

SUPREME COURT OF QUEENSLAND

CITATION: *Walz Construction Co P/L v ASP Ship Management (A Firm) & Ors; Qld Alumina Ltd v Walz Construction Co P/L & Ors; Walz Construction Co P/L v Suncorp Insurance & Finance*
[2002] QCA 155

PARTIES: **WALZ CONSTRUCTION COMPANY PTY LTD**
ACN 010 354 908
(plaintiff/appellant)

v

ASP SHIP MANAGEMENT (A FIRM)
(first defendant/first respondent)

QUEENSLAND ALUMINA LIMITED
ACN 009 725 044

(second defendant/second respondent)

GARDNER PERROTT (A FIRM)
(third defendant/third respondent)

QUEENSLAND ALUMINA LIMITED
ACN 009 725 044

(plaintiff/second respondent)

v

WALZ CONSTRUCTION COMPANY PTY LTD
ACN 010 354 908

(first defendant/appellant)

ASP SHIP MANAGEMENT (A FIRM)
(second defendant/first respondent)

GARDNER PERROTT (A FIRM)
(third defendant/third respondent)

SUNCORP GENERAL INSURANCE LIMITED
ACN 075 695 966

(third party/fourth respondent)

WALZ CONSTRUCTION COMPANY PTY LTD
ACN 010 725 908

(plaintiff/appellant)

v

SUNCORP INSURANCE AND FINANCE
(defendant/fourth respondent)

FILE NO/S: Appeal No 2989 of 2001
SC No 120 of 1995
SC No 124 of 1995

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: Judgment delivered 16 April 2002
Further Order delivered 3 May 2002

DELIVERED AT: Brisbane

HEARING DATE: 1 November 2001

JUDGES: McMurdo P, Davies JA and Ambrose J
Further Order of the Court

ORDERS: **(1) Order 4 of the judgment given by the learned primary judge on 8 March 2001 is varied by substituting the figure "50" for both the figure "15" and the figure "85".**

(2) Order 1 of the learned primary judge of 3 May 2001 is amended by substituting the sum of \$57,458.60 for the sum of \$270,313.60.

(3) Order 3 of the learned primary judge of 3 May 2001 is amended by deleting the words "on the standard basis" and adding the words "on the appropriate District Court scale".

(4) Order 4 of the learned primary judge of 3 May 2001 is amended by deleting the words "and plaintiff by counterclaim".

(5) Order 5 of the learned primary judge of 3 May 2001, is amended by adding the words "plaintiff by counterclaim and the" before "second defendant".

(6) Order 6 of the learned primary judge of 3 May 2001 is amended by substituting the figure "50" for both the figure "15" and the figure "85".

(7) Walz pay the costs to be assessed of Gardner Perrott of the appeal and the cross-appeal.

(8) Walz and Gardner Perrott pay the costs to be assessed of the appeal and the cross-appeal of Queensland Alumina and ASP.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where judgment delivered – where further submissions made as to costs – where apportionment of negligence on appeal altered in favour of the third respondent - where third respondent made appellant an offer to settle the appeal and cross appeal – where offer made by the third respondent was more favourable to the appellant than that resulting from the appeal – where courts encourage the acceptance of realistic offers to settle appeals through the exercise of discretion to award costs

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where apportionment on appeal meant

the judgment for the appellant against the third respondent is barely within the lower limit of the District Court's monetary jurisdiction – where r 698 UCPR requires that costs be assessed as if the proceeding were commenced in the District Court unless the Court otherwise orders – whether another order is appropriate

Uniform Civil Procedure Rules 1999 (Qld), r 388, r 698

Meehan v Fuller [1999] QCA 37, Appeal No 1323 of 1998, 17 November 1999, considered

COUNSEL: J S Douglas QC, with J A McDougall, for the appellant
K Fisher (*sol*) for the first respondent
H Barlow for the second respondent
H B Fraser QC, with P A Hastie, for the third respondent
J A Griffin QC, with R T Whiteford, for the fourth respondent

