SUPREME COURT OF QUEENSLAND

CITATION:	*Thomson v State of Queensland & Anor (No 2)* [2019] QSC 115
PARTIES:	**STEPHEN THOMSON** (plaintiff) **v** **STATE OF QUEENSLAND** (first defendant) and **QUEENSLAND POLICE-CITIZENS YOUTH WELFARE ASSOCIATION (ACN 009 666 193)** (second defendant)
FILE NO:	BS 8331 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	8 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Applegarth J
ORDERS:	**1. The first defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on an indemnity basis, including those costs incurred by the plaintiff in proceeding against the second defendant, to be agreed or assessed.** **2. The plaintiff's costs be assessed on the basis that, except insofar as they are of an unreasonable amount, the fees of two counsel should be regarded as costs necessary and proper insofar as they are limited to fees for or in preparation for trial, and otherwise be at the discretion of the assessor.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – MULTIPLE DEFENDANTS – where the plaintiff sued successfully for injuries sustained as a consequence of working at a school farm – where the plaintiff was an employee of the second defendant and the farm was operated by the first defendant – where the liability of each defendant to the plaintiff was in

dispute at trial – where the plaintiff succeeded against both defendants – where the plaintiff cannot obtain an order for costs against the second defendant due to the effect of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where the plaintiff seeks an order that the first defendant pay both the costs incurred in pursuing the first defendant and the costs incurred in pursuing the second defendant – whether the costs order against the first defendant in favour of the plaintiff should include the costs that the plaintiff incurred in successfully pursuing the second defendant

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – TWO COUNSEL – where the plaintiff seeks an order that the fees of two counsel should be regarded as costs necessary and proper – where the first defendant submits that the claim by the plaintiff did not involve significant complex issues – where the plaintiff submits a number of relevant factors as to why the fees of two counsel should be regarded as necessary and proper – whether an order should be made concerning the costs of the two counsel engaged by the plaintiff

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 316

Gould v Vaggelas (1984) 157 CLR 215, cited
Kerle v BM Alliance Coal Operations Pty Ltd & Ors (No 2) [2017] QSC 7, followed
Paskins v Hail Creek Coal Pty Ltd (No 2) [2018] 2 Qd R 518; [2017] QSC 213, followed
Thomson v State of Queensland & Anor [2019] QSC 95, cited
Wiltshire v Amos [2018] QSC 224, cited

COUNSEL: G J Cross and O Perkiss for the plaintiff
M T O'Sullivan for the first defendant

SOLICITORS: The Personal Injury Lawyers for the plaintiff
Crown Solicitor for the first defendant

[1] The plaintiff succeeded in obtaining a judgment against the first defendant and a judgment against the second defendant.[1] Formal orders were made on 17 April 2019, including a direction that the issue of costs as between the plaintiff and the first defendant be adjourned to a date to be fixed. They have been the subject of written submissions by those parties.

[2] Because the plaintiff's offers to settle to the first defendant (including an offer of $900,000 plus costs in May 2016) were less than the sum awarded against the first defendant, there is no contest that the first defendant should be ordered to pay the

[1] *Thomson v State of Queensland & Anor* [2019] QSC 95.

plaintiff's costs of and incidental to the proceeding against it, to be assessed on an indemnity basis.

Should the costs order made in favour of the plaintiff against the first defendant include the costs of pursuing the second defendant?

[3] The first contentious issue is whether that costs order should include the costs incurred by the plaintiff in pursuing the second defendant. The plaintiff submits that in circumstances in which he succeeded against both defendants, his indemnity should include the expense to which he has been put by reason of the first defendant's stance which necessitated his pursuit of the second defendant and increased his costs burden. Reliance is placed upon the decision of McMeekin J in *Paskins v Hail Creek Coal Pty Ltd (No 2)*[2] in which a similar issue arose.

[4] In response, the first defendant submits that:

(a) the plaintiff was not entitled to a costs order against the second defendant because the judgment against the second defendant fell short of any offer of settlement made by the plaintiff to the second defendant;

(b) even if the plaintiff had made an effective written final offer to the second defendant, he would only have been entitled to standard costs against the second defendant from the date of the offer, and therefore the plaintiff's argument seeks to place him in a far better position than if he had made an effective written final offer against the second defendant;

(c) the costs order sought by the plaintiff would be contrary to, and would circumvent, s 316(1) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("*WCRA*") which provides that "No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding";

(d) the decision of McMeekin J in *Paskins* is distinguishable as there the Court ordered the second defendant to indemnify the first defendant in respect of the claim of the plaintiff.

