SUPREME COURT OF QUEENSLAND

CITATION:	*Oldfield v Mario Verrochi & East Yarra Friendly Society Pty Ltd t/a Chemist Warehouse (No 2)* [2017] QSC 114
PARTIES:	**LOUISE KELLY OLDFIELD** (applicant) **v** **MARIO VERROCHI and EAST YARRA FRIENDLY SOCIETY PTY LTD trading as CHEMIST WAREHOUSE** (respondent)
FILE NO/S:	No 10368 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Burns J
ORDER:	**The orders of the court are that:** **1. Subject to 2 below, the applicant shall pay the respondent's costs of and incidental to the application;** **2. The applicant shall not be obliged to pay the said costs until after the resolution of any residual claim for damages arising from her Notice of Claim for Damages dated 5 May 2016, whether such resolution is by final judgment, settlement or abandonment.**
CATCHWORDS:	COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant was employed by the respondent – where the applicant gave a Notice of Claim for Damages pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where the respondent's workplace insurer waived compliance with s 275 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) on a number of conditions including that the applicant may be required to bring, and have determined, an application for an extension of the limitation period pursuant to s 31 of the *Limitations of Actions Act* 1974 (Qld) before the compulsory conference is held – where the applicant was subsequently

required to bring, and have determined, an extension application in advance of the compulsory conference – where the application for an extension of the limitation period was dismissed – where, despite the failure of the extension application, the applicant might still have a residual claim for damages against the respondent – where the applicant contends that the respondent should be ordered to pay her costs or, alternatively, that there should be no order as to costs – where the respondent contends that the applicant should be ordered to pay its costs, either immediately or after the determination, resolution or abandonment of the applicant's residual claim – what costs order should be made

Limitation of Actions Act 1974 (Qld) s 30, s 31
Uniform Civil Procedure Rules 1999 (Qld), r 681
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 275, s 276, s 298

Oldfield v Mario Verrochi and East Yarra Friendly Society trading as Chemist Warehouse [2017] QSC 84, cited

COUNSEL:	G A Hampson for the applicant S T Farrell for the respondent
SOLICITORS:	Schultz Toomey O'Brien Lawyers part of the Slater and Gordon Group for the applicant BT Lawyers for the respondent

[1] On 23 May 2017, I dismissed an application brought on behalf of Louise Kelly Oldfield for an order extending the statutory limitation period for the commencement of a proceeding for damages for personal injuries.[1] After some preliminary observations were made regarding the question of costs,[2] the parties were directed to file and serve submissions on that topic.

[2] In my preliminary observations, I expressed an inclination to order "either that the respondent's costs of and incidental to the application be its costs in any proceeding that is subsequently commenced by the applicant or that there be no order as to costs".[3] I pointed to a number of features: that WorkCover required the application to be made; that, notwithstanding its failure, the applicant might still have a residual claim against the respondent with respect to any breach occurring after 11 May 2013; that she gave a candid and forthright account when giving evidence; and that it was unlikely that she has the means to satisfy a costs order. None of those features was singled out as being determinative of the way in which the costs discretion should be exercised in this case; the preliminary view which I expressed was based on the aggregation of those features. It was of course then for the parties to advance submissions on the point, and that is what subsequently occurred – by the applicant on 26 May 2017 and by the respondent on 1 June 2017.

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1 *Oldfield v Mario Verrochi and East Yarra Friendly Society trading as Chemist Warehouse* [2017] QSC 84. The application was brought pursuant to s 31 of the *Limitations of Actions Act* 1974 (Qld).
2 Ibid [62].
3 Ibid [61].

[3] It was submitted on behalf of the applicant that, despite the failure of the application, costs should be awarded in her favour or, alternatively, that there be no order as to costs. In support of this submission, the point was made that "the application was not brought at her instigation, but at the instigation of the respondent".[4] This was submitted to have been unnecessary because the applicant could have proceeded to a compulsory conference under the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) without the limitation point having first been determined, in which event, "discussion of the relevant evidentiary matters"[5] may have resulted in the applicant not pursuing the part of her claim that the court has now determined is out of time. Thus, it was contended that the applicant was forced to bring the application when that could, and should, have been avoided.

[4] The respondent submitted that the applicant should be ordered to pay its costs and that, if the "court is concerned that the making of a costs order … might stifle the applicant's residual claim",[6] an order could be made deferring the obligation to pay until after that claim is determined, settled or abandoned. The respondent maintained that it was appropriate to require the applicant to make the application because, without it, there would have been an unresolved and "fundamental impediment to settlement".[7] The point was made that, if the claim proceeded to a compulsory conference in those circumstances, the parties would have "incurred considerable expense for no benefit as the matter simply would not have been capable of resolution".[8] It was also submitted that the feature that the applicant had been candid in her evidence should not have the consequence that the respondent is deprived of its costs and, further, that the impecuniosity of an unsuccessful party is "not generally a relevant consideration".[9] In this latter respect, it was contended that there was "no evidence of the applicant's means before the court".[10]

[5] The general rule about costs is that they are in the discretion of the court but follow the event unless the court orders otherwise: *Uniform Civil Procedure Rules* 1999 (Qld), r 681. The discretion is at large, but it must be exercised judicially. Costs are not awarded to punish an unsuccessful party; their primary purpose is compensatory. However, as r 681 makes clear, the successful party cannot in all cases expect to be awarded costs; the justice of the case may require a different order.

