE(1).

> (2) The claimant must not be ordered by the court to pay costs incurred by another party to the proceedings, except in accordance with subsection (3) of this section.
>
> (3) The claimant may be ordered to pay the costs only if:
>
> (a) the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause; or
>
> (b) the court is satisfied that the claimant's unreasonable act or omission caused the other party to incur the costs." [emphasis added]

[4] ERM and the natural person defendants were, effectively, wholly successful on the strike out applications. They accept, for present purposes at least, that s 1317AH applies to the proceeding generally and to the strike out applications within the proceeding. But they each submit that the Court should order the plaintiff to pay the costs of their respective application from:

(a) in the case of ERM, the date of service of its outline of argument on the plaintiff (23 October 2020); and

(b) in the case of the natural person defendants, the date of filing their outline of argument (27 October 2020),

on the basis that, after that time, the court should be satisfied that the plaintiff's continued opposition to the applications was unreasonable and caused ERM and the natural person defendants to incur costs (s 1317AH(3)(b)).

[5] Section 1317AH was added to Part 9.4AAA of the *Corporations Act* in 2019.[1] As explained in the explanatory memorandum to the Bill which became the 2019 amending Act, the level of protection provided for whistleblowers by the amended laws was "increased" by, inter alia, "providing that generally a court may not make a cost order against a whistleblower or other individual seeking remedies for victimisation, to ensure that such individuals are not deterred from bringing proceedings by potential adverse costs orders".[2]

[6] The explanatory memorandum also states:

> "2.115 Legal costs can be prohibitive to any person seeking compensation for damage, and the risk of being ordered to pay the costs of other parties to the proceedings may deter whistleblowers and other victims of victimisation from bringing the matter to court.
>
> 2.116 The new law addresses this by protecting victims from an award of costs against them in court proceedings seeking compensation except in limited circumstances. The limited circumstances where the court may make such an order are where it is satisfied that:

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1 *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act* 2019 (No 10 of 2019).

2 Explanatory memorandum to the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill* 2017 at [2.20].

- the victim instituted the proceedings vexatiously or without reasonable cause; or
- the victim's unreasonable act or omission caused the other party to incur the costs."

[7] There has not yet been any judicial consideration of s 1317AH(3).[3] There is, however, assistance to be gained from decisions which have considered similar provisions, for example, s 570(2) of the *Fair Work Act* 2009 (Cth) and s 824(2) of the *Workplace Relations Act* 1996 (Cth). I apply the following principles, adapted from those authorities:

(a) The power otherwise conferred on the court[4] to make an order for costs is constrained by s 1317AH of the *Corporations Act*.[5]

(b) Section 1317AH establishes a rule that a claimant in a proceeding in relation to a matter arising under s 1317AE of the *Corporations Act* must not be ordered to pay costs incurred by another party to the proceedings, except in accordance with s 1317AH(3)(a) or (b).

(c) For the exception under s 1317AH(3)(b) to arise, two criteria must be met:

(i) first, the court must be satisfied the claimant has engaged in "an unreasonable act or omission"; and

(ii) second, the court must be satisfied that the unreasonable act or omission *caused* the other party to incur costs.

If both criteria are met, the court then has a discretion whether to order the claimant to pay some or all of the other parties' costs.[6]

(d) Whether a party has conducted itself or its litigation in such a way as to cross the threshold and be said to have engaged in an unreasonable act or omission, will depend on the particular circumstances of the case.[7]

(e) As to what is "unreasonable", there is a distinction between a party who pursues arguments which are ultimately abandoned or rejected by the Court and a party who prosecutes a case which is misconceived in the sense of being incompetent or insupportable.[8]

(f) Simply because a claimant does not conduct the litigation in the most efficient way does not mean their conduct is "unreasonable" for the purposes of the s 1317AH.[9]

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3 Cf *Environmental Group Ltd v Bowd (No 2)* [2019] FCA 122, in which the section was referred to, but it was unnecessary to consider (at [32]).

4 For example, by s 15 of the *Civil Proceedings Act* 2011 (Qld) and r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld).

5 *Australian and International Pilots Association v Qantas Airways Ltd (No 3)* (2007) 162 FCR 392 at [21].

6 *Construction, Forestry, Mining and Energy Union & Ors v Clarke* (2008) 170 FCR 574.

7 Ibid, at [28].

8 Ibid, at [29]; *Australian and International Pilots Association v Qantas Airways Ltd (No 3)* (2007) 162 FCR 392 at [36].