[5] The essential issue is this: should the protection given to an employer against a costs order when the plaintiff does not make an effective mandatory final offer to the employer operate to protect the other defendant, in this case the State of Queensland?

The plaintiff is not entitled to a costs order against the second defendant

[6] There is no dispute that the plaintiff is not entitled to a costs order against the second defendant. In short, his mandatory final offer to the second defendant ($700,000 clear of the WorkCover refund of $188,727.10 or a gross offer of $888,727.10) far exceeded the judgment sum against the second defendant. The offer seemingly did not take account of the fact that the second defendant was not liable for the significant claim for past and future care. Under the *WCRA*, a plaintiff is only entitled to costs, on the standard basis, if he or she has been awarded an amount of damages that was equal to or

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2 [2018] 2 Qd R 518; [2017] QSC 213 ("*Paskins*").

more than the plaintiff's written final offer.[3] As noted, no order about costs, other than an order allowed under s 316, is to be made by the Court "in the claimant's proceeding".[4] As a result, there was no order for costs made as between the plaintiff and the second defendant.

Liability was contested by both defendants until after the evidence closed

[7] Each defendant denied liability, including during the course of four days of evidence. Both liability and quantum were contested. Each defendant sought contribution or indemnity from the other. Liability to the plaintiff was only admitted shortly before written submissions on both liability and quantum were due. The defendants resolved issues of indemnity and contribution, making it unnecessary and inappropriate for the Court to decide contribution and indemnity between them.

Is *Paskins* distinguishable?

[8] In *Paskins* the plaintiff sued for damages for injuries sustained in the course of his employment. Two defendants were sued. Each defendant denied liability. Both were found liable. The second defendant was required to indemnify the first defendant in respect of the plaintiff's claim.

[9] As in this case, the rights of the plaintiff to a costs order against his employer (the first defendant in the case of *Paskins*) were governed by the *WCRA*. It was accepted that he had no entitlement to a costs order against his employer, given the mandatory final offers made by the plaintiff and his employer. The plaintiff and his employer bore their own costs of the proceeding between them. The same applies here. Mr Paskins sought an order that the second defendant pay not only the costs incurred by him in pursuing the second defendant, but the costs incurred by him in pursuing his employer (the first defendant). McMeekin J posed the question of whether Mr Paskins could circumvent the effect of the *WCRA* by those means.[5]

[10] The issue of costs was in the Court's discretion. There was no doubt that it was reasonable for the plaintiff to take the course of pursuing both defendants. The defendants each contended that the other was liable, and the plaintiff could not take the risk of suing one and not the other.

[11] McMeekin J cited well-accepted authority that if a plaintiff pursues both defendants and fails against one and so incurs an adverse costs order, the unsuccessful defendant can be ordered to pay those costs directly to the successful defendant (a *Sanderson* order) or the court can order that the plaintiff pay the costs of the successful defendant but recover them from the unsuccessful defendant (a *Bullock* order).[6]

[12] In *Paskins* the plaintiff did not fail against one defendant but, as here, succeeded against both. The conduct of the second defendant in denying that it was liable made it fair to impose some liability on it for costs in respect of the claim against the first defendant. The issue for McMeekin J was whether the legislation which denies a plaintiff the protection of a costs order against his employer if he or she does not put in place a

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3 *WCRA* s 316(2)(a).
4 Ibid s 316(1).
5 *Paskins* at [9].
6 See generally *Gould v Vaggelas* (1984) 157 CLR 215 at 230.

mandatory final offer less than the eventual award against the employer should operate to protect the other defendant. McMeekin J had regard to the objects and provisions of the *WCRA* and concluded that they were not offended by the making of the order the plaintiff sought.

