SUPREME COURT OF QUEENSLAND

CITATION:	*Sheridan v Warrina Community Co-operative Ltd & Anor* [2004] QCA 308
PARTIES:	**ANGELA RUTH SHERIDAN** (plaintiff/respondent) **v** **WARRINA COMMUNITY CO-OPERATIVE LTD (QC0125)** (first defendant/appellant) **MICHAEL JOHN WALTON** (second defendant)
FILE NO/S:	Appeal No 5953 of 2004 DC No 50 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	27 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2004
JUDGES:	Williams JA and Helman and Dutney JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted** **2. Appeal dismissed with costs**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – WORDS TO BE GIVEN LITERAL AND GRAMMATICAL MEANING – where respondent claimed damages for personal injuries she claimed she sustained in the course of her employment – where claim governed by *WorkCover Queensland Act* 1996 (Qld) – where learned trial judge dismissed proceeding – where, under s 325, the court had no power to order costs in favour of WorkCover where the claim was dismissed – where learned trial judge did not award costs to WorkCover – whether the literal meaning of s 325 is so obviously absurd that it could never have been intended by the legislature – whether court should place a different construction on the section – whether leave to appeal should be granted

WorkCover Queensland Act 1996 (Qld), s 325

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297, considered
R v Etteridge [1909] 2 KB 24, cited
R v Vasey [1905] 2 KB 748, cited
Salmon v Duncombe (1886) 11 App Cas 627, cited
Vacher & Sons Ltd v London Society of Compositors [1913] AC 107, followed

COUNSEL: D V C McMeekin SC for the applicant
B Laurie for the respondent

SOLICITORS: Moray & Agnew for the applicant
Wonderley & Hall for the respondent

[1] **WILLIAMS JA:** This is an application for leave to appeal against the order of a District Court judge refusing to order costs against the respondent in favour of the appellant.

[2] The respondent commenced a proceeding in the District Court at Toowoomba claiming damages for personal injuries she claimed she sustained in the course of her employment. The first defendant, the present appellant, was her employer and the second defendant was the owner of the property on which the alleged incident occurred. After a trial Judge Britton SC found in favour of the defendants and dismissed the proceeding. The defendants were separately represented at the trial, and the trial judge made an order that the respondent pay the second defendant's costs.

[3] The appellant's case was conducted by WorkCover and it was clear that the claim against the appellant was governed by the provisions of the *WorkCover Queensland Act* 1996 (the "Act"); Reprint No 4 was the relevant version. The attention of the learned trial judge was drawn to s 325(1) of that Act and it was submitted on behalf of the unsuccessful plaintiff that, notwithstanding the dismissal of the proceeding, an order for costs could not be made in favour of the appellant. In a considered judgment Judge Britton SC accepted those submissions and declined to make an order for costs in favour of the appellant.

[4] From that decision the appellant seeks leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967. The court indicated that it wished to hear submissions on the merits of the appeal.

[5] Section 325 is found in Part 11 of the Act which deals with "Costs". Division 1 deals with the situation where the worker has a "certificate injury" or is a dependant; Division 2 deals with the situation where the worker's injury was a "non-certificate injury". It was accepted by all that Division 2 applied to the proceeding in question. Section 325 is the only substantive section in Division 2; it is in these terms:

> "**(1)** No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding.
>
> **(2)** If a party to the proceeding makes a written final offer of settlement that is refused and the court later awards damages to

> the worker, the court must, in the following circumstances, make the order about costs provided for –
>
> (a) if the amount of damages awarded is equal to or more than the worker's final offer – an order that WorkCover pay the worker's party and party costs from the day of the final offer;
>
> (b) if the amount of damages awarded is equal to or less than the WorkCover's final offer – an order that the worker pay WorkCover's party and party costs from the day of the final offer.
>
> **(3)** If the award of damages is less than the claimant's written final offer but more than WorkCover's final offer, each party bears the party's own costs.
>
> **(4)** An order about costs for an interlocutory application may be made only if the court is satisfied that the application has been brought because of unreasonable delay by 1 of the parties.
>
> **(5)** If an entity other than the worker's employer or WorkCover is joined as a defendant in the proceeding, the court may make an order about costs in favour of, or against, the entity according to the proportion of liability of the defendants and the justice of the case.
>
> **(6)** The court may make an order for costs against the worker's employer or WorkCover under subsection (5) only if –
>
> (a) the order is in favour of the entity; and
>
> (b) the worker's employer or WorkCover joined the entity as a defendant."

