SUPREME COURT OF QUEENSLAND

PUBLISHED CITATION:	*PJM & Ors v AML & Anor (No 2)* [2018] QSC 204
PARTIES:	**PJM** (first applicant) **PKM** (second applicant) **PJM AS LITIGATION GUARDIAN FOR PLM** (third applicant) **v** **AML** (first respondent) **ACL** (second respondent)
FILE NO:	6551 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	6 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Decided on the papers
JUDGE:	Davis J
ORDER:	**1. The applicants' solicitors Shine Lawyers forthwith pay the first respondent's costs of the application on the indemnity basis, fixed at $37,255.57.** **2. The applicants' solicitors Shine Lawyers pay the second respondent's costs of the application to be assessed on the indemnity basis, or as agreed, save those costs ordered to be paid on 27 June 2018.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – LEGAL PRACTITIONER – where the respondents were successful in the principal application – where findings were made about shortcomings in the applicants' solicitors' work – where the respondents seek indemnity costs and one seeks fixed costs – whether costs should be ordered against the applicants' solicitors – whether costs should be fixed – whether two counsel should be

	allowed
	Uniform Civil Procedure Rules 1999 (Qld) r 687
	EMI Records Ltd v Ian Cameron Wallace Ltd [1983] Ch 59, cited *Hobbs & Anor v Oildrive (No 2)* [2008] QSC 52, cited *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271, cited *PJM & Ors v AML and Anor* [2018] QSC 187 *Stanley v Phillips* (1966) 115 CLR 470, cited
COUNSEL:	M Eliadis for the applicants M Horvath with B Buckley for the first respondent C J Kanther (solicitor) for the second respondent
SOLICITORS:	Shine Lawyers for the applicants Corney & Lind Lawyers for the first respondent BTLawyers for the second respondent

[1] The applicants applied for a freezing order against the first respondent's interest in a house in which the second respondent also had an interest. No claim was made against the second respondent, who was only a party to the application because of her interest in the house.

[2] On 17 August 2018 I made the following orders:

1. Application dismissed.

2. The respondents file and serve any material and written submissions on costs by 4 pm on 24 August 2018.

3. The applicants file and serve any material and written submissions on costs by 4 pm on 31 August 2018.

4. The respondents file and serve any material and written submissions in reply by 4 pm on 4 September 2018.

5. The issue of costs be decided without oral argument.[1]

[3] In compliance with the directions, both respondents filed and served written submissions on costs by the date set for those submissions, namely 24 August 2018.

[4] Both respondents sought costs on an indemnity basis. The first respondent sought to have the costs fixed at $37,255.57. That claim was supported by an affidavit which

---

[1] *PJM & Ors v AML and Anor* [2018] QSC 187.

explained in significant detail how the sum claimed was calculated. Exhibited to the affidavit was both the first respondent's solicitors' costs agreement and an itemised bill. It is clear from that affidavit that the first respondent claimed the cost of two counsel: Mr Horvath and Mr Buckley who appeared on the application. The barristers' bills were exhibited to the affidavit.

[5] The second respondent, in her submissions on costs, raised the question as to whether the costs ought to be ordered against the applicants' solicitors personally. I formed the preliminary view that the discretion to order the applicants' solicitors to pay the costs had arisen. At my direction, on 27 August 2018, my Associate sent an email to the applicants' solicitors,[2] the relevant part of which is as follows:

> "His Honour has directed me to inform you that his Honour considers that the discretion to make a costs order against your firm in favour of both respondents has arisen for consideration, particularly because:
>
> 1. There appears to have been no proper consideration as to the admissibility of much of the evidence sought to be relied upon by the applicants.
>
> 2. Even when there was consideration of the admissibility of evidence (Ms Hoeft-Marwick's second affidavit), that affidavit mistakenly omitted the source of the deponent's information and belief and that indicates significant negligence in the preparation of the affidavit.
>
> 3. Much of the evidence was in an inadmissible form.
>
> 4. The affidavit material contained multiple typographical, grammatical and substantive errors, suggesting a lack of care in its preparation.
>
> 5. The application failed against both respondents through a lack of proof of the basic elements of the claim for relief.
>
> 6. The stance taken against the second respondent, who was cooperative in the application, was unreasonable.
>
> The applicant's submissions are due on 31 August 2018. His Honour directs that any submissions which your firm wishes to make in resistance of any order against it personally also be filed and served on that day."

