

SUPREME COURT OF QUEENSLAND

CITATION: *Costello v State of Qld* [2002] QCA 503

PARTIES: **ALAN EDWARD COSTELLO**
(plaintiff/applicant)
v
STATE OF QUEENSLAND
(defendant/respondent)

FILE NO/S: Appeal No 8816 of 2002
DC No 2692 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EXTEMPORE ON: 19 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 19 November 2002

JUDGES: Davies and Williams JJA and Philippides J
Separate reasons for judgment of each member of the Court;
each concurring as to the orders made

ORDER: **1. Application for leave to appeal granted.**
2. Appeal allowed.
3. Set aside the order for costs made on 28 August 2002.
4. In lieu substitute an order that the costs of that application be reserved.
5. The respondent to pay the applicant's costs of this application.

CATCHWORDS: PROCEDURE - COSTS - GENERAL RULE - COSTS FOLLOW THE EVENT - COSTS OF ISSUES - where the learned District Court judge dismissed an application for summary judgment by the defendant - where the plaintiff was ordered to pay the defendant's costs of the application - whether the costs order was wrongly made

PROCEDURE - COSTS - APPEALS AS TO COSTS - DISCRETION - where costs did not follow the event - where costs order appealed - where Court of Appeal reluctant to grant leave on matters of practice and procedure - whether the costs order should stand

COUNSEL: J W Lee for the applicant
T J Bradley for the respondent

SOLICITORS: Keith Scott & Associates for the applicant
Hunt & Hunt for the respondent

DAVIES JA: Alan Edward Costello seeks leave to appeal against an order for costs made against him in the District Court on 28 August this year. He was and is the plaintiff in an action for damages for personal injuries against the State of Queensland arising out of alleged negligence by medical staff of the Royal Brisbane Hospital.

On 7 August 2002 the learned District Court judge heard an application for summary judgment by the defendant which, in her judgment dated 28 August 2002, she dismissed. In her original reasons for judgment which she published on that day she included an order that the costs of the application be reserved to the trial judge or the judge hearing a renewed application for summary judgment. However on that day she rightly invited the parties to make submissions as to the appropriate order for costs and, apparently after hearing some submissions, ordered the applicant to pay the respondent's costs.

Nothing which her Honour said on that day clearly reveals why she changed her mind. The respondent appears to have argued on that day that because the applicant filed an amended statement of claim after the hearing of the summary judgment application but before her Honour delivered her reasons, for some reason which, presumably it would be contended, appeared from the amended statement of claim, the applicant should pay the respondent's costs to the summary judgment application. However the applicant's counsel objected to the respondent's counsel putting in that statement of claim and her Honour

upheld the objection so neither the existence nor the content of the amended statement of claim caused her Honour to change her mind.

Mr Bradley who appeared for the respondent before us today said that the answer to this mystery appears in paragraphs 47 and 48 of her Honour's reasons for judgment. They are in the following terms:

"[47] My review of the material and the chronology I have outlined satisfies me that the Plaintiff may have a cause of action. The pleadings may need to be amended and further evidence may need to be gathered. At this point I consider that it is premature to give Summary Judgement to the Defendant.

[48] After careful reading I have reached the view that the Plaintiff's prospects are not so slim as to be fanciful. The chronology and material indicate to me that the Defendant may have been negligent in ways not particularised and/or the Plaintiff may have a cause of action against parties other than the Defendant. I consider it appropriate to give the Plaintiff an opportunity to review the action."

Mr Bradley submits, and this is the way I put it rather than the way he put it, that what her Honour was really saying there was that the plaintiff had no real prospect of succeeding on the claim as pleaded but that in the exercise of her discretion she refused summary judgment because there was a prospect that the plaintiff would succeed on some other non-pleaded course of action.

This may, he submits, explain her Honour's statement addressed to Mr Lee, who was then appearing for the applicant before her Honour:

"its highly arguable once you have read [the reasons for judgment] whether you've won or not. I mean, they had

their application dismissed but you do not escape without considerable implied and expressed criticism. So I don't know about these costs following the event. If the costs followed the event, they'd probably get it."

Nevertheless, I must say I find it difficult to see, or see at least clearly, that that is what her Honour intended.

In paragraph 47 it seems, at least as likely, perhaps more likely, that her Honour was saying that she was satisfied that the plaintiff may have a cause of action on the pleadings as pleaded. In other words that she was satisfied that the plaintiff had some real prospect of succeeding on the claim and that what she goes on to say in paragraphs 47 and 48, refer to, in the first place, the need to amend the pleading and, perhaps gather some more evidence to improve it, and in paragraph 48, the possibility that in other ways not pleaded there may also be causes of action against the defendant and against other parties and the defendant.

In the end I am unclear as to what her reasons were for the conclusion which she reached.

In those circumstances I cannot be satisfied that the view which her Honour took is other than wrong because one would ordinarily expect in an application of this kind that the order which would be made by the Court would be either that the costs be costs in the cause, or that they be reserved.

That seemed to be her Honour's initial view of the matter when she published her reasons for they are the orders which her

Honour has included in her reasons, and I can find nothing in what took place on the hearing before her Honour when she invited argument on the question of costs which caused her to change her mind.

In those circumstances it seems to me that the order was wrongly made and notwithstanding the reluctance of this Court to grant leave on matters of practice and procedure, especially on questions of costs, it seems to me that it ought not to be permitted to stand.

I would therefore grant leave, allow the appeal, set aside the order for costs made on the 28th of August 2002 and in lieu substitute an order that the costs of that application be reserved.

WILLIAMS JA: I agree.

PHILIPPIDES J: I also agree.

...

DAVIES JA: The respondent should pay the applicant's costs of this application.
