

SUPREME COURT OF QUEENSLAND

CITATION: *Thompson v Body Corporate for Arila Lodge & Ors* [2019] QCA 296

PARTIES: **EMMA THOMPSON**
(applicant)
v
BODY CORPORATE FOR ARILA LODGE
CTS 14237
(first respondent)
SGR PROP INVEST 01 PTY LTD
ACN 153 375 378
LYN McCLELLAND
(second respondents)

FILE NO/S: Appeal No 9215 of 2019
QCATA No 441 of 2016
QCATA No 75 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time – Further Orders

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane – [2018] QCATA 56; [2018] QCATA 133; Unreported 26 July 2019 (Member P Roney QC)

DELIVERED ON: 13 December 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Sofronoff P

ORDERS: **1. The applicant, Emma Thompson, shall pay the first respondent’s costs of and incidental to the notice of appeal filed on 28 August 2019, the application filed on 16 September 2019 and the application filed on 7 November 2019 on an indemnity basis.**

2. The first respondent’s *instanter* application for costs against the applicant’s solicitor be adjourned to a date to be fixed.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – HOPELESS CASES – where the applicant sought an extension of time within which to appeal various orders of the Queensland Civil and Administrative Appeal Tribunal – where the first respondent put the applicant’s solicitor on notice about the hopelessness of the application prior to the hearing – where the applicant failed to address the reasons for the delay and the reasons why an appeal

would have prospects of success at the hearing – where the Court refused the extension of time on 22 November 2019 and directed the parties to make written submissions as to costs – where the first respondent sought an order that the applicant pay its costs on an indemnity basis – where the first respondent made an *instanter* application at the delivery of judgment that the applicant’s solicitor pay its costs on an indemnity basis – where the applicant’s submissions do not address the issue of costs sought against both the applicant and the applicant’s solicitor and instead seek to reargue and make fresh submissions about leave to appeal – whether the applicant should pay the first respondent’s costs on an indemnity basis – whether the applicant’s solicitor should pay the first respondent’s costs on an indemnity basis

COUNSEL: A Abaza (*sol*) for the applicant
 C Francis (*sol*) for the first respondent
 S Reid (*director*) for SGR Prop Invest 01 Pty Ltd and
 L McClelland for the second respondents

SOLICITORS: Andrew P Abaza for the applicant
 Grace Lawyers for the first respondent
 The second respondents appeared on their own behalf

- [1] **SOFRONOFF P:** The applicant in this proceeding sought an extension of time within which to appeal against certain orders made by the Queensland Civil and Administrative Appeal Tribunal. On 13 November 2019 I heard those applications and on 22 November 2019 I refused the extension of time and published my reasons for that decision. I made directions for the parties to file written submissions about costs and they have done so.
- [2] The first respondent, which was represented by solicitors in these proceedings, seeks an order that the applicant pay its costs on an indemnity basis. It also seeks an order that the applicant’s solicitor pay those costs. The grounds for making such orders are said to be these:
- (a) The application concerning the order made on 26 July 2019 was incompetent because the order was not a “cost-amount decision” or a “final decision” within the meaning of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).
 - (b) Although the applicant bore the onus of providing a satisfactory explanation for her delay, the two affidavits that she filed, the three written outlines that she submitted and the oral argument made on her behalf did not address this matter.
 - (c) The proposed grounds of appeal also questioned two orders made on 8 December 2016 but those two orders were not the subject of any appeal.
 - (d) I had found that the applicant’s affidavits, outlines of argument and the oral argument made on her behalf demonstrated that, if granted leave, she wished to argue incoherent propositions and incompetent grounds of appeal and she did not raise any serious and professionally considered propositions for the Court to consider.
 - (e) I found that the proceedings were hopeless, utterly unmeritorious and doomed to fail as soon as they were filed.