[6] A number of observations must be made about the section. Firstly, the wording of subsection (1) is clear; there is no room for any ambiguity. Secondly, the section is not limited to directing the court as to how costs are to be awarded depending upon the relationship between the quantum of damages awarded by the court and the amount of each party's final offer. In that regard the section must be contrasted with the provisions found in Division 1; there the provisions are limited to directing the court as to the approach to the awarding of costs depending upon the relativity between each party's final offer and the amount of damages awarded by the court or where WorkCover denies liability (or admits liability of not more than 25 per cent) when WorkCover's liability as established in the proceeding exceeds 75 per cent. The scope of operation of s 325 is highlighted by subsection (4) which deals with all interlocutory applications brought in the proceeding. Thirdly, subsection (5) expressly allows the court to make an order about the costs of a defendant to the proceeding other than the employer represented by WorkCover. The subsection makes it clear that the order about costs can either be in favour of or against that other defendant. It follows that s 325 is an all embracing provision as to costs and is much more restrictive than Division 1. It is also significant that there is no equivalent of s 321(4) found in Division 2; that subsection provides: "In any other case, the court may make an order about costs as it considers appropriate."

[7] It is therefore clear that on a reading of s 325 as a whole, and giving each of the words therein their ordinary and natural meaning, prima facie the court has no power to order costs in favour of WorkCover where (in a proceeding to which the section applies) the claim is dismissed.

[8] Counsel for the appellant drew the court's attention to the obvious unfortunate consequences of placing such a construction on the section. It would mean, for example, that even where a claim was dismissed as being fraudulent an order for costs could not be made in favour of WorkCover. It was therefore submitted that the court should find some way of construing s 325 so as to empower the court to make an order for costs in favour of WorkCover where the proceeding was dismissed.

[9] One cannot simply say that subsection (1) is limited to, or conditional upon, the court making some award of damages in favour of the claimant. That is entirely inconsistent with the ambit of operation of subsections (4) and (5).

[10] It was then submitted that the dismissal of the proceeding was the equivalent of the court awarding "nil" damages. But again that approach cannot be reconciled with the wording of subsection (2). That subsection is predicated on the fact that "the court later awards damages to the worker"; then one is directed by the later wording of the subsection to "the amount of damages awarded". In a case such as this one cannot logically and realistically say that the court has awarded damages to the worker albeit in a "nil" amount.

[11] Mr McMeekin SC for the appellant recognised all of those obstacles, and in consequence ultimately submitted that this court should conclude that the literal meaning of s 325(1) is so obviously absurd that it could never have been intended by the legislature, and that this court should, in consequence, place a construction on the section, however strained and by adding words if necessary, which would more accurately reflect what a legislature, acting reasonably, must be presumed to have intended. It should be noted that the Second Reading Speech and the Explanatory Memorandum provide virtually no assistance to the court in resolving the question now before it.

[12] In support of his submission counsel for the appellant referred to a passage in *Maxwell on the Interpretation of Statutes*, (12th ed, 1969) at 228 to the following effect:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

[13] One of the difficulties facing the appellant in relying on that passage is that it cannot be said that the literal construction of s 325(1) is not consistent with the clear main object and intention of the statute. What the Second Reading Speech does make clear is that the intention of the legislation was to minimise the costs of proceedings

involving WorkCover, and a clear intent of the legislature in enacting s 325 was to impose restrictions on the recoverability of costs in proceedings involving WorkCover. Further, as the passage from Maxwell makes clear, the court's power to modify the meaning of a statutory provision can be defeated by the "absolute intractability of the language used". When one has regard to the authorities relied on by Maxwell (for example *Salmon v Duncombe* (1886) 11 App Cas 627 at 634-6, *R v Vasey* [1905] 2 KB 748 at 750-1 and *R v Etteridge* [1909] 2 KB 24 at 27-8) the permissible substituted construction has to be consistent with what the court regards as the clear intention of the statute and not be contrary to a clear express prohibition contained in the statute.

[14] That again highlights, in my mind, the difficulty faced by the appellant here. Section 325(1) contains an express prohibition in clear terms and in effect the court is being asked to place a construction on it which would confer on the court a power caught by the prohibition and where it could be said there is "absolute intractability" in the language used.