[13] In that case it was common ground that the second defendant should be ordered to pay Mr Paskins' costs of the proceeding against the second defendant on the standard basis.[7] As a result, the following question was posed by McMeekin J:

> "The question then is whether it is just, that the plaintiff, who was successful against both defendants, obtain an indemnity, to the extent that an order for costs on the standard basis can do so, against the expense to which he has been put by reason of the second defendant's unsuccessful stance, that led to the plaintiff incurring this increased costs burden? I cannot see why, in fairness, the second defendant [should] not be required to bear that burden itself."[8]

[14] The first defendant in this matter accepts that the judgment in *Paskins* is relevant to general considerations concerning the discretion on costs, but submits that it is not relevant to this case, as there, McMeekin J ordered the second defendant to indemnify the first defendant in respect of the claim of the plaintiff.

[15] I am not persuaded that this is a valid ground of distinction. If this matter had proceeded to a final judgment on liability, including issues of indemnity and contribution between defendants, then there would have been a judicial determination of contribution and indemnity between defendants, rather than the 80:20 apportionment negotiated by them. In that event a similar issue would have arisen to that which arose in *Paskins*. In this case it was open to the defendants to negotiate an appropriate agreement concerning contribution or indemnity with respect to the costs of each defendant in defending the plaintiff's claim against it, as well as each defendant's contingent liability to a costs order being made against it in favour of the plaintiff. The fact that issues of indemnity and contribution between defendants were decided by the Court in *Paskins*, and were resolved by agreement between the defendants after the evidence concluded in this case, is not a valid point of distinction. The essential issue is the same. It is whether it is just that the plaintiff, who was successful against both defendants, should have included in the order for costs to be made against the first defendant the additional costs incurred in pursuing the second defendant because of the first defendant's unsuccessful stance in denying liability.

The issue

[16] The issue for decision is the appropriate order for costs *against the first defendant*. I am not directly concerned with deciding the appropriate order for costs *against the second defendant* in respect of the proceeding brought against it. That issue has been determined in accordance with the statute.

[17] The fact that the plaintiff is not able to recover from the second defendant the costs he incurred in pursuing it because his mandatory final offer to it was not good enough is a relevant circumstance. However, s 316 of the *WCRA* is concerned with an order for

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7 *Paskins* at [6].
8 Ibid at [19].

costs made in the "claimant's proceeding" against the employer. It is not concerned with the appropriate order for costs in the proceeding brought against another defendant, being a proceeding which is not governed by s 316 of the *WCRA*. Section 316(1) does not purport to prohibit or regulate an order as to costs against another defendant. I follow, with respect, the analysis of McMeekin J in *Paskins* that the order the plaintiff seeks does not offend the objects of the *WCRA*.

[18] The order sought does not circumvent s 316 of the *WCRA*. Instead, the fact that the plaintiff has not been able to recover the costs of pursuing the second defendant by virtue of s 316 of the *WCRA* is a relevant consideration. That said, the plaintiff was not unsuccessful in his pursuit of the second defendant. He succeeded in obtaining judgment against the second defendant, but not to the extent that would entitle him to a costs order against the second defendant in light of the settlement offers made by him.

[19] If the plaintiff had failed entirely against the second defendant, and succeeded only against the first defendant, there would have been a basis, in accordance with general principles governing costs in such an event, for him to seek a costs order against the first defendant with respect to his unsuccessful pursuit of the second defendant. In circumstances in which he has succeeded against the second defendant, his ability to engage this principle must be the same, if not stronger. There is no reason to doubt the reasonableness of the course taken by him in pursuing both defendants, neither of which admitted liability.

A curiosity?

[20] The first defendant submits that it would be a curious state of affairs that allowed a plaintiff who had not made an effective written final offer, to seek costs, not on a standard basis, but on an indemnity basis against the first defendant in respect of proceedings he brought against the second defendant, in the present circumstances. The first defendant submits that the plaintiff's argument seeks to place him in a far better position than if he had made an effective written final offer against the second defendant at the compulsory conference.

[21] This submission has some attraction. However, it does not fully engaged with the point that a plaintiff, who has not only failed to make an effective written final offer, but who completely fails against another defendant, may seek to have the costs of pursuing an unsuccessful claim against a successful defendant recovered by way of a costs order made against an unsuccessful defendant. Moreover, even if the plaintiff had made an effective written final offer against the second defendant and obtained a costs order against the second defendant on the standard basis, there would be nothing, in point of principle, which would prevent him from seeking an order against the first defendant which would have the effect of granting him a more complete indemnity for the cost of pursuing the second defendant. Therefore, there is nothing in point of principle that prevents the plaintiff from seeking a costs order in his proceeding against the first defendant in respect of the additional cost to which he was put in pursuing a proceeding against the second defendant, including an order which would place him in a better position than if he had made an effective written final offer against the second defendant.