- [3] The first respondent relies upon the well-known principles established by *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd*¹ and *Colgate-Palmolive Company v Cussons Pty Ltd*.² These cases established that indemnity costs can be awarded against an unsuccessful party when a proceeding has been commenced in circumstances in which the party who issued the proceedings, properly advised, should have known that they had no chance of success. Of course, that a proceeding is of such a character raises the discretion for exercise but the existence of that fact does not necessarily determine whether it ought to be exercised. The first respondent submits that the discretion should be exercised in its favour for a number of reasons.
- [4] The first respondent points out that its solicitors put the applicant's solicitor on notice about the hopelessness of her case by a letter of 14 October 2019. That letter said that the application was completely unmeritorious and would fail. The letter invited the applicant to withdraw her application and to consent to pay the first respondent's costs. The applicant's solicitor's response of 16 October 2019 did not address the substantive complaints about the applicant's claims and, instead, accused the first respondent's solicitors of bullying the applicant and being guilty of "harassment and oppression".³
- [5] The first respondent also points to the applicant's failure even to address the most basic matters that she had to address on an application for an extension of time, namely the reasons for the delay and why an appeal would have prospects of success.
- [6] The applicant's outline in relation to costs, prepared by Mr Abaza, does not address any of these complaints about the applicant's case. Instead, the applicant seeks to controvert my substantive decision insofar as it was based upon the meaning of the term "cost-amount decision" and she also repeats her groundless claim that the adjudicator's decision was made "without jurisdiction and in denial of natural justice". Mr Abaza has annexed a 68 page bundle of documents to his outline. This includes a letter of 26 August 2019 from Robinson Locke Litigation Lawyers, who were acting for the applicant at first instance, to their client. The letter reveals that the applicant knew, before the expiry of time to apply for leave to appeal from Mr Roney's decision of 26 July 2019, that time for applying for leave to appeal had begun to run. Yet she did not apply within time and has not explained her knowing failure to do so.
- [7] As Mr Francis, solicitor for the first respondent, has correctly pointed out, the applicant's written submissions ignore the issues that had to be addressed about costs and seek to reargue what has already been decided and, otherwise, it seems, to raise fresh matters about leave to appeal. Therefore, no grounds have been put forward to resist the making of the order that is sought.
- [8] In these circumstances, because of the matters I have referred to in paragraph [2] above and in accordance with the principles referred to in paragraph [3], the applicant should pay the first respondent's costs of and incidental to the application for an extension of time on an indemnity basis.
- [9] The first respondent has also sought an order that Mr Abaza pay the costs. Such an application was foreshadowed when I published my reasons and sought submissions

¹ (1988) 81 ALR 397, at 400-401.

² (1993) 46 FCR 225, at 230.

³ In that connection, the applicant's solicitor referred the first respondent's solicitors to *Union Steamship Co of New Zealand Ltd v The Caradale* (1937) 56 CLR 277, at 281. At that page, Dixon J discussed whether a proceeding brought in admiralty jurisdiction should be stayed. The case has nothing whatever to do with the applicant's case for an extension of time within which to appeal.

on costs. No application in writing has been filed seeking such relief but no such application is strictly necessary. It is open to me to treat the application against Mr Abaza as having been made *instanter*.

[10] The applicant's written outline about costs simply does not address this aspect of the first respondent's application. Mr Abaza has had an opportunity to be heard so it would be open to me to make an order on that part of the first respondent's application.

[11] However, I am disturbed by the possibility that Mr Abaza has simply not appreciated or understood what the first respondent is asking for. An application against a solicitor acting in a proceeding that the solicitor personally pays the costs of the unsuccessful party should normally be made by a written application that is served on that solicitor. I am therefore not prepared to make an order against him until he has had a further opportunity to make submissions as to why an order should not be made that he pay the first respondent's costs of this application on an indemnity basis. If the first respondent wishes to make such an application it should now do so. That will put the matter on a formal footing and permit Mr Abaza to take advice about his position and to respond to it. There is no need for me to make an order to enable that to be done. Once such an application is made, it would be preferable if the first respondent, as applicant for the order, files all of its materials to support its application as well as its outline at the same time. The parties are at liberty to apply through the Registry for the matter to be mentioned for the purpose of making any necessary directions (if they cannot agree) and to set a hearing date.

[12] The orders will be:

1. The applicant, Emma Thompson, shall pay the first respondent's costs of and incidental to the notice of appeal filed on 28 August 2019, the application filed on 16 September 2019 and the application filed on 7 November 2019 on an indemnity basis.
2. The first respondent's *instanter* application for costs against the applicant's solicitor be adjourned to a date to be fixed.