SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Humphrey & Ors* [2018] QCA 321
PARTIES:	**OLGA DAY** (appellant) **v** **PROFESSOR JOHN HUMPHREY** (first respondent/not a party to the appeal) **ASSOCIATE PROFESSOR TINA COCKBURN** (second respondent/not a party to the appeal) **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (third respondent/not a party to the appeal) **WESLEY LERCH** (fourth respondent) **DAVID BRAY** (fifth respondent) **QUEENSLAND COMPENSATION LAWYERS PTY LTD** ACN 135 360 119 (sixth respondent)
FILE NO/S:	Appeal No 12360 of 2017 SC No 5774 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 236 (Daubney J)
DELIVERED ON:	16 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Morrison and Philippides JJA and Brown J
ORDERS:	**1. The appellant pay the respondents one third of their costs of and incidental to the appeal.** **2. The respondents pay the appellant's costs of the appeal.** **3. The costs of the proceedings below are reserved, to be dealt with by the judge who hears the eventual trial or other determination of the proceedings.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS – COSTS – RELEVANT CONSIDERATIONS GENERALLY – where the appellant contends the fourth respondent should be ordered to personally pay her costs of the appeal– where the appeal concerned only two issues, one being an application for the learned primary judge to recuse himself and the other

summary judgment – where the appellant was successful only in regards to the summary judgment issue – where orders for costs do not always follow the event where a summary judgment application is concerned – where the appellant failed on the other ground, and as such, could have costs ordered against her – where the appellant is self-represented – whether the parties should be ordered to pay a proportion of the costs

Uniform Civil Procedure Rules 1999 (Qld), r 684

Allianz Australia Insurance Ltd v Swainson [2011] QCA 179, followed
BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2) [2009] QSC 64, cited
Day v Lerch & Ors [2018] QCA 224, related
State of Queensland v Nixon & Ors [2002] QSC 296, cited

COUNSEL: The appellant appeared on her own behalf
No appearance for the respondents

SOLICITORS: The appellant appeared on her own behalf
Queensland Compensation Lawyers Pty Ltd for the respondents

[1] **MORRISON JA:** On 18 September 2018 the Court delivered its primary reasons in respect of the appeals in CA No 12360 of 2017 and CA No 3799 of 2017, which were heard together. These reasons now deal with the question of costs in CA No 12360 of 2017.

[2] There were two distinct issues on the appeal in CA No 12360 of 2017. The first concerned an appeal from the refusal of the learned primary judge to recuse himself from further hearing the matter. That appeal failed.

[3] The second concerned an appeal against the orders made by the learned primary judge, giving summary judgment against the appellant and thus dismissing her claim for damages[1] suffered because of her termination of employment. That part of the appeal succeeded. As a consequence orders 3 and 4, made by the learned primary judge on 26 October 2017, were set aside. Those orders were as follows:

> "3. The plaintiff's claims against the fourth, fifth and sixth defendants are dismissed.
>
> 4. The plaintiff is to pay the fourth, fifth and sixth defendants' standard costs of and incidental to this proceeding."

[4] Following delivery of the reasons the parties were directed to make any submissions they had in respect of the costs of appeal, within 14 days and restricted to a two page outline. The appellant has filed her submissions and the respondents to the

---

[1] For personal injuries in the form of PTSD.

appeal have signified that they make no submissions with respect to costs.[2] However, the respondents sought costs in their outline on the appeal.

The appellant's submissions

[5] The appellant contends that the fourth respondent, Mr Lerch,[3] should be ordered to personally pay her "outlays and disbursements of and incidental to the above appeal and the application filed on 31 March 2017 seeking a summary judgment".[4] This is said to be an order available in the Court's inherent jurisdiction to order costs against solicitors representing parties, and relies upon r 690 of the *Uniform Civil Procedure Rules* 1999 (Qld). The basis for making that order is contended to be as follows:

(a) in 2013 Mr Lerch allegedly dismissed the appellant from her employment during her sick leave;

(b) subsequently Mr Lerch and others filed an originating application "enforcing the premature compulsory conference without first obtaining liability, investigative and medical reports as required by the PIPA";

(c) Mr Lerch allegedly provided a number of misleading statements to the Court; these seemed to be Employment Separation Certificates or related Statutory Declarations dealing with the reason for the appellant's termination of employment;