[6] On 31 August 2018 counsel for the applicants filed and served a submission on costs. The submission contained only two paragraphs which were in the following terms:

> "1. Counsel is instructed that the applicants' solicitors consent to an order that the applicants' solicitors pay the respondents' costs of the application to be assessed on the indemnity basis, or as agreed.

---

[2] Copied to all the other parties.

2. Accordingly, the applicants' solicitors request the Court to make an order in those terms."

[7] It can be seen that the applicants' submissions on costs do not deal with the first respondent's submissions that the costs should be fixed in the sum of $37,255.57. No material was filed in resistance of fixing the costs in that sum.

[8] Again, faithfully in obedience to the directions made on 17 August 2018, the respondents filed submissions in reply. The first respondent's submission in reply repeats the submission that the costs should be fixed at $37,255.57 but submits that if an order is made in terms of the applicants' written submission then, when ordering the applicant's solicitors to pay costs on an indemnity basis, I ought to find that the fees of two counsel be regarded as necessary and proper and I ought declare that fact.

[9] The second respondent made short submissions in reply agreeing to the order sought by the applicants, on the understanding that the clear effect of an order in terms of "the costs of" the application, as opposed to "the costs of and incidental to" the application, not restrict the costs recoverable, consistently with the judgment of Jackson J in *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)*.[3]

[10] On 5 September 2018, my Associate received an email from Mr Eliadis of Counsel who appeared for the applicants on the application. The email is as follows:

"Dear Associate

Would you please advise his Honour that:

1. the applicants do not agree to pay the first respondent's costs fixed at $37,255.57;

2. the applicants do not agree that the indemnity costs should include the costs of two Counsel;

3. if the Court proposes to fix the indemnity costs rather than order them to be assessed in the usual manner, the applicants wish to make further submissions to the Court."

Should the applicants' solicitors have an opportunity to make further submissions?

[11] The first respondent's submissions filed 24 August 2018 very clearly asserted (relevantly here):

1. the costs should be paid on an indemnity basis;

2. the costs should be fixed at $37,255.57;

---

[3] [2013] QSC 271 at [5]–[22].

3. the figure of $37,255.57 includes a claim for the cost of two counsel.

[12] My Associate's email raised a fourth issue: whether the applicants' solicitors should pay the costs personally. That matter is now conceded, as is the appropriateness of an order for costs on the indemnity basis.

[13] The directions made on 17 August gave the applicants an opportunity to make submissions in writing by 4.00 pm on 31 August 2018 and to file material in support of any submissions. The applicants' solicitors, while conceding that they should pay the costs personally, made no submissions as to why the costs should not be fixed at the sum claimed. The applicants' written submissions do not challenge the assessment of indemnity costs on the basis of two counsel being briefed. The applicants' solicitors did not take the opportunity to file material in the costs application. The email from Mr Eliadis sheds no light on why the applicants' solicitors chose not to make full and proper submissions by the date directed.

[14] The judgment of 17 August 2018 details the shortcomings in the preparation of the application: shortcomings for which the applicants' solicitors now accept responsibility. The respondents have complied with the directions as to the costs submissions. The first respondent should not be put to the further expense and inconvenience of answering further costs submissions by the applicants' solicitors. I decline to receive further submissions and I will determine the issue of costs on the written submissions filed and served in accordance with the directions I made on 17 August 2018.

Two counsel

[15] Whether costs of two counsel should be allowed usually arises as a question for assessment of costs on a standard basis. The principles were considered in detail by Daubney J in *Hobbs & Anor v Oildrive (No 2)*.[4] An order for costs on an indemnity basis seeks to compensate the relevant party for costs actually incurred. Even so, I would not be minded to allow the costs of two counsel if the costs were extravagant or unreasonable.[5]

[16] Depending upon the nature of the case, retaining two counsel may add very little to costs compared to costs where only one counsel is retained. Two counsel should not unnecessarily duplicate work. There is nothing in the material before me to suggest that Mr Horvath and Mr Buckley, working under Mr Horvath's leadership, have worked other than efficiently. Affidavits and very detailed submissions had to be prepared quite quickly. Both the affidavits and the submissions prepared on behalf of the first respondent were of a high standard. The work done by the two barristers is detailed in the material. In all the circumstances, it was reasonable for two counsel to appear on the application. The barristers' fees are not excessive and Mr Buckley's in particular are very modest.

