

# SUPREME COURT OF QUEENSLAND

CITATION: *Day v Humphrey & Ors (No 2)* [2019] QSC 55

PARTIES: **OLGA DAY**  
(plaintiff)  
v  
**PROFESSOR JOHN HUMPHREY**  
(first defendant)  
**ASSOCIATE PROFESSOR TINA COCKBURN**  
(second defendant)  
**QUEENSLAND UNIVERSITY OF TECHNOLOGY**  
(third defendant)  
**WESLEY LERCH, Director of Queensland  
Compensation Lawyers Pty Ltd**  
(fourth defendant)  
**DAVID BRAY, Director of Queensland Compensation  
Lawyers Pty Ltd**  
(fifth defendant)  
**QUEENSLAND COMPENSATION LAWYERS PTY  
LTD (ACN 135 360 119)**  
(sixth defendant)

FILE NO: BS5774 of 2016

DIVISION: Trial Division

PROCEEDING: Costs

DELIVERED ON: 14 March 2019

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Mullins J

ORDER: **The plaintiff must pay the defendants' costs of the application filed on 20 December 2018.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS — GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the plaintiff applied for recusal of the supervising judge on the grounds of reasonable apprehension of bias – where the recusal application was refused – where the supervising judge decided not to continue in that role in the interests of justice for all parties in the proceeding – whether costs should follow the event

*Uniform Civil Procedure Rules 1999 (Qld), r 681*

*Oshlack v Richmond River Council* (1998) 193 CLR 72;  
[1998] HCA 11, considered

COUNSEL: O Day (in person) for the plaintiff  
D J Schneidewin for the first, second and third defendants

SOLICITORS: Barry Nilsson Lawyers for the first, second and third  
defendants  
Queensland Compensation Lawyers for the fourth, fifth and  
sixth defendants

- [1] On 1 March 2019 I published my reasons for refusing Mrs Day's application that I recuse myself as the supervising judge of this proceeding on the SRL Supervised Case List: *Day v Humphrey & Ors* [2019] QSC 28 (the reasons).
- [2] Even though I refused the application for recusal I decided (at [76] of the reasons) that it was in the interests of justice for all parties to the proceeding that I not continue as the supervising judge. I therefore directed the parties to apply to the Senior Judge Administrator to nominate a judge in lieu of me to be the supervising judge pursuant to Practice Direction No 10 of 2014 of this proceeding.
- [3] The question of the costs of the recusal application was adjourned to be decided on the papers and all parties filed written submissions on costs on 11 March 2019.

#### **Mrs Day's submissions on costs**

- [4] Mrs Day relies on her recusal application and supporting affidavit filed on 4 February 2019 and seeks leave to rely on paragraphs [63]-[65] of her affidavit filed on 11 March 2019. To the extent that Mrs Day requires leave to rely on those paragraphs which are, in fact, paragraphs [62]-[64] of her affidavit, I give that leave. Those paragraphs, however, relate to Mrs Day's proposal to the defendants on 6 February 2019 as to the directions that were to be made at the review hearing scheduled for 2.30pm on 8 February 2019. As it turned out, the order that I made on the review hearing reserved the costs of the review. The paragraphs that Mrs Day is relying on in her affidavit filed on 11 March 2019 are therefore not particularly relevant to the costs of the recusal application.
- [5] Mrs Day relies on *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [40]-[41] to submit that there is no automatic rule that costs follow the event and that r 681 of the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR) reflects the general proposition that the court has a wide discretion with respect to costs, including the circumstances in which a party obtained a full or partial relief sought in the application.
- [6] Mrs Day submits that as a result of my deciding not to continue as the supervising judge, she, in substance, obtained the relief sought in her application seeking my recusal. Mrs Day submits it was relevant that the solicitors for the QUT parties did not file any material or make submissions to the court in relation to the recusal application and that the QCL

parties did not file any material in relation to the recusal application and a short written submission only was filed by them, without any additional oral submissions being made.

- [7] Mrs Day therefore submits that there be no order as to costs in respect of the recusal application.

### **The defendants' submissions**

- [8] Each of the QUT parties and the QCL parties submit the plaintiff should be ordered to pay their costs on the standard basis. Both sets of parties submit that the recusal application was unsuccessful and, although I decided not to continue to supervise the proceeding for the reasons set out in paragraph [76] of the reasons, that did not result in an outcome which was success for Mrs Day on her recusal application. The recusal application was without merit. It was the conduct of Mrs Day in connection with her unsuccessful recusal application that resulted in my conclusion that it would be in the interests of justice for all parties for me not to continue as the supervising judge, because otherwise Mrs Day would be distracted from the proceeding by my supervision.
- [9] Each of the QUT parties and the QCL parties submit that it was Mrs Day's own conduct which caused the bringing of the recusal application that was unsuccessful and therefore the costs to be incurred by the defendants. There should not be a departure from the usual rule that costs should follow the event.

### **What is the appropriate costs order?**

- [10] The starting point for resolving the issue of costs in relation to an application is r 681 of the *UCPR*:
- “(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
- (2) Subrule (1) applies unless these rules provide otherwise.”
- [11] Although r 681 reflects the proposition that generally in making an order for costs the discretion is exercised in favour of the successful party, as Mrs Day submits in reliance on *Oshlack*, it does not remove the broad discretion that the court has with respect to costs.
- [12] The difference between Mrs Day and the defendants is the characterisation of the outcome of the application. The reasons show that Mrs Day did not have grounds for seeking my recusal for apprehended bias when she made her application on 20 December 2018 or when the application was heard on 8 February 2019. It was her choice to bring the application in *inter partes* litigation. In fact, Mrs Day sought an order for payment of her disbursements and outlays against the defendants in the application filed on 20 December 2018. It is apparent from the reasons that Mrs Day's recusal application was refused. It is also apparent that after refusing it, I have made a separate decision about the interests of justice for all parties in respect of my ongoing supervision of the proceeding and decided not to continue in my role as the supervising judge under the Practice Direction.

Mrs Day's submission that she obtained the relief sought in her application seeking my recusal from involvement in the proceeding overlooks my conclusion in paragraph [74] of the reasons that maintenance of the public confidence in the administration of justice did not require me to recuse myself from being the supervising judge of this proceeding. The fact that I then made a judgment call for the benefit of all parties in the proceeding not to continue as the supervising judge does not equate to success on the application for Mrs Day.

- [13] As the recusal application could potentially affect the other parties to the proceeding, it was appropriate they be represented at the hearing to ensure their interests were protected. Appropriately they did not file affidavits for the purpose of the recusal application. There was nothing in the conduct of the defendants in appearing on the application that weighs against them in seeking their costs. The fact that I then decided not to continue as the supervising judge of this proceeding is not a reason not to order Mrs Day (as the unsuccessful party on the recusal application) to pay the defendants' costs of the recusal application. To the extent that Mrs Day is concerned about the fact that the hearing of the application was adjourned at 11.25am on 8 February 2019 until 2.30pm and the effect that may have on the costs of the attendance of counsel and solicitors for the defendants is a matter that can be pursued on any costs assessment.
- [14] The appropriate exercise of the discretion in the circumstances is to order that the plaintiff must pay the defendants' costs of the application filed on 20 December 2018. In the absence of any further specification, it means that the costs will be assessed on the standard basis.