

SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Rail Limited v Eden & Ors; State of Queensland & Anor v Kalari Proprietary Limited & Ors (No 2)* [2019] QSC 247

PARTIES: **QUEENSLAND RAIL LIMITED ACN 132 181 090**
(first plaintiff)
v
ANTHONY DAVID EDEN
(first defendant)
KALARI PROPRIETARY LIMITED ACN 004 595 395
(second defendant)
DORNOCH LIMITED
(third party)

AND

STATE OF QUEENSLAND
(first plaintiff)
**CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN
ROADS**
(second plaintiff)
v
KALARI PROPRIETARY LIMITED ACN 004 595 395
(first defendant)
ANTHONY DAVID EDEN
(second defendant)
DORNOCH LIMITED
(third party)

FILE NO/S: BS 12846 of 2017 and BS No 2160 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 12 February 2019; costs submissions received on 19 September 2019

JUDGE: Davis J

- ORDERS:
1. **There be no order in relation to plaintiffs' costs in the application brought in BS No 2160 of 2018;**
 2. **The defendants' costs in the application brought in proceeding BS No 12846 of 2017 be their costs in the proceeding;**
 3. **The defendants' costs in the application brought in proceeding BS No 2160 of 2018 be their costs in the proceeding;**
 4. **There be no order in relation to the third party's costs in the applications.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – COSTS – where an application was brought by the third party for judgment against the defendants – where the plaintiffs had no real interest in the applications but appeared and sought costs – where the defendants succeeded on the application and sought costs against the third party – whether the third party's submissions on the application were reasonably arguable

Uniform Civil Procedure Rules 1999, r 681, r 299

The State of Queensland v Nixon & Ors [2002] QSC 296

COUNSEL: S Couper QC with D Markwald for the third party in each proceeding (applicant in the two applications)
RE Cavanagh SC with K Holyoak for the defendants in each proceeding (respondents to the two applications)
A Nicholas for the plaintiffs in BS 2160 of 2018

SOLICITORS: Barry & Nilsson for the third party/applicants
Lander & Rogers for the defendants/respondents
Clayton Utz for the plaintiffs in BS 2160 of 2018

[1] On 29 August 2019 I made the following orders, on applications brought by the third party for summary judgment against the defendants in the third party claims:

1. The application for summary judgment brought in proceeding 12846 of 2017, by the third party is dismissed.
2. The application for summary judgment brought in proceeding 2160 of 2018, by the third party is dismissed.
3. Each party may file and serve written submissions on the question of costs by 19 September 2019.
4. The issue of costs will be determined on the written submissions without further oral hearing.

5. Each party has liberty to apply to vacate order 3 if it wishes to make oral submissions on costs.¹
- [2] The costs submissions have now been received. No party sought to make oral submissions on costs.
- [3] There is an error in the reasons delivered on 29 August 2019. There it is noted that Ms Nicholas appeared, instructed by Clayton Utz for each plaintiff whereas in fact she only appeared in BS 2160 of 2018 where the plaintiffs were State of Queensland and Chief Executive, Department of Transport and Main Roads. There was no appearance for the plaintiff, Queensland Rail Limited in BS 12846 of 2017.
- [4] The position of the respective parties on costs is as follows:
1. The plaintiffs in BS 2160 of 2018 seek their costs against the third party;
 2. The defendants in each proceeding seek their costs against the third party and in the alternative submit that the order should be that they have their costs in the cause;
 3. The third party submits that the plaintiffs in BS 2160 of 2018 should not have their costs in any event and otherwise submits that the costs of all parties should be costs in the cause or reserved.

The plaintiffs' costs

- [5] The plaintiffs in BS 2160 of 2018 (to whom I shall refer as "the plaintiffs") submit they should have their costs against the third party because:
- (i) The applications and supporting material were served on them;
 - (ii) They kept their involvement to an appropriate minimum;
 - (iii) They only sought to make short oral submissions in relation to the cause of the fire which apparently led the second defendant to drive the truck from the road;
 - (iv) That one of the bases for dismissing the application was that there were undetermined facts in dispute including the cause of the accident.² They were matters in dispute between not only the defendants and the third party but also between the plaintiffs and the defendants.
- [6] The application may well have been served upon the plaintiffs. The real question though is whether it was reasonably necessary for the plaintiffs to appear on the application.