[22] The point remains that the first defendant's denial of liability, which was unmeritorious, put the plaintiff to the increased cost burden of pursuing a proceeding against the

second defendant. If the first defendant had admitted liability and accepted the plaintiff's offer dated 12 May 2016 or his subsequent offer made pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld) dated 27 July 2017, then the plaintiff would not have been required to incur the costs which he did in pursuing a proceeding against the second defendant to trial.

[23] It is true, and relevant, that the plaintiff might have better protected himself by making an offer to the second defendant which gave him an entitlement to a costs order against the second defendant in his proceeding against it. If he had done so, the plaintiff would have been entitled to standard costs against the second defendant. However, this fact does not, in my view, disentitle the plaintiff from seeking an order against the first defendant in respect of the additional costs he incurred by reason of the first defendant's denial of liability and unsuccessful stance at trial, which led to the plaintiff incurring this increased cost burden.

[24] The relevant order made in *Paskins* was for costs to be assessed on the standard basis. However, this was because it was common ground that the second defendant should be ordered to pay Mr Paskins' costs of the proceeding against the second defendant on the standard basis. In this matter, the plaintiff is entitled to indemnity costs against the first defendant because of the effective offer or offers which he made to it, and which were rejected by the first defendant. The issue, then, is whether the additional costs which the plaintiff incurred in pursuing a successful claim against the second defendant should be included as part of the costs order to be made against the first defendant and, if so, whether those costs should also be assessed on the indemnity basis.

[25] In my view, it is appropriate to exercise my discretion as to costs to so order. The plaintiff was forced to pursue a proceeding against the second defendant in circumstances where the first defendant denied liability and sought indemnity or contribution against the second defendant in respect of its alleged negligence. It was reasonable for the plaintiff to not take the risk of suing one defendant and not the other. The plaintiff in fact succeeded in obtaining a judgment against the second defendant. He would not have been put to the cost of pursuing a claim against the second defendant if the first defendant had admitted liability. In the circumstances, it is just that the costs order against the first defendant should include the costs incurred by the plaintiff in proceeding against the second defendant. The indemnity costs order against the first defendant should include those costs.

Two counsel

[26] The plaintiff seeks an additional order that his costs be assessed on the basis that, except insofar as they are of an unreasonable amount, the fees of two counsel should be regarded as costs necessary and proper insofar as they are limited to fees for or in preparation of trial, and otherwise be at the discretion of the assessor. The order sought is consistent with that made in *Kerle v BM Alliance Coal Operations Pty Ltd & Ors (No 2)*[9], and in *Paskins*. The essential issue is whether it was necessary and proper for the attainment of justice or for defending the rights of the plaintiff to brief two counsel.[10] The plaintiff submits that it was necessary. His claim was a complex one, with liability, causation and quantum disputed by both defendants. The brief was in excess of 1,500

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[9] [2017] QSC 7.

[10] See *Wiltshire v Amos* [2018] QSC 224 at [29] – [33].

pages and included multiple expert and lay witnesses, with a five day trial anticipated. The quantum of the claim exceeded $1 million. The trial plan envisaged numerous witnesses being called. Different cases arose in respect of the defence of the proceeding against the first defendant and the defence of the proceeding against the second defendant. The first defendant submits that the claim by the plaintiff did not involve significant, complex issues. However, I consider that the extent of the evidence, the number of expert witnesses and the number and complexity of issues relating to liability, causation and quantum made it necessary and proper for the plaintiff to brief two counsel to prepare for and appear at trial. Accordingly, there should be an order for costs in the form proposed by the plaintiff.

Orders

[27] The orders will be:

1. The first defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on an indemnity basis, including those costs incurred by the plaintiff in proceeding against the second defendant, to be agreed or assessed.

2. The plaintiff's costs be assessed on the basis that, except insofar as they are of an unreasonable amount, the fees of two counsel should be regarded as costs necessary and proper insofar as they are limited to fees for or in preparation for trial, and otherwise be at the discretion of the assessor.