

SUPREME COURT OF QUEENSLAND

CITATION: *Bentleys (Sunshine Coast) Pty Ltd & Ors v Thomson* [2019] QCA 104

PARTIES: **BENTLEYS (SUNSHINE COAST) PTY LTD**
ACN 010 527 876
(first appellant)
PETA GRENFELL
(second appellant)
ULRIKE BENDLE
(third appellant)
CHERYL BLINCO
(fourth appellant)
v
CAROLYN MARY THOMSON
(respondent)

FILE NO/S: Appeal No 6309 of 2017
SC No 4288 of 2016
DC No 3868 of 2017

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 26 May 2017 (Boddice J)

DELIVERED ON: Judgment delivered 21 December 2018
Further Orders delivered 28 May 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser and Morrison JJA and Flanagan J

ORDERS: **1. Set aside the order made in the Trial Division reserving the costs of the applications.**

2. Instead order that:

(a) The costs of the application for a separate trial of the third party proceedings are reserved.

(b) The defendant pay to the third parties 50 per cent of the third parties’ costs of the application filed on 11 May 2017.

(c) The third parties pay to the defendant 50 per cent of the defendant’s costs of the application filed on 11 May 2017.

3. Order that:

(a) The respondent pay to the appellants 50 per cent of the appellants' costs of the appeal, excluding costs incurred only in the appeal against the decision not to order a separate trial of the third party proceedings.

(b) The appellants pay to the respondent 50 per cent of the respondent's costs of the appeal, excluding costs incurred only in the appeal against the decision not to order a separate trial of the third party proceedings.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – where the appellants succeeded in having the respondent's pleading struck out with leave to re-plead – where the respondent succeeded in defeating the appellants' attempt to have the whole of the claim struck out – whether costs should follow the event – whether costs should be awarded on an indemnity basis

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – where the respondent submitted that the Court found that the order under appeal had no basis in law – where the respondent submitted that she did not attempt to persuade the primary judge to make the order under appeal – whether an indemnity certificate ought to be granted to the respondent

Appeal Costs Fund Act 1973 (Qld), s 15

Firebird Global Master Fund II Ltd v Republic of Nauru

(No 2) (2015) 90 ALJR 270; [2015] HCA 53, cited

Murdoch v Lake [2014] QCA 269, applied

Reihana v QCAT Clients Services Manager & Ors [2017]

QCA 117, cited

Sochorova v Commonwealth of Australia [2012] QCA 152, cited

COUNSEL: C Sweeney QC for the appellant
The respondent appeared on her own behalf

SOLICITORS: HWL Ebsworth for the appellant
The respondent appeared on her own behalf

- [1] **FRASER JA:** The parties have made submissions about costs pursuant to leave granted in *Bentleys (Sunshine Coast) Pty Ltd & Ors v Thomson*.¹ The appellants contend that because their appeal was allowed they should be given the benefit of the usual approach that a successful litigant is entitled to costs. The respondent contends that costs should instead be awarded according to the different results of separate issues in the appeal.

¹ [2018] QCA 358.

[2] The proceedings out of which the appeal arose were described in the principal decision:

“[1] In proceedings in the Trial Division the plaintiff claimed against the defendant (the respondent to this appeal) damages pursuant to s 588M of the *Corporations Act 2001* (Cth). The basis of that claim, to express it very broadly, is that between 20 March 2009 and 29 April 2015 the respondent acted as a director of Kadoe Pty Ltd (in liquidation) (“Kadoe”) notwithstanding that she was not formally appointed as a director, Kadoe traded when it was insolvent, and it incurred a debt to the plaintiff.

[2] The respondent brought a third party claim against four third parties (the appellants in this appeal). The appellants applied in the trial division to strike out the respondent’s amended third party notice and further amended statement of claim and (if the claim was not struck out) for an order that the third party proceeding be tried separately from the plaintiff’s claim against the respondent.

[3] The primary judge struck out two paragraphs of the amended third party notice, which claimed against the appellants aggravated and exemplary damages. The primary judge refused to strike out the respondent’s claims against the appellants (paragraph 1) to be indemnified by the appellants against the plaintiff’s claim, (paragraph 2) that the appellants indemnify the respondent in relation to any future claims that may be made against her from the ascertainable class of creditors to the liquidation of Kadoe, (paragraph 6) that the appellants indemnify the respondent in relation to any claim that may be made against her from any party that conducted business with Kadoe as trustee for “The For Three Trust” or any claim provable against Kadoe in its own capacity, and (paragraph 7) that the second and third appellants pay any judgment for the plaintiff against the respondent. The primary judge ordered the respondent to file and serve a further amended third party notice setting out in paragraphs 1, 2 and 6 the basis upon which the respondent said that the third parties were required to indemnify her.

...