9 *Construction, Forestry, Mining and Energy Union & Ors v Clarke* (2008) 170 FCR 574 at [29].

(g) In order to give effect to the purpose of the provision – to ensure whistleblowers are not deterred from bringing a matter to court by fear of an adverse costs order – a court should not too readily find conduct of a claimant to be unreasonable.[10]

[8] In the present case, the defendants (collectively) reason backwards from their success in the strike out applications to contend that the plaintiff's persistence in opposing them was unreasonable. He is, variously by ERM and the natural person defendants, said to have acted unreasonably, by:

(a) pressing his further amended statement of claim despite being aware of the defendants' detailed critique of aspects of it;

(b) failing to file another further amended statement of claim, addressing the defects identified by the defendants in their outlines of argument, despite having ample time to do so before the hearing of the applications;

(c) purporting to defend the strike out applications by reference to an offer to provide particulars which was said not to have been taken up by the defendants, which was incorrect;

(d) arguing the strike out applications were an abuse of process, when there was no evidentiary basis for this;

(e) abandoning part of his legal argument on the construction of s 1317AA in the course of oral submissions (as to the meaning of the "good faith" requirement);

(f) taking every point and making no concessions;

(g) improperly putting into evidence without prejudice communications in support of his estoppel argument; and

(h) the fact that he was almost entirely unsuccessful in his defence of the applications.

[9] The defendants (again collectively) seek to gain support for their submission from an email which the plaintiff sent to the eighth defendant and the thirteenth defendant on 28 February 2021, two days after judgment was delivered. In that email, the plaintiff said, in part:

> "Oh for your information the judgement on Friday went exactly to my plan i set up with my lawyers ☺
>
> Sometimes a loss might looknlike a loss to the winners but if you look carefully it achieved exactly what we wanted just a few months late due to ERMs senior counsel unavailability, but coincidentally timing is bow better for us now with COVID out of the way
>
> 2021 is going to be a very good year for me with things now running to MY plan, not so sure others will end up with a good year. …"

[10] I am not persuaded that the plaintiff's conduct in opposing the strike out applications can be said to have crossed the threshold into unreasonableness, such as to satisfy the first of the criteria under s 1317AH(3)(b). Pursuing his opposition to the strike out

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10 Ibid, at [29]; *Stanley v Service to Youth Council Inc (No 3)* (2014) 225 FCR 357 at [40].

applications, the first to be dealt with by the court in this proceeding,[11] is not to be regarded as an unreasonable act, notwithstanding the success of the defendants on those applications. The plaintiff was entitled to advance the arguments his legal representatives saw fit to advance in defence of the pleading. The fact that he was aware of the defendants' detailed critique of the pleading does not mean it was unreasonable not to accede to them. Similarly, the late abandonment of one small part of the legal construction question (the meaning of the "good faith" requirement) does not render the plaintiff's conduct unreasonable – the far more substantive issue as to the construction of s 1317AA remained contested and was determined by the court. Whilst I found against the plaintiff, both on the admissibility of the without prejudice communications and the purported estoppel argument, again, it was a matter he was entitled to argue. The abuse of process argument skates close to unreasonable, in my view. There was no basis to advance such an argument. But this did not trouble the defendants, or the court, to any significant extent – it occupied a small part of the oral submissions made at the hearing. And I am reluctant to adopt an approach of dividing up particular issues, in determining whether, overall, the plaintiff engaged in an unreasonable act or omission in his opposition to the strike out applications.

[11] The email does not cause me to form a different view. That is best viewed as a chest-beating exercise of false bravado. I am not prepared to infer from that email that the approach taken by the plaintiff, upon the advice of his solicitors and senior and junior counsel, was part of a nefarious plan – to persist in opposing strike out applications he knew were doomed to fail, for an ulterior purpose. I would be prepared to infer that the plaintiff behaved unreasonably in sending the email. But that conduct did not cause the defendants to incur costs in relation to the strike out applications. Those costs had already been incurred.

[12] The fact that a substantial dispute has arisen at an early stage about what is a very long and complex pleading, in what will no doubt be lengthy and complex litigation, is not surprising. That the plaintiff chose to fight against the claimed deficiencies, in some respects on bases I found were weak, and in others on bases I found against him in any event, does not render his conduct, at this stage at least, unreasonable.

[13] Consistent with s 1317AH(1), I will order that each of the plaintiff, ERM and the natural person defendants bear their own costs of the applications filed on 29 September 2020.

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[11] Cf *Australian and International Pilots Association v Qantas Airways Ltd (No 3)* (2007) 162 FCR 392 at [36].