[15] That leaves for consideration the applicability in the present case of the reasoning of the majority of the High Court in *Cooper Brookes* (*Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297. Gibbs CJ, after noting at 304 that there "are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case", went on to deal at 305 with the particular situation there confronting the Court: "In the present case the words of the Act which give rise to the question of interpretation are not substantive provisions which of their own force apply to the case of a holding company. The difficulty is caused by the application to the case of a holding company which is not the taxpayer of a provision intended to apply to the case of a subsidiary company which is the taxpayer. The provisions of s. 80B (5) are given an extended application by s. 80C (3). Clearly some modification of the provisions of s. 80B (5) was necessary to enable those provisions to be applied to a situation with which they were by themselves not intended to deal." But even in that situation Gibbs CJ found the case to be "one of some difficulty"; however he was able to "conclude that the intention of the legislature sufficiently appears when ss. 80A, 80B and 80C are read together and that it is permissible to depart from the literal meaning of the words of s. 80C (3) in order to give effect to that intention" (307).

[16] Stephen J noted that "if literal meaning is to be departed from, it must be clear beyond question both that literal meaning does not give effect to the intention of the legislature and that some departure from literal meaning will fulfil that intent." (310) In applying that approach to the problem in hand which flowed from certain words appearing in s 80C (3) he said that "a close examination of that sub-section against the background of its legislative history and that of its neighbouring sections has satisfied me that the intent of its framers, which it reflected when it was originally enacted, has been stultified by amendments to other provisions".

[17] In their joint judgment Mason and Wilson JJ, referring to the "golden rule" of construction, said at 320 that there are "statements of the rule which would confine the courts to the ordinary grammatical sense of the words used unless that produces an absurdity or inconsistency. … In some cases in the past these rules of construction have been applied too rigidly. The fundamental object of statutory

construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction." Then comes a passage at 321 on which counsel for the appellant here heavily relied:

> "On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."

[18] I would observe that there their Honours are referring to "an alternative interpretation" which to my mind is something other than an interpretation in direct conflict with a clear statutory prohibition.

[19] I can find nothing in the reasoning of the judges quoted, who constituted the majority, which would justify this court in the present circumstances construing s 325 in such a way as to recognise that on dismissing the respondent's proceeding the court had power to order the respondent pay costs to WorkCover. Reading the relevant statutory provisions in the way proposed by the majority was not contrary to an express provision of the statute.

[20] There is another, not irrelevant, consideration which supports the view that s 325(1) must be given its plain, ordinary meaning. At a time after the relevant date for purposes of the present proceeding, but before the determination of the proceeding, amendments were made to Division 1 clarifying the approach to the awarding of costs where the worker had a work related impairment of 20 per cent or more. At the time of making those amendments the only amendment made to Division 2 was in the heading and in s 324 defining the application of the Division. Instead of referring to "costs applying to worker with non-certificate injury" the Division henceforth applied "if the claimant is a worker who has a WRI of less than 20 percent or no WRI." The fact that such a limited change (indeed one of no practical consequence) was made leaving s 325(1) unamended suggests that the legislature intended that subsection to have the consequence which clearly flowed from its clear, precise wording.

[21] At the end of the day I am of the view that words of Lord Atkinson in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 121 are apposite here:

> "If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results."

[22] Here the legislature has enacted that in the existing circumstances the court may make no order as to costs other than as prescribed in subsections (2), (3), (4) and (5) of the section. The order sought does not come within any of those provisions and therefore the court has no power to make the order for costs sought.

[23] In the circumstances leave to appeal should be granted, but the appeal should be dismissed with costs.

[24] **HELMAN J:** It should not be assumed that when s. 325 of the *WorkCover Queensland Act* 1996 was enacted the Parliament overlooked the possibility of a claim's failing, or regarded such a result as impossible. The language of the statute is plain, admitting of only one meaning, and so the Parliament must be taken to have intended what it plainly expressed. I agree with Williams J.A. and Dutney J. that leave to appeal should be granted and the appeal dismissed with costs.

[25] **DUTNEY J:** The apparent effect of s 325 of the *WorkCover Queensland Act* 1996 ("the Act") is to deprive WorkCover of its costs when it successfully defends a claim brought against it by a worker but entitles it to recover costs from a worker who, although successful, recovers less than WorkCover's final offer.