(d) Mr Lerch has made contradictory statements about when and why the appellant's employment was terminated; the outline indulges in the scandalous allegation that "Mr Lerch is suffering from alcohol abuse", that being the alleged reason for his failure to admit that he was provided with certain documents, and his failure to respond to various requests by the appellant;

(e) the application brought by the respondents to strike out the pleading was effectively abandoned, and instead summary judgment was pursued;

(f) on 29 May 2017 Mr Lerch threatened the appellant with the recovery of his costs, and demanded that the appellant withdraw;

(g) Mr Lerch failed to make an application that I recuse myself from sitting on the appeal on the basis that I had heard a stay application in appeal CA No 3799 of 2017, in the course of which I had cause to look at the grounds of appeal as they then stood; and

(h) subsequently to the decision handed down on 18 September 2018, Mr Lerch requested the appellant to file an amended statement of claim confirming that she was not employed by the sixth respondent (QCL) as at 4 November 2013 "despite evidence to the contrary".[5]

Discussion

[6] As mentioned above, the appeal in question concerned only two issues: (i) the application for the learned primary judge to recuse himself;[6] and (ii) the summary

---

2 Email dated 27 September 2018 to the Court of Appeal Registry.
3 A solicitor and director of the sixth respondent, QCL.
4 Outline para 11.
5 Outline paras 4-11.
6 This was the second such application, the first being the subject of appeal No. 3799 of 2017.

judgment. The appellant failed on the first issue, but succeeded on the second. Her allegations of conduct on the part of Mr Lerch extends to matters well in advance of the commencement of each of those applications, and to one matter which post-dates the resolution of the appeal.

[7] Reliance on r 690 *UCPR* is misplaced. It gives power to order a lawyer to repay that lawyer's client where the client has been ordered to pay costs. That is not the case here.

[8] The general rule is that costs follow the event.[7] In various circumstances the court may depart from the general rule and make a different costs order. Usually this will be because of some misconduct on the part of the party who would normally receive the benefit of that order.[8]

[9] Costs can also be awarded on a differential basis depending on the degree of success, and whether the success was only on issues that occupied an identifiable proportion of the time.[9] Other bases for departing from the general rule include where the successful party was seeking an indulgence from the court, where the successful party had excessively delayed the prosecution of the case or where a successful party's interests were conducted jointly with that of an unsuccessful party.

[10] Orders for costs do not always follow the event where a summary judgment application is concerned. The position was explained by Muir J in *Queensland v Nixon*:[10]

> "The position in relation to summary judgment applications though, as r 299(1) recognises, is somewhat different. Such an application may fail even though that applicant may have good prospects of ultimately succeeding in the action. The party seeking to resist the application may rely on evidence which may not be accepted on the final hearing and the applicant may be obliged to proceed on the basis that the respondent's version of the facts be accepted for the purposes of the application.
>
> Because of considerations such as these, costs of summary judgment applications are something reserved or made the parties' costs in the cause. It is otherwise where it appears, for example, that the applicant for summary judgment ought reasonably to have appreciated that the application would fail or is applying primarily with a view to securing a forensic advantage."

[11] *UCPR* r 684 provides that the court can make an order for costs in relation to a particular question in, or a particular part of, a proceeding. Rule 684 provides an exception to the general rule, and necessarily the circumstances which engage r 684 are "exceptional" circumstances. The enquiry must be: "What is it about the present case which warrants the departure from the general rule?"[11] One of the features about awarding costs under r 684 is that it applies where the particular question or

---

7 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67]; [1998] HCA 11.

8 See, for example, *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2001] 1 Qd R 26; [2001] QCA 191.

9 For example, *X & Y v Pal (by her tutor X)* (1991) 23 NSWLR 26; [1991] NSWCA 302; *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10; [1986] FCA 357.

10 *State of Queensland v Nixon & Ors* [2002] QSC 296 at [6]-[7].