[6] Here, it is uncontroversial that WorkCover required the applicant to bring the application for an extension of time. After its solicitors received the Notice of Claim for Damages, they wrote to the applicant's solicitors on 10 May 2016 in terms agreeing that there was an urgent need to start a proceeding for damages[11] and advising, inter alia, that they would waive compliance with s 275 of the *Workers' Compensation and Rehabilitation Act* on certain conditions. One of those conditions was that the applicant may be required to "bring her application for an extension of the limitation period … and receive the court's decision before holding the compulsory conference". It should also be observed with respect to the letter of 10 May 2016 that WorkCover was firmly of the view that (at least part of) the claim was statute barred, and its solicitors said as much. On the following

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4 Applicant's Submissions as to Costs, par 3.
5 Ibid par 27.
6 Respondent's Submissions as to Costs, par 2.
7 Ibid par 7.
8 Ibid par 9.
9 Ibid par 19.
10 Ibid par 18.
11 As to which, see s 276(6) of the Act.

day, the applicant's solicitors responded. They disputed that the limitation period had lapsed and set out their reasons. Otherwise, they accepted the conditions proposed by the solicitors for WorkCover subject to some minor amendments that have no present relevance. Then, on 22 September 2016, the applicant's solicitors were advised that WorkCover required the applicant to bring the subject application and have it determined before holding the compulsory conference.

[7] Because WorkCover agreed that there was an urgent need to start a proceeding for damages, it was entitled to impose such conditions as it considered necessary or appropriate to satisfy it to waive compliance: s 276. Of course, the applicant was not obliged to agree to those conditions; she could have applied to the court for leave to start the proceeding (despite noncompliance with the requirements of section 275): s 298. The applicant did not do that, preferring instead to accept the conditions imposed by WorkCover. There was accordingly always the prospect that WorkCover might insist on the subject application being heard and determined prior to the compulsory conference. As such, it was solely a matter for WorkCover to decide whether it should proceed to the compulsory conference with or without a determination of the limitation issue and, had it proceeded without one, it would still have been open to it WorkCover rely on a limitation defence if the claim could not be resolved.

[8] As it happened, WorkCover did insist on the application being brought but I do not think it can be criticised for that course. Without a determination, the limitation issue may very well have stood in the way of any meaningful settlement discussions. Although the applicant's submission to the effect that the pre-litigation procedures under the *Workers' Compensation and Rehabilitation Act* are intended to promote the resolution of claims may be accepted, that does not mean that the course taken in this case was "unnecessary",[12] especially when regard is had to somewhat entrenched positions taken on the face of the correspondence to which I have referred.

[9] The other features referred to in my preliminary observations were not the subject of any submissions on behalf of the applicant. On the other hand, the respondent made a number of submissions with respect to each of them. To be clear, I do not accept the submission that there is "no evidence of the applicant's means before the court".[13] To the contrary, there is a body of evidence on which the inference contained in my observations – i.e., that it is unlikely that the applicant has the means to satisfy a costs order – can be drawn. Of course, an unsuccessful party's inability to satisfy a costs order will not of itself usually be sufficient to warrant a departure from the general rule about costs, but the making of an order in some such cases may be considered futile. Nonetheless, I accept the submissions of the respondent to the effect that this is not such a case.

[10] After considering the submissions of the parties, I do not think that it would be right for the respondent to be deprived of a costs order in the circumstances of this case. It was open to the applicant to not agree to the condition requiring the making of the application. Equally, she could have decided not to press the application when she was required to bring it. Instead, she agreed to the condition and, when it was called up, she chose to proceed with the application. Furthermore, I am not satisfied that the other features referred to in my preliminary observations are, even when taken together, sufficient to justify the making of any order other than that the applicant pay the respondent's costs.

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12 Applicant's Submissions as to Costs, par 24.

13 Respondent's Submissions as to Costs, par 18.

However, I do think that they are sufficient to warrant a deferral of her obligation to pay until her residual claim (if any) has been disposed of, whether by court determination, settlement or abandonment. As I have previously observed, in the event that the applicant succeeds in recovering damages from the respondent, she will be entitled to set off the costs of the subject application against her costs in that proceeding or any award of damages in her favour.[14]

[11] It follows that the applicant will be ordered to pay the respondent's costs of and incidental to the application, to be calculated on the standard basis, but it will also be ordered that the applicant shall not be obliged to pay those costs until after the resolution of any residual claim for damages arising from her Notice of Claim for Damages dated 5 May 2016, whether such resolution is by final judgment, settlement or abandonment.

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14 *Oldfield v Mario Verrochi and East Yarra Friendly Society trading as Chemist Warehouse* [2017] QSC 84, [62].