[26] I consider that the language of ss 325(2) (a) and (b) readily accommodates the situation where the judgment of the court is that the claimant recovers no damages. Those paragraphs merely refer to "the amount of damages awarded". Where an action is dismissed with the consequence that the worker receives no damages, it does little violence to the language to regard that result as an award of damages less than WorkCover's final offer. The problem is created by the preamble to s 325(2) which sets up as a prerequisite to awarding costs that there be a final offer of settlement that is refused and that the court later "awards damages to the worker".

[27] This language is much more difficult to construe as covering the situation where the worker fails to recover damages.

[28] The effect of the appellant's submissions is that the phrase, "awards damages to the worker", should be construed as including a situation where the court determines the claim but the damages awarded by the court are nil, presumably because the worker failed to establish the necessary breach of duty.

[29] The construction which the appellant seeks to put on the prerequisite is not the obvious meaning of the words used. The natural meaning of the words requires a positive award in favour of the worker.

[30] In support of his submissions, Mr McMeekin SC for the appellant relied on the passage from *Maxwell on the Interpretation of Statutes*, 12th ed at 228 which is set out in the reasons of Williams JA which I have had the advantage of reading and on passages from the judgment of the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297.

[31] The effect of that authority is that it is permissible to depart from the literal meaning of the plain words of a statute where it is "clear beyond question both that literal meaning does not give effect to the intention of the legislature and that some departure from literal meaning will fulfil that intent."[1]

[32] For myself, I doubt that any assistance can be derived from the fact that the provisions of Part 11, Division 1 of the Act were amended after the relevant date. The wording of Division 1 was always different to the wording of Division 2. Sub-

[1] *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 per Stephen J at 310.

section 321(1) made it a prerequisite to costs in the case of a worker with a certificate injury that the court had assessed damages. That expression was retained after the amendments. The fact that different expressions were used in Division 1 and Division 2 might assist in concluding that different meanings were intended.

[33] Some support for the submission that the legislature intended the meaning contended for by the appellant can be found in s 294 of the Act. That section requires each party to make a final offer of settlement if the claim is not settled at the compulsory conference. The worker is precluded from bringing an action until the 14 days for acceptance of the offer has expired. The worker's final offer must be filed with the originating process. The section makes it mandatory for the court to have regard to the offers in making a decision about costs.

[34] The Explanatory Notes to s 325 of the Act record the drafter's intention in these terms:

> "The basis of cost orders is that if the court makes an award at or above the worker's written final offer, then WorkCover must pay party and party costs … from the date of offer to trial. Conversely, should the court award damages equal to or below WorkCover's written final offer, then the worker must pay WorkCover's party and party costs from the date of the final offer to trial. In circumstances where the judgment award falls between each party's final offer, then each party bears their own costs."

[35] This also tends to support the construction urged by the appellant without expressly addressing the present situation.

[36] An outcome where WorkCover can recover costs where a worker succeeds but recovers damages in an amount less than that offered by WorkCover but cannot recover costs where the worker fails entirely seems odd. It is not impossible, however, to imagine a situation where the legislature might have considered it an appropriate result. If the worker recovers damages of less than the amount offered there is a fund of money payable by WorkCover to the worker against which the costs order could be set off. Where the worker fails entirely there is no such fund. A legislature which was prepared to limit damages and impose penalties for not accepting a reasonable offer might have baulked at making an injured worker, who could not establish liability on the part of the employer, indebted for costs to WorkCover. WorkCover is a statutory organisation set up to administer a compensation scheme for injured workers. One of the statutory aims of the scheme is to ensure that injured workers are treated fairly.[2]

[37] Since s 325(1) unequivocally removes any power to award costs except in the specific and limited circumstances it sets out, this Court should be slow to conclude that the failure to include this case within the scope of permissible costs orders results from the use of inappropriate words to convey the legislature's obvious intention. It is also possible that the legislature simply failed to think about this fact situation. That might explain the failure to include it in the limited list of allowable orders.

[38] This is not, in my view, a case where it is clear beyond question that the legislature failed to express its real intention in the statute. Hence it is unnecessary that this

---

[2] *WorkCover Queensland Act* 1996, s 5(4)(b).

Court should examine the limits of its power to construe the Act so as to give effect to that intention under the principles to which the appellant referred.

[39] Giving the words of the Act their ordinary meaning, the appellant is not entitled to costs against the respondent.

[40] I would grant leave to appeal, but I would dismiss the appeal on the basis that the plain language of s 325 excludes the making of the order sought. I would order the appellant to pay the respondent's costs of the application for leave to appeal and the appeal on the standard basis.