11 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64.

part of a proceeding is definable and severable, and has occupied a significant part of the trial.[12]

[12] In *Allianz Australia Insurance Ltd v Swainson*[13] this Court addressed the question of the appropriate costs orders where most of the appeal was concerned with the question of negligence, on which one party was unsuccessful. The party succeeded on the appeal but a substantial part of the appeal was concerned with an issue on which that party did not succeed. The contention was that special circumstances were shown and that as the party was unsuccessful on that aspect it should pay half of the other party's costs. Fraser JA[14] said:

> "[4] The decisions cited by the insurer for its argument that costs should follow the event except in "special circumstances" did not support that proposition, but the general proposition did derive support from another authority cited by the insurer, McMurdo J's statement in *Whiting v Somerset Regional Council (No 2)* that "[o]rdinarily the fact that a successful plaintiff or applicant fails on particular arguments does not mean that he should be deprived of some of its costs or require an apportionment of costs between issues." The same general principle was expressed in somewhat less emphatic terms by Muir JA in *Alborn & Ors v Stephens & Ors*:
>
> > "The usual rule is that the costs of a proceeding follow the event. [*Uniform Civil Procedure Rules* 1999 (Qld), r 681 and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] to [70].] The 'event' is not to be determined merely by reference to the judgment or order obtained by the plaintiff or appellant, but is to be determined by reference to 'the events or issues, if more than one, arising in the proceedings'. [*Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at 60; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 615; and *Byrns v Davie* [1991] 2 VR 568 at 570, 571.] However, a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs. [*Waterman v Gerling (Costs)* [2005] NSWSC 1111; *Todrell Pty Ltd v Finch (No 2)* [2007] QSC 386.]"
>
> [5] A similar approach was adopted in relation to costs of an appeal in *Sequel Drill & Blast P/L v Whitsunday Crushers P/L (No 2)*:
>
> > "Rule 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') provides that costs of a proceeding are in the discretion of the Court but follow the event unless the Court orders otherwise. The rule which specifically relates to appeals is r 766(1)(d), which simply provides that the Court of Appeal 'may make the order as to the

---

12 *BHP Coal* at [6]-[8].
13 [2011] QCA 179.
14 With whom A Lyons and Martin JJ concurred.

whole or part of the costs of an appeal it considers appropriate'. Although r 766(1)(d) does not express the general principle under which a successful appellant is usually given costs in its favour, that general principle remains applicable. In *Oshlack v Richmond River Council* (1998) 193 CLR 72, which concerned a provision conferring a discretionary power to award costs in general terms, McHugh J explained why a successful party is usually given costs:

> '[67] The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is granted in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party [*Latoudis* (1990) 170 CLR 534 at 543, per Mason CJ: at 562-563, per Toohey J; at 566-567, per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ]. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.
>
> [68] As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.'

The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the Court considers that some other order is more appropriate: see *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at [84], per McPherson JA."

> [6] None of the cases I have mentioned are sufficiently analogous to this case to provide direct assistance in deciding the appropriate costs order here, but *Daly v D A Manufacturing Co P/L & Anor* may be seen as a relevant example of a case in which the results on issues were taken into account in deciding the appropriate order as to costs of an appeal. In that case the costs which a respondent/plaintiff was ordered to pay to an appellant/defendant were limited to the costs of the successful appeal on quantum where the defendant had also unsuccessfully appealed on liability and contributory negligence. If a similar approach were adopted here, the insurer might be given its costs of the issue of contributory negligence but otherwise deprived of costs."[15]

[13] Awarding costs of issues, whilst possible, can present difficulties for costs assessors in assessing costs statements delivered as a consequence of such an order. Those complications can be avoided by awarding one side or the other a proportion of the costs.[16]

[14] The appellant having failed on that part of the appeal that relates to the refusal of the learned primary judge to recuse himself, if costs follow the event, then they could be ordered against her.

[15] As for the appeal against the summary judgment, most of the allegations by the appellant do not relate directly to the way in which that application was conducted. True it is that the application for summary judgment became the primary relief that the respondents sought, as opposed to striking out the statement of claim. It is also true that there had been a number of hearings in respect of the part-heard application to strike out before summary judgment was elevated to the primary relief. However, summary judgment was always sought as alternative relief. There was nothing improper in the respondents' deciding to seek summary judgment given the state of the pleadings, nor in the way that application was conducted.

[16] Ms Day's complaints as outlined in her submissions on costs are misconceived. Whatever might be the correct characterisation of the events in 2013 or 2015, surrounding the termination of her employment and the documents brought into existence relating to that termination, none of it impacts upon the way in which the application for summary judgment was conducted, nor the prima facie entitlement of the respondents to seek that relief given the state of the pleadings.

