

# SUPREME COURT OF QUEENSLAND

CITATION: *168 Wharf St Pty Ltd & Anor v Amstar Learning Pty Ltd & Ors* [2005] QCA 44

PARTIES: **168 WHARF STREET PTY LTD**  
(first respondent/first plaintiff)  
**BECKETT SERVICES PTY LTD**  
(second respondent/second plaintiff)  
v  
**AMSTAR LEARNING PTY LTD (formerly ADROIT HUMAN RESOURCES PTY LTD)**  
(first appellant/first defendant)  
**NARENDRA JAIN**  
(second appellant/second defendant)  
**GEOFFREY GRAHAM BATT-RAWDEN**  
(third appellant/third defendant)

FILE NO/S: Appeal No 2229 of 2004  
DC No 922 of 2002

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application - Civil

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 1 March 2005

DELIVERED AT: Brisbane

HEARING DATE: 1 March 2005

JUDGES: McPherson, Williams and Jerrard JJA  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The appeals by the second and third defendants are allowed to the extent of reducing the amount (including interest) for which judgment was given against them in the District Court from \$72,605.75 to \$33,573.36**  
**2. No order as to costs of the plaintiff and the second and third defendants of appeal**  
**3. Further order that appeal by the first appellant be dismissed with costs**  
**4. Plaintiff applicants to pay their own costs of this application**  
**5. No order as to the costs of the defendants as respondents to this application**

**CATCHWORDS:** PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – CORRECTION UNDER ‘SLIP RULE’ – liability of guarantors – ambiguity in order rectified – costs orders

**COUNSEL:** P J Favell for the appellants  
C D Coulsen for the respondents

**SOLICITORS:** Turner Freeman for the appellants  
Fox Lawyers for the respondents

McPHERSON JA: This is an application under the slip rule UCPR 388 or UCPR 667(2) to correct an order of the Court of Appeal made on 30th July 2004. That was the date on which the Court as presently constituted delivered judgment in an appeal in an action brought in the District Court by the present applicant plaintiffs against the three now respondent defendants who were the first defendant company Amstar Learning Pty Ltd and two individuals named Jain and Batt-Rawden who are the second and third defendants in the action. Judgment was given in favour of the plaintiff in the District Court in the amount of \$72,605.75 for rent or money due for use and occupation of premises owned by the plaintiffs and let to Amstar that was guaranteed by those two individuals.

All three defendants appealed against that judgment. On the appeal coming before the Court on 21 June 2004 Mr De Buse of counsel announced his appearance on the appeal for the second and third appellant defendants. When asked about the first appellant Mr De Buse said the company had gone into administration "and no longer has a director, so there is no

one to retain us". That being so, the proper course would have been for the plaintiff respondents to the appeal by their counsel to apply to strike out the appeal by the appellant Amstar; but no such order was sought. It could not, I think, have been said that such an order would have been a Court "proceeding" *against* the company Amstar within the terms of s 440D of the *Corporations Act* 2001.

In the result, the appeal was heard and, on 30 July 2004, it was allowed to the extent of varying the District Court judgment by reducing the amount for which it was given from \$72,605.75 to \$33,373.36, with no order as to the costs of the appeal. Because the appeal by Amstar had not been formally struck out, it is possible to regard the order in the form in which it was made and entered as extending to the judgment against the defendant Amstar as well as the other two individual defendants on their guarantees. But that was clearly not the intention of the Court or of anyone else on the appeal, which, as can be seen from the reasons, was concerned only with the liability of the second and third defendants as guarantors. It was only that issue that was litigated in the Court of Appeal. The amount of \$72,605.75 for which Amstar as the principal debtor was liable was not the subject of any submissions on appeal because no one appeared on its behalf to move its appeal or ask that it be allowed.

The order made by the Court on 30 July 2004 was so far as costs were concerned that there be no order for the costs of appeal of the plaintiffs or the second and third defendants and we speaking now do not intend to vary that order or the absence of an order as to costs.

In the circumstances that I have related it seems to me that it is, however, appropriate to make an order now rectifying the ambiguity in the order made on the appeal on 30th July 2004 by substituting for it the following:

The appeals by the second and third defendants are allowed to the extent of reducing the amount (including interest) for which judgment was given against them in the District Court from \$72,605.75 to \$33,573.36.

There will, as I have said, be no order as to the costs of the plaintiff or the second and third defendants of that appeal.

The plaintiff's present application to amend the order is not opposed before us by any of the defendants including Amstar who have appeared by counsel before the Court today. In view of the failure of Amstar to appear on the appeal itself on 21 June 2004 we are prepared to grant the further orders sought against it by the applicant plaintiffs, which are that the appeal by the first appellant be dismissed with costs. We

would have been prepared to make such an order on the appeal had we been asked to do so.

In my view, the plaintiffs before us today ought to pay their own costs of this application. There will be no order as to the costs of the defendants as respondents to this application.

WILLIAMS JA: I agree.

JERRARD JA: I agree.

McPHERSON JA: The orders will be as I have stated them.

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