SUPREME COURT OF QUEENSLAND

CITATION:	*McDonald Keen Group Pty Ltd (in liq) v State of Queensland (No 2)* [2019] QSC 172
PARTIES:	**McDONALD KEEN GROUP PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 090 921 949** (plaintiff) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO/S:	BS No 4531 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Burns J
ORDER:	**THE ORDER OF THE COURT IS THAT:**

1. There be summary judgment for the defendant against the plaintiff on the plaintiff's claims in debt and for damages for breach of contract (and interest on those claims) as set out in paragraphs 1, 3 and 4 of the Amended Claim filed 6 December 2017, insofar as such claims are pleaded in paragraphs 8 to 12, 19, 24 and 28 of the Amended Statement of Claim filed on 6 December 2017.

2. The plaintiff has leave, to the extent that leave is necessary, to further amend its Amended Statement of Claim in accordance with the terms of the draft Further Amended Statement of Claim received as exhibit 1 on the hearing of the applications.

3. The Plaintiff has leave to further amend its Amended Claim with the terms of the draft Further Amended Statement of Claim received as exhibit 1 on the hearing of the

applications.

4. As to costs:

(a) **The Defendant's costs of and incidental to the claims in respect of which summary judgment has been granted, as referred to in paragraph 1 of these orders, shall be the Defendant's costs in the proceeding;**

(b) **One half of the Plaintiff's costs of and incidental to the Defendant's application for summary judgment filed on 16 March 2018 shall be the Plaintiff's costs in any event;**

(c) **One half of the Defendant's costs of and incidental to its application for summary judgment filed on 16 March 2018 shall be the Defendant's costs in any event;**

(d) **The costs of and incidental to the Plaintiff's application for leave to amend filed 18 June 2018 shall be each party's costs in the proceeding.**

THE COURT DIRECTS THAT:

5. The parties are directed to participate in, and act reasonably and genuinely in, a mediation to be conducted on or before 16 October 2019 at a venue to be agreed between the parties.

6. The identity of the mediator is to be agreed by the parties, and the Plaintiff shall inform the mediator of his or her appointment.

7. The period of mediation is fixed at a maximum of one (1) day and may extend beyond this period only with the authorisation of the parties.

8. The parties are to pay the following percentages of the costs of the mediator and mediation venue:

(a) **Plaintiff – 50%;**

(b) **Defendant – 50%.**

9. The parties are to negotiate a fee with the mediator and shall pay their respective shares of the mediator's costs in accordance with the terms of the tax invoices issued by the mediator.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTERLOCUTORY PROCEEDINGS – where the defendant applied for summary judgment on the plaintiff's claims – where the plaintiff cross-applied for leave to amend its claim and statement of claim – where the defendant obtained summary judgment with respect to part of the plaintiff's claims – where the plaintiff was granted leave to amend its claim and statement of claim in certain respects –whether the defendant should have its costs with respect to the claims on which it obtained summary judgment –whether it should be ordered that the costs with respect to the application for summary judgment and the cross-application for leave to amend be each party's costs in the proceeding

Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684.

McDonald Keen Group Pty Ltd (in liq) v State of Queensland [2019] QSC 94, cited

COUNSEL: G I Thomson for the plaintiff
F Y Lubett for the defendant

SOLICITORS: Mullins Lawyers for the plaintiff
King & Wood Mallesons for the defendant

[1] Reasons for judgment on the defendant's application for summary judgment and the plaintiff's cross-application for leave to further amend its amended claim and amended statement of claim were handed down on 10 April 2019.[1] It was determined that the defendant was entitled to summary judgment on part of the plaintiff's claims and that the plaintiff be granted leave to amend in certain respects. The parties were directed to bring in minutes of order to reflect the reasons for judgment. As to the question of costs, the following was expressed:

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1 See *McDonald Keen Group Pty Ltd (in liq) v State of Queensland* [2019] QSC 94.