¹ *Queensland Rail Limited v Eden & Ors; State of Queensland & Anor v Kalari Proprietary Limited & Ors* [2019] QSC 212

² Judgment [48].

- [7] The dispute the subject of the application was clearly one between the defendants and the third party. No relief was sought against the plaintiffs in the application. Ms Nicholas' only contribution to the hearing was to seek to tender a document, and when challenged, she did not persist with the tender.
- [8] The plaintiff in BS 12846 of 2017 elected not to appear, no doubt properly understanding that the application for summary judgment brought by the third party against the defendants was a matter in which it did not have any real interest. That was the proper approach. If the plaintiffs in BS 2160 of 2018 wished to appear on the application then they could choose to do so. It is not though appropriate to burden either of the real combatants in the applications (the applicant and the third party) with any costs so incurred.
- [9] I refuse the plaintiffs' application for costs.

The defendants' application for costs

- [10] Rule 681 of the *Uniform Civil Procedure Rules 1999* (UCPR) provides as follows:

"681 General rule about costs

- (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] Part 2 of Chapter 9 of the UCPR deals with applications for summary judgment. Division 4 of Part 2 contains the following in relation to costs;

"299 Costs

- (1) If it appears to the court that a party who applied under this part for judgment was or ought reasonably to have been aware that an opposite party relied on a point that would entitle that party to have the application dismissed, the court may dismiss the application and order costs to be paid within a time specified by the court.
- (2) Subrule (1) does not limit the court's powers in relation to costs."

- [12] The interaction between the general rule as to costs in r 681 and the more specific provisions of r 299 of the UCPR was explained by Muir J (as his Honour then) in the *State of Queensland v Nixon & Ors* [2002] QSC 296 where his Honour said:

- "[6] 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.

[7] Because of considerations such as these, costs of summary judgment applications are [sometimes] 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."

- [13] In *Nixon*, the costs were reserved but as the defendants here correctly observe, there was in that case an amendment to the defence after the bringing of the application for summary judgment.³ The defendant's case could not then be properly understood at the time the application for summary judgment was brought.
- [14] Rule 299(1) expressly makes, as a relevant consideration to the determination of costs in summary judgment applications, whether the unsuccessful party should have been aware of the point(s) raised by the successful party in defeating the application. However, by r 299(2) that issue is not determinative of costs and the general discretion is preserved.
- [15] Here, the application failed (in broad summary) because the circumstances and cause of the accident are in dispute and the proper construction of the exclusion clauses is not without doubt. Those two facts ought to have been known to the third party. That properly enlivens the consideration identified in r 229(1).
- [16] On the other hand, the third party's proposed construction of the policy is clearly arguably open. Further, the third party may well establish at trial a breach of one or more of the many overlapping statutory provisions which applied to the transportation of the prilled sodium nitrate. The third party's submissions that the evidence must circumstantially prove a breach of at least one statutory provision concerning the transportation of the ammonium nitrate was a submission that was carefully constructed and put. The fact that the argument did not result in summary dismissal of the third party claims does not mean that such an argument will be unsuccessful at trial.
- [17] In all the circumstances, the defendants should only have their costs if successful in the principal proceedings but should not be at risk of paying the third party's costs of the applications for summary judgment.
- [18] The appropriate order in each of the applications is that the costs of the applications be the defendants' costs in the cause.

Orders

- [19] It is ordered that:
1. There be no order in relation to plaintiffs' costs in the application for summary judgment brought in BS No 2160 of 2018;

³ *The State of Queensland v Nixon & Ors* [2002] QSC 296 at [8].

2. The defendants' costs in the application brought in proceeding BS No 12846 of 2017 be their costs in the proceeding;
3. The defendants' costs in the application brought in proceeding BS No 2160 of 2018 be their costs in the proceeding;
4. There be no order in relation to the third party's costs in the applications.