[17] The allegation that Mr Lerch is or was suffering from alcohol abuse is simply scandalous, and no regard should be paid to it.

[18] The contention that Mr Lerch threatened the appellant in his email of 29 May 2017 is misconceived. The email was part of material which the appellant sought to adduce as further evidence in the appeal.[17] It was ruled irrelevant and therefore excluded. However, the general nature of it is referred to in the primary reasons, namely: (i) predicting that costs would be ordered against her; (ii) saying what the

---

15 *Allianz Australia Insurance Ltd v Swainson* at [4]-[6]; footnotes omitted.

16 *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] 1 All ER 440; [1945] KB 356 at 363; *Saarinen v Clay* [1954] VLR 392; [1954] VicLawRp 56.

17 *Day v Lerch & Ors* [2018] QCA 224 at [79].

total of those costs might be, and that such orders would be enforced; and (iii) requesting that she pay the costs.[18] The email does not bear the characterisation that the appellant gives to it in her current outline.

[19] As for the conduct subsequent to the delivery of the principal reasons, that can be disposed of quickly. On the day following the principal reasons Mr Lerch emailed the appellant asking if she could provide her amended statement of claim within 21 days, and whether she would consent to the matter being placed on the supervised case list for self-represented parties. The question of amendment was said to be important because, if the appellant said she was not a QCL employee at the time of the injury, Mr Lerch proposed to return to his public liability insurer "with a renewed request for indemnity for your claim".[19] The reason for Mr Lerch's request is obvious as (i) the appellant's success in overturning the summary judgment order was essentially because there was a factual dispute as to when and how her employment was terminated, and (ii) the case which she wished to agitate was not the one which was pleaded in her statement of claim. It follows that Mr Lerch's request as to whether she intended to amend was perfectly reasonable.

[20] On this particular appeal the issue on which the respondents succeeded, that is on the recusal issue, did not occupy as much of the time of the court or the parties as did the issue of summary judgment. This was partly because the recusal issue built upon a similar contention in appeal No 3799 of 2017. For that reason there was no new exposition of legal principle, but rather the addition of some extra allegations concerning circumstances which were alleged gave rise to apprehended bias. By contrast nothing in appeal No 3799 of 2017 concerned the summary judgment. Attempting some division as between the two issues is largely a matter of impression, and it is not an exercise much assisted by numeric calculations. In my view, it is reasonable to conclude that about one-third of the time and effort, including the material filed in respect of that issue, was spent on the recusal issue.

[21] The recusal issue was quite distinct from the summary judgment issue, both in terms of material filed, and in the legal and factual issues. For that reason it does not appear to me to be just that the respondents be denied any recovery of costs in respect of that issue. Therefore, it seems to me that the appropriate order is that the appellant pay one-third of the respondents' costs of and incidental to the appeal.

[22] The costs incurred in respect of the summary judgment are different. The respondents do not oppose an order in favour of the appellant on that issue.

[23] The appellant has always been self-represented in the appeal (and below). Thus there are no legal costs that she can recover. However she will have incurred certain outlays such as those associated with filing the notice of appeal and the preparation of the record book. There is no reason to discount them because there were two issues on the appeal, as the fees for filing and preparation are, no doubt, fixed. Accordingly, in my view, the appellant is entitled to an order that the respondents pay her costs of the appeal.

[24] The costs of the proceedings below should be reserved, to be dealt with by the judge who hears the eventual trial or other determination of the proceedings. That follows because of the issues identified in paragraph [10] above, and because this court is

---

18 The relevant text of that email is set out in paras 7 and 8 of Ms Day's Affidavit filed 10 July 2017, AB 226.

19 Affidavit of Ms Day filed 2 October 2018 para 11.

not in a position to make any assessment of the division of time and effort on the separate issues below.

Conclusion

[25] I propose the following orders:

1. The appellant pay the respondents one third of their costs of and incidental to the appeal.
2. The respondents pay the appellant's costs of the appeal.
3. The costs of the proceedings below are reserved, to be dealt with by the judge who hears the eventual trial or other determination of the proceedings.

[26] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and with the orders proposed by his Honour.

[27] **BROWN J:** I agree with the reasons given by Morrison JA, and the orders proposed by his Honour.