> "As both parties have enjoyed partial success on their respective applications, it seems to me that the appropriate costs order will be that the costs incurred by each party with respect to the applications be its costs in the proceeding, but each party has leave to provide brief written submissions on this question within 14 days should either (or both) contend for the making of a different costs order."[2]

[2] The parties subsequently agreed on appropriate orders to reflect the reasons but could not agree on the appropriate costs order. Accordingly, written submissions on that issue were provided.

[3] There are three components for consideration: the costs of the claims in respect of which summary judgment was granted; the costs of the defendant's application for summary judgment; and the costs of the plaintiff's application for leave to amend. I deal with each in turn.

[4] The claims in respect of which summary judgment was granted were the claims in debt and for damages for breach of contract (and interest on those claims) set out in paragraphs 1, 3 and 4 of the amended claim and pleaded in paragraphs 8 to 12, 19, 24 and 28 of the amended statement of claim. The defendant submitted that, because that part of the proceeding was now at an end, there is no reason why the costs incurred with respect of those claims should not be assessed and paid now. The plaintiff, on the other hand, argued that these costs should be reserved. It submitted that it would be artificial to separate out the costs of those claims when claims for restitution (including the works that were the subject of the debt and damages claims in respect of which summary judgment was granted) survived and an amended claim in respect of part of those works is still pursued both under contract and as damages for breach of it. As such, the plaintiff argued, "the summary judgment application merely removed one of several possible ways of approaching the claims for payment", with the "real substance of the claim for these works … yet to be tested".[3] It was also submitted to be "difficult to conceive that the allegations about the contractual payment claims … have given rise to any additional or different costs of a substantial nature",[4] although it was accepted that this would ultimately be a matter for assessment. To my mind, the defendant should have its costs of the claims on which it succeeded. True it is that alternative claims to restitution or payment remain, but it cannot be gainsaid that the claims in respect of which summary judgment was granted have, as the defendant submitted, come to an end. Nonetheless, for the reasons advanced by the plaintiff, there is merit in deferring the assessment of these costs until the conclusion of the proceeding when the overall picture (including the interplay between the various claims) should be clearer. It will be ordered that the defendant's costs of and incidental to the claims in respect of which summary judgment was granted be the defendant's costs in the proceeding

[5] Because the defendant succeeded on its application for summary judgment so far as the debt

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2 Ibid, [48].

3 Plaintiff's submissions on costs, para 5.

4 Ibid, para 6.

and damages claims were concerned, it was submitted on its behalf that the costs of that application ought, through the routine application of r 681 of the *Uniform Civil Procedure Rules 1999* (Qld), follow the event. However, the defendant accepted that it abandoned the part of its application which related to the plaintiff's restitutionary claim during the hearing and, because of that, the defendant submitted that the appropriate order would be that the plaintiff pay one half of the defendant's costs of the application.[5] The defendant also argued that, if the costs of the summary judgment application were ordered to be either party's costs in the proceeding, that would have the "potential effect" of awarding to the plaintiff all of the costs of the application for summary judgment (if it succeeds on one or more of its remaining claims) "despite the fact that it opposed and lost the application".[6] The plaintiff submitted that this does not correctly characterise the substantive outcome and ignores the feature that the plaintiff was "vindicated in its resistance to that part of the application that was abandoned".[7] It argued that the appropriate order was the order I previously foreshadowed (and which is extracted in [1] above). Whilst it may be accepted that the "potential effect" referred to by the defendant would be realised if the plaintiff ultimately succeeds, the same may be said with respect to the part of the application that was abandoned if the defendant ultimately succeeds. Either way, that is an undesirable outcome. Instead, and declaring as I do under r 684 UCPR that the apportionment contended for by the defendant is appropriate, it will be ordered that the parties be respectively entitled to one half of their costs of the application in any event. In practical terms, that may result in the benefit of one order cancelling out the other, but that shall again be a matter for assessment at the conclusion of the proceeding.

[6] The parties are agreed that the costs of and incidental to the plaintiff's application for leave to amend should be each party's costs in the proceeding. That is the order that will be made.

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5 Such an apportionment being permitted under r 684 UCPR.

6 Defendant's submissions on costs, para 13.

7 Plaintiff's submissions on costs, para 11.