DISTRICT COURT OF QUEENSLAND

CITATION:	*Workcover Queensland v Wallaby Group Limited & Anor* [2020] QDC 188
PARTIES:	**WORKCOVER QUEENSLAND** (Plaintiff) **v** **WALLABY GRIP LIMITED** (First Defendant) AND **WALLABY GRIP (BAE) PTY LIMITED (IN LIQUIDATION)** (Second Defendant)
FILE NO/S:	437 of 2019
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	12 August 2020
DELIVERED AT:	Brisbane
JUDGE:	Richards DCJ
ORDER:	1. Plaintiffs pay the defendants costs of the plaintiff's application. 2. Defendants pay the plaintiffs costs of the defendants' application. 3. Costs to be assessed unless otherwise agreed.
CATCHWORDS:	PROCEDURE– CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS– COSTS– GENERAL RULE: COSTS FOLLOW EVENT– where the primary purpose of awarding costs to the successful party is to indemnify them against expenses that may not have been incurred otherwise - where costs can be awarded in relation to a particular question or part of a proceeding or in a percentage basis – where there was an application by the plaintiff to strike out parts of the statement of claim of the first and second defendants – where the plaintiff was unsuccessful in the application – where the plaintiff is to pay the defendants cost of the application PROCEDURE– CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS– COSTS– GENERAL RULE:

COSTS FOLLOW EVENT– where the first and second defendants' made an application to set aside the deemed admissions to the notice to admit facts – where the defendants solicitors failed to act in timely fashion in relation to the notice to admit facts – where the defendants had to seek the court's indulgence to set aside the notice to admit facts – where the plaintiff was successful in the application - where it was reasonable for the plaintiff to oppose the application – where the defendants are to pay the cost of the plaintiffs application

Legislation

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

Cases

Aion Corporation Pty Ltd v Yolanda Holdings Pty Ltd & Anor [2013] QSC 216

Bucknell v Robins [2004] QCA 474

Folwell and Mayer No 2 [2020] QSC 211

Interchase Corporation Limited (In liq) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26

Oshlack v Richmond River Council [1998] 193 CLR 72

COUNSEL: Mr K Holyoak for the plaintiff

Mr G Diehm QC for the first and second respondents

SOLICITORS: BT Lawyers for the Plaintiff

Zambra Legal for the First and Second Defendants

Introduction

[1] On 7 July 2020, judgement was delivered in relation to applications by both parties. These reasons deal with the costs of those applications.

[2] The general rule about costs is found in r 681 of the UCPR;

> **"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."

[3] There must be special or exceptional circumstances to depart from the general rule.[1]

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1 *Oshlack v Richmond River Council* [1998] 193 CLR 72 at 96 per McHugh J.

[4] Where there are two or more issues in a proceeding for determination this gives rise to different "events" for which the costs can be determined separately.[2]

[5] The primary purpose of awarding costs to the successful party is to indemnify them against expenses that may not have been incurred otherwise. It was observed in *The President's Club Limited & anor v Palmer Coolum Resort Pty Ltd & anor (No 2)* [2002] QSC 11 [at p18] by Wilson J:

> "The general rule should only be departed from, in the Court's discretion, with "good reason". As was observed by Philippides J, as her Honour then was, in *Bucknell v Robins*,[3] there are limited exceptions to the general rule, which focus on whether:
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> 1. the conduct of the successful party disentitles such an order; or,
>
> 2. the existence of "special" or "exceptional" circumstances."

[6] Rule 684 of the UCPR provides for costs to be awarded in relation to a particular question or part of a proceeding or in a percentage basis. The courts have the power from time to time to make an "intelligently made apportionment" for costs which reflects the outcome of different parts or questions.[4]

[7] In this matter, there were two separate applications. Firstly, the application to strike out the plaintiff's application to strike out parts of the statement of claim of the first and second defendants and secondly, the first and second defendants' application to set aside the deemed admissions to the notice to admit facts.

[8] It is accepted that the starting position is that the costs should follow the event. In relation to the plaintiff's application, the plaintiff was unsuccessful. The determination was that the legislation may be open to the interpretation suggested by the plaintiff however at the end of the day it will depend on how the trial proceeds. In those circumstances it was not appropriate for the application to be bought at this stage and the costs should follow the event.

[9] In relation to the defendants' application, the application was necessary because the solicitors failed to act in timely fashion in relation to the notice to admit facts. It is

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2 *Interchase Corporation Limited (In liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26 and *The President's Club Limited and anor v Palmer Coolum Resort Pty Ltd & anor (No 2)* [2020] QSC 11.

3 [2004] QCA 474.

4 *Aion Corporation Pty Ltd v Yolanda Holdings Pty Ltd & Anor* [2013] QSC 216 per Jackson J.

correct to suggest that the notice to admit facts were poorly drafted and some of the statements involved matters of law. However, those matters could easily have been raised within the appropriate time and resolved without the necessity for an application in court had the solicitors fulfilled their duty under the UCPR. There was nothing improper in the plaintiff insisting that the defendants should be held to the timetable set by the rules.

[10] In the circumstances, the defendants had to seek the court's indulgence to set aside the notice to admit facts. Given the wealth of material in relation to the cause of mesothelioma and the effects of asbestos on the body, it was not unreasonable, in my view, for the plaintiff to oppose the application.

[11] In *Folwell and Mayer No 2*[5], Bowskill J noted at paragraph six

> "…but as to the other points it is well supported that although it is a matter for the exercise of the court's discretion, a party seeking an indulgence – particularly of the kind sought in this case – can expect to be required to pay the other party's costs, unless the other party's opposition was highly unreasonable."

[12] The defendants should pay the plaintiff's costs on that part of the application.

ORDER

The plaintiffs pay the defendants costs of the plaintiff's application. The defendants pay the plaintiffs costs of the defendants' application. Costs to be assessed unless otherwise agreed.

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5 [2020] QSC 211 at para 6.