SOLICITORS: Lyons O'Shea & Co for the appellant
Thynne & Macartney for the first respondent
Carter Newell for the second respondent
Minter Ellison for the third respondent
Heiser Bayly & Mortensen for the fourth respondent

- [1] **THE COURT:** Judgment was delivered in this matter on 16 April 2002 when the further hearing of these proceedings was adjourned for seven days to permit the parties to agree or make submissions upon the appropriate orders which follow from the apportionment of negligence equally between the appellant ("Walz") and the third respondent ("Gardner Perrott").
- [2] The parties brought to the Court's attention that the formal orders 1 and 2 did not reflect the reasons for judgment of the majority. The judgment, orders and the Court's record have now been amended to reflect those reasons: UCPR r 388.
- [3] This Court dismissed the appeal by Walz and allowed the cross-appeal by Gardner Perrott to the limited extent of adjusting the apportionment of liability to the second respondent ("Queensland Alumina") between Walz and Gardner Perrott from 15 per cent and 85 per cent respectively to 50 per cent each. Walz was therefore wholly unsuccessful in its appeal and Gardner Perrott successful only as to the issue of apportionment in its cross-appeal.
- [4] Significantly, Gardner Perrott made Walz an offer to settle the appeal and cross-appeal which was more favourable to Walz than the result of the appeal. Courts encourage the acceptance of realistic offers to settle appeals through the exercise of the discretion to award costs: see *Meehan v Fuller*.¹
- [5] In those circumstances, Walz should pay Gardner Perrott's costs of the appeal and cross-appeal to be assessed.
- [6] The first respondent ("ASP") took no active part in the appeal other than reserving, through its solicitor Mr Fisher, its position as to costs in the event of any change in

¹ [1999] QCA 37, Appeal No 1323 of 1998, 17 November 1999, [10]-[11].

apportionment of liability. Walz and Gardner Perrott should pay ASP's costs of the appeal and the cross-appeal to be assessed.

- [7] Walz and Gardner Perrott should also pay Queensland Alumina's costs of the appeal and the cross-appeal to be assessed.
- [8] The learned primary judge gave Walz and Gardner Perrott leave to appeal on the question of costs. His Honour ordered that Walz and Gardner Perrott pay the costs of Queensland Alumina and ASP in the respective proportions of 15 per cent and 85 per cent. Consistent with his Honour's reasoning, that order should now be altered so that Walz and Gardner Perrott each pay 50 per cent of the costs of the trial of Queensland Alumina and ASP to be assessed.
- [9] A further difficulty is that the reasons for judgment of the majority mean that judgment will be given for Walz against Gardner Perrott for \$57,458.64, an amount barely within the lower limit of the District Court's monetary jurisdiction. UCPR r 698 requires that in those circumstances the costs recoverable by a plaintiff must be assessed as if the proceeding had been started in the District Court unless the Court otherwise orders. Walz has not demonstrated that another order is appropriate. Walz's costs of the trial payable by Gardner Perrott should be on the appropriate District Court scale.
- [10] Queensland Alumina now contends that the learned primary judge erred in the costs orders made against Walz and Gardner Perrott in that the words "plaintiff by counterclaim" were mistakenly placed in order 4 instead of order 5. It seems appropriate to correct this error now.
- [11] We would make the following additional orders.
- (1) Order 4 of the judgment given by the learned primary judge on 8 March 2001 is varied by substituting the figure "50" for both the figure "15" and the figure "85".
 - (2) Order 1 of the learned primary judge of 3 May 2001 is amended by substituting the sum of \$57,458.60 for the sum of \$270,313.60.
 - (3) Order 3 of the learned primary judge of 3 May 2001 is amended by deleting the words "on the standard basis" and adding the words "on the appropriate District Court scale".
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 - (7) Walz pay the costs to be assessed of Gardner Perrott of the appeal and the cross-appeal.
 - (8) Walz and Gardner Perrott pay the costs to be assessed of the appeal and the cross-appeal of Queensland Alumina and ASP.