---

[4] [2008] QSC 52; see also *Stanley v Phillips* (1966) 115 CLR 470 at 478-80.

[5] *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59.

[17] For the assessment of costs on an indemnity basis, the fees charged by both barristers ought to be allowed.

Fixing the costs

[18] Rule 687(2) of the *Uniform Civil Procedure Rules* 1999 (UCPR) provides (relevantly):

> "**687 Assessed costs to be paid unless court orders otherwise**
>
> …
>
> (2) However, instead of assessed costs, the court may order a party to pay to another party—
>
> (a) a specified part or percentage of assessed costs; or
>
> (b) assessed costs to or from a specified stage of the proceeding; or
>
> (c) an amount for costs fixed by the court; or
>
> (d) an amount for costs to be decided in the way the court directs." (**my underlining**)

[19] Practice Direction Number 3 of 2007 (Amended) concerns r 687(2). Relevantly, the practice direction provides:

> "2. This Practice Direction is intended:
>
> a. to encourage parties to agree on the amount of costs otherwise to be assessed; and
>
> b. to signal the authority of the court, in an appropriate case, to fix costs, and to ensure parties are in a position to inform that process.
>
> 3. a. The court has a broad discretion to fix costs, and will do so where that will avoid undue delay and expense, but only provided the court is confident to fix costs on a reliable basis.
>
> b. Parties should therefore, at all relevant times in the course of the hearing of a matter, be in a position to inform the court of their realistic estimate of the amount of the recoverable costs, on a standard or indemnity basis, should that party be the beneficiary of a costs order. Where practicable, the estimate should be verified on affidavit.
>
> c. Preferably parties should not, for this purpose, be put to the expense, and suffer the delay, of preparing a costs statement complying with the UCPR. Any estimate must nevertheless be carefully formulated and realistic."

[20] Here, there is clear material upon which I can assess costs. The affidavit in support of the application to fix costs is detailed and the various amounts claimed seem reasonable. I can see no reason to justify putting the first respondent to the expense of having the costs assessed.

[21] I fix the first respondent's costs at $37,255.57. There is no material before me suggesting that the costs should not be paid forthwith. I will so order.

The second respondent

[22] The second respondent has the benefit of an order that the applicants pay her costs of an adjournment of the application fixed at $900. An assessment of party/party costs of $6861.21 by Tonkin Legal Consulting has been filed. That assessment is for the costs of the application since the adjournment. There is no evidence from which I could though fix the second respondent's costs on an indemnity basis. The applicants have conceded that the costs should be assessed on the indemnity basis.

[23] The applicants' solicitors consent to an order to pay "the respondents' costs of the application to be assessed on the indemnity basis". The second respondent though is concerned to clarify that the order not differ in effect from one proposed by her namely that the applicants' solicitors pay "the respondents' costs of and incidental to the application to be assessed on the indemnity basis." The second respondent refers to *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)*.[6]

[24] In *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)*,[7] Jackson J conducted a detailed analysis of the rules and concluded that the words "of and incidental to", when referring to costs of a proceeding, are superfluous. In particular, his Honour referred to the definition of "costs of the proceeding" in Chapter 17A of the UCPR. That definition is as follows:

> "***costs of the proceeding*** mean costs of all the issues in the proceeding and includes—
>
> (a) costs ordered to be costs of the proceeding; and
>
> (b) costs of complying with the necessary steps before starting the proceeding; and
>
> (c) costs incurred before or after the start of the proceeding for successful or unsuccessful negotiations for settlement of the dispute."

[25] Consistently with his Honour's detailed analysis, I conclude that it is inappropriate to express the order in terms of costs "of and incidental to" the application. By ordering

---

6 [2013] QSC 271.

7 At [5] to [22].

the costs I am adopting the definition of "costs of the proceeding" in Chapter 17A of the UCPR. The proceeding here is the application.

[26] I make the following orders:

1. The applicants' solicitors Shine Lawyers forthwith pay the first respondent's costs of the application on the indemnity basis, fixed at $37,255.57.

2. The applicants' solicitors Shine Lawyers pay the second respondent's costs of the application to be assessed on the indemnity basis, or as agreed, save those costs ordered to be paid on 27 June 2018.