



[2002] QSC 215

## Transcript of Proceedings

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July 17, 2002

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

de JERSEY CJ

No S22 of 2001

STEVEN MICHAEL PARKER

Plaintiff

and

CHRISTOPHER BORG

First Defendant

and

SUNCORP METWAY INSURANCE LIMITED

Second Defendant

and

NOMINAL DEFENDANT

Third Defendant

ROCKHAMPTON

..DATE 12/07/2002

JUDGMENT

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THE CHIEF JUSTICE: The registrar of the Supreme Court at Mackay has, under Rule 706 sub rule 3 of the Uniform Civil Procedure Rules, referred to the Court two questions of law arising in relation to a costs assessment.

The plaintiff brought a claim for damages in respect of personal injuries against the third defendant, the Nominal Defendant, and the first and second defendants as the alleged driver and insurer respectively of the vehicle which collided with and injured him.

He was unable positively to identify that vehicle. The learned trial Judge did not in the result accept that the first defendant was the driver and he gave judgment in the plaintiff's favour against the third defendant, the Nominal Defendant.

He also ordered that the third defendant pay the plaintiff's costs of and incidental to the action to be assessed on an indemnity basis.

Under rule 704 sub rule 3, paragraph b, when assessing costs on the indemnity basis, the Registrar must have regard to any costs agreement between, in this case, the plaintiff and his solicitor.

1 On 20th June 1997, the plaintiff's solicitor wrote to the 1  
plaintiff setting out in considerable detail the charges the  
solicitor would impose in the event he were retained.

10 Attached to that letter was a proforma document by which, if 10  
so inclined, the plaintiff would, by signing, confirm the  
giving of instructions. The second paragraph reads:

20 "I hereby authorise you to transfer from moneys held in 20  
trust on my behalf any moneys required to meet outlays  
incurred with respect to my claim. I agree that your  
proper costs may be billed on an interim basis."

30 The plaintiff signed that document, dated it 9th July 1997, 30  
and returned it to the solicitor. The first question asked by  
the Registrar is whether the letter of 20th June 1997,  
together with the document dated 9th July 1997, constituted a  
costs agreement to which he should have regard under rule 704.

40 The term "costs agreement" is not defined in the Uniform Civil 40  
Procedure Rules. It should, in my view, be taken to bear its  
natural meaning, that is, an agreement between a party and his  
solicitor as to the costs payable to the solicitor for work  
carried out pursuant to the retainer. 50

50 At the time of this transaction the Legal Practitioners Act 50  
1995 provided for agreements as to costs, in section 23. At  
the time the Uniform Civil Procedure Rules commenced, such an

JUDGMENT

agreement, by operation of the Criminal Justice Reform Act 1998 which resurrected the Queensland Law Society Act 1952 provisions, was styled a "client agreement" not a "costs agreement". But that aside, there is no warrant for not giving the expression in rule 704 its natural meaning, being the meaning earlier expressed.

The document of 9th July plainly related back to the letter of 20th June. By returning the signed form originally attached to that letter, the plaintiff would ordinarily be taken to have signified that he was retaining the solicitor on the terms set out in the letter, including as to costs.

Mr Robinson, who appeared for the third defendant, emphasised the concluding words of the 9th July form, "I agree that your proper costs may be billed on an interim basis," submitting that the word "proper" should be taken to mean reasonable.

It would certainly have been preferable had the document referred directly to the details of charging set out in the letter. But it must sensibly be concluded that in authorising billing of "proper costs" this plaintiff had in mind costs on the basis particularised in the preceding letter.

As to a separate point, the absence of a single document containing the signatures of both parties did not preclude

JUDGMENT

1 there being a costs agreement where as here, the letter of 1  
20th June can be regarded as an offer, and the document of 9th  
July specifically referred to in the earlier letter, regarded  
as recording assent.

10 The Registrar's first question should therefore be answered  
yes.

20 The second question is whether the plaintiff is not entitled 20  
under the order to costs incurred in proceeding unsuccessfully  
against the first and second defendants. They were joined,  
together with the third defendant, the Nominal Defendant,  
because it was not clear against whom the claim should  
30 succeed. See rule 65. Each blamed the other. 30

40 I would have thought that the order contemplated the third  
defendant's meeting the plaintiff's costs of the action in all  
its respects; that is, including the costs of proceeding 40  
against the other defendants as well, the Judge implicitly  
having accepted the reasonableness of the plaintiff's taking  
that course. The order refers in terms to the plaintiff's  
50 costs "of and incidental to the action", meaning the whole 50  
proceeding, not just parts of it. Otherwise the Judge would  
specifically have limited the costs recoverable.

60 JUDGMENT 60

Mr Robinson has however referred me to a comprehensive analysis of this issue in the Victorian Court of Appeal in Dimos and Willetts 2000 2 Victorian Reports 170.

I feel that the proposition in Quick on Costs to which Ormiston JA refers at page 186, may be too broadly stated. This is a case which falls within that Judge's qualification, expressed at page 187 in these terms:

"It must always be remembered that a successful plaintiff is entitled, if granted costs, to all costs necessary and proper to the prosecution of its claim, so that any costs incurred in joining additional parties for conformity's sake (for example) may be comprehended by the order..."

This was a case, again adopting that Judge's terms, of "strictly but one claim or cause of action brought against a number of defendants" (p187) that sufficiently disposes of any suggestion of the relevance in principle of Dimos to this case.

But I would wish to add this. At page 187 of Dimos, Ormiston JA describes as follows the way cost orders should be interpreted:

"Where as in the present case, the Court dismisses a claim against a second or other defendant with costs, that should be construed as dealing with the costs of that claim if no contrary order is made.

Likewise, again as in the present case, an order for costs against an unsuccessful defendant should be construed upon the basis that the Court was dealing with

1 the claim or claims made against that defendant, so that 1  
in the absence of any contrary order, it should be  
construed as dealing with only the costs necessarily and  
properly incurred by the plaintiff in prosecuting that  
claim or those claims.

10 The words "of the action" used here ,as in so many Court 10  
orders, should be read as having implicitly added to them  
the words, "as against the first defendant", but that is  
strictly unnecessary because the proceeding or event  
prima facie under consideration was that against the  
first defendant, who was thereby ordered to pay those  
costs."

20 I would not wish, with respect, to be taken to agree with 20  
that. The meaning of this order is plain and the implicit  
rationale for its having been made as covering all costs  
equally plain.

30 I would think it falls to a defendant in this situation, 30  
seeking to have the recoverable costs limited, to ensure that  
the order made is specifically limited, otherwise where an  
order is made in the terms used by this learned Judge it  
should, in my view, receive its natural interpretation; that 40  
is, as covering the costs of the proceedings as against all 40  
defendants.

50 I answer the Registrar's second question by saying that under 50  
the costs order the plaintiff is entitled to his costs of  
proceeding against the first and second defendants as well as  
against the third defendant.

60 JUDGMENT 60

...  
THE CHIEF JUSTICE: There will be an order that the third  
defendant pay the plaintiff's costs of and incidental to the  
reference to be assessed.

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JUDGMENT

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