[6] The primary judge refused the application to strike out the amended third party notice and further amended third party statement of claim for the following reasons. The question was whether the pleading disclosed no reasonable cause of action or whether it satisfied the requirements of the rules which were designed to ensure that the opposing party appreciated the case it was required to meet. Some latitude should be given to the respondent because she was self-represented. Whilst the pleading was inelegant and included matters which would not necessarily be there if the respondent was legally represented, it did explain the basis of the respondent’s contention that if she were found liable to the plaintiff she was entitled to

recover the sum of that liability from the third parties. The pleading was not so deficient that it ought to be struck out. Although it might be the case that the respondent must lose at the trial the matter for decision was not whether the action would succeed but whether it disclosed no reasonable cause of action or contained matter that was unnecessary and liable to be struck out. The further amended statement of claim addressed the material issues and set out the facts sought to be relied upon and the basis upon which it was alleged that the third parties were liable if the defendant were to be found liable to the plaintiff.²

- [3] The orders striking out the third party notice and the third party further amended statement of claim were sought in one application. In a separate application the appellants sought an order for a separate trial of the third party proceedings. The primary judge decided that the application for a separate trial should be adjourned to a date to be fixed because it was not practicable to determine what order should be made in that respect until the pleadings had closed. The primary judge reserved the costs of both applications.
- [4] Before the appeal was heard, an order was made in the Trial Division for the third party proceeding to be tried separately.³ The appeal against the primary judge's decision not to rule upon the application for a separate trial thereby became moot. The primary judge's order reserving the costs of that application in the Trial Division should not be disturbed and no order should be made about any party's costs incurred in the appeal in relation only to that matter.
- [5] The Court allowed the appeal, set aside the order refusing the application to strike out the further amended third party statement of claim, struck out the further amended third party statement of claim, and gave leave to the respondent to re-plead within 30 days of publication of the Court's reasons or as otherwise directed by a judge in the Trial Division.
- [6] The relevant application and the notice of appeal sought orders about two quite distinct matters (striking out an originating process/striking out a pleading). Ultimately the appellants succeeded only in having the pleading struck out (with leave to re-plead) and the respondent succeeded only in defeating the appellants' attempt to have claims in the third party notice struck out. It may properly be said that this is a case in which "the event of success is contestable, by reference to how separate issues have been determined",⁴ but even in such a case the successful party is often not deprived of its costs of a separate issue upon which it failed.⁵
- [7] The appropriate order depends upon the facts of the particular case. In this matter at first instance and on appeal the arguments necessarily differed as between the separate orders sought.⁶ Furthermore, the appellants' challenge to claims in the

² [2018] QCA 358 at [1] – [3], [6].

³ Order of Holmes CJ, 3 August 2017.

⁴ *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* (2015) 90 ALJR 270 at 271 [6].

⁵ See *Murdoch v Lake* [2014] QCA 269 at [20], referring with approval to *Alborn & Ors v Stephens & Ors* [2010] QCA 58 at [8], and *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* (2015) 90 ALJR 270 at 271 [5].

⁶ See [2018] QCA 358 at [12] – [42] (as to the pleading) and at [43] – [49] (as to the third party claim).

third party notice depended in part on evidence upon which they relied in their unsuccessful argument that the respondent pursued her third party claim for an improper purpose. It is significant that the issue upon which the appellants failed was inherently much more serious and significant than the issue upon which they succeeded. In the particular circumstances of this case, the costs orders in the Trial Division and on appeal should take into account the different results upon these separate issues.

- [8] Although the arguments differed as between the challenge to the pleading and the challenge to the third party notice, there was some overlap. Upon the material available to the Court it is not practicable to make a very precise apportionment of costs based upon differences in the time spent in preparing for and litigating the different issues, but the uncertainty and complexity of an assessment under an order allowing costs for only one of the two significant issues sought in one application should be avoided. Instead, adopting the necessary broad brush approach, the appellants should be given 50 per cent of their costs of the relevant application in the Trial Division and 50 per cent of their costs of the appeal against the orders made on that application. An order in favour of the respondent in the same terms should be made, even though as a self-representing litigant the costs recoverable by her (if any) comprehend only court fees, including any filing costs.⁷
- [9] The notice of appeal seeks orders that the respondent pay the appellants' costs in the Trial Division and the appeal on an indemnity basis. The respondent submits that costs awarded to the respondent should not be assessed on the indemnity basis. The appellants' submissions, which were made after the respondent made her submissions, do not contend that costs awarded to the appellants should be assessed on the indemnity basis or articulate reasons why an assessment on that basis might be appropriate. Costs should be assessed upon the standard basis.
- [10] The appellants also seek an order that the costs of the appeal and the application be fixed "in whatever sum this Honourable Court considers reasonable." The appellants rely upon affidavits by a solicitor who had the day to day conduct of the matter. From those affidavits it appears that the legal costs actually incurred by the appellants in the Trial Division and the appeal, presumably including costs in relation to the application for a separate trial as well as the application to strike out the pleading and the third party notice, were as follows:

Professional fees in relation to the applications in the Supreme Court proceedings 4288 of 2016	\$6,517.50
Disbursements in relation to the applications in the Supreme Court proceedings 4288 of 2016	\$23,850.76
Professional fees in relation to the appeal in the Court of Appeal proceedings 6309 of 2017	\$14,710.00
Disbursement in relation to the appeal in the Court of Appeal proceedings 6309 of 2017.	\$20,942.82
Total	\$66,021.08

⁷ *Reihana v QCAT Clients Services Manager & Ors* [2017] QCA 117 at [11] – [18].

- [11] Most of the disbursements comprise fees charged by senior counsel for preparing and appearing on the applications in the Trial Division and in the appeal.⁸
- [12] A complication in fixing the recoverable costs is that it would be necessary for the Court to estimate, and deduct from the total costs incurred by the appellants, the costs attributable to the separate trial application, yet those costs were reserved by the primary judge and may yet be the subject of a separate and potentially conflicting assessment. Another consideration is that there is no evidence directed to the appropriateness on a standard basis assessment of the amount allowed for the solicitors' care and consideration and (most significantly) the amounts allowed for senior counsel's fees. The costs recoverable upon the standard basis would likely be less than the total costs incurred by the appellants, but the affidavits do not contain any evidence about the amounts that might be recoverable on the standard basis. In some previous appeals the Court has acted upon succinct and general affidavit evidence by solicitors about the usual proportions (often in the range of one half to two thirds) which costs assessed on the standard basis have borne to the particular firm's actual costs in similar cases. The absence of such evidence does not necessarily require rejection of the application, but taking that into account together with the other circumstances already mentioned, the preferable course is for the costs to be assessed.
- [13] The respondent applies for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973* (Qld). She submits that the Court found that "at law there was no basis for the learned judge to make the order under appeal and could not properly have been made." Rather, the Court's view about the extent and significance for a fair trial of the pleading's departure from procedural rules differed from the primary judge's view.⁹ The respondent also submits that she did not try to persuade the primary judge to make the order under appeal. But the respondent was on notice of the appellant's complaints about her pleading and she did not accede to the appellants' contention made before and at the hearings in the Trial Division, and again in the notice of appeal, that her pleading should be struck out. An indemnity certificate should not be granted in these circumstances.
- [14] In that event, the respondent sought an order that costs not be assessed and enforced until completion of the primary and third party proceedings. Particular submissions by the respondent and my reasons relating to them are as follows:
- (a) She represented herself because she did not have the financial capacity to pay for legal representation. That should be accepted for present purposes.
 - (b) That situation was attributable to the negligence of the third parties. That is contentious. The discretion should be exercised upon the footing that it might prove to be correct or incorrect.
 - (c) The costs she could recover are minimal and could not be offset against any costs awarded to the appellants, so that the appellants were given a strategic advantage to bring the proceedings to an end by bringing bankruptcy proceedings against the respondent upon a costs order. The appellants did not deny that they sought such an advantage. On the

⁸ The affidavits do not include evidence that the appellants have paid those fees.

⁹ [2018] QCA 358 at [10], [42].

other hand, it is relevant that the appellants have incurred substantial legal costs in obtaining an order setting aside the respondent's deficient pleading.

- (d) The first appellant's managing director had given an undertaking to the Court not to enforce a costs order. The respondent did not submit that the suggested undertaking comprehended a costs order in this appeal. It is therefore not a significant consideration.
- (e) In a different case an order of the same kind was made in circumstances in which the Court accepted that the effect of the party entitled to the costs order enforcing that entitlement might well be the stifling of the further prosecution of the claim against that party.¹⁰ Each case turns upon its own facts.

[15] Two other factors are also relevant in this case. First, the appellants will not be in a position to enforce a costs order against the respondent until after the costs have been assessed. Secondly, it is preferable that any application for an order of the kind sought by the respondent should be brought before a judge in the Trial Division and supported by evidence of the current position to the third party litigation. In these circumstances no such order should be made at this time.

[16] The appropriate orders are:

1. Set aside the order made in the Trial Division reserving the costs of the applications.
2. Instead order that:
 - (a) The costs of the application for a separate trial of the third party proceedings are reserved.
 - (b) The defendant pay to the third parties 50 per cent of the third parties' costs of the application filed on 11 May 2017.
 - (c) The third parties pay to the defendant 50 per cent of the defendant's costs of the application filed on 11 May 2017.
3. Order that:
 - (a) The respondent pay to the appellants 50 per cent of the appellants' costs of the appeal, excluding costs incurred only in the appeal against the decision not to order a separate trial of the third party proceedings.
 - (b) The appellants pay to the respondent 50 per cent of the respondent's costs of the appeal, excluding costs incurred only in the appeal against the decision not to order a separate trial of the third party proceedings.

[17] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

[18] **FLANAGAN J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons.

¹⁰ *Sochorova v Commonwealth of Australia* [2012] QCA 152 at [23] – [24].