SUPREME COURT OF QUEENSLAND

CITATION:	*Edmunds v D. Dunn Industries Pty Ltd and WorkCover* [2006] QSC 230
PARTIES:	STEPHEN ALEXANDER EDMUNDS (Applicant) AND D. DUNN INDUSTRIES PTY LTD (ACN 075 710 619) trading as CD PROJECTS (First Respondent) AND WORKCOVER QUEENSLAND (Second Respondent)
FILE NO/S:	S343 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	8 August 2006
DELIVERED AT:	Townsville
HEARING DATE:	10 July 2006
JUDGE:	Cullinane J
ORDER:	**There will be no order as to costs.**
CATCHWORDS:	COSTS – Whether interlocutory applications in s.325(4) of *WorkCover Act* limited to applications in pending actions. *WorkCover Queensland Act* 1996 *Calvert v Mayne Nickless Ltd (No 2)* [2005] QCA 303 *Clarkson v Australia Meat Holdings Pty Ltd* [2003] 2 Qd.R 122 *Ex parte Britt* [1987] 1 Qd.R 221 *Re: Lankheet* [1999] QSC 73 *Sheridan v Warrina Community Cooperative Limited & Anor* [2004] QCA 308
COUNSEL:	Mr K.F. Holyoak for the Applicant Mr R. Douglas SC for the First and Second Respondent

SOLICITORS: Murphy Schmidt for the Applicant

Roberts Nehmer McKee for the First and Second Respondent

[1] Following the delivery of judgment in this matter I gave the parties leave to make written submissions on the issue of costs.

[2] The application, which was dismissed, was for a declaration that a conference that had been held between the parties was not a compulsory conference within the meaning of 308(2) of the *WorkCover Queensland Act* 1996 amended.

[3] As appears from the judgment it is plain that what motivated the application was the fact that the holding of the compulsory conference under the Act is a significant event in relation to the period of limitation within which the action must be brought. In this case the action was not brought within the 60 days of the holding of the conference which s.308(2) of the Act fixes as the time within which any action must be instituted.

[4] The written submissions which I received were primarily directed to the question of s.325(1) and in particular whether the application falls within the description "the claimant's proceeding" in s.325(1).

[5] One of the causes of action in this case pre-dated amendments made to the WorkCover legislation in July 2001 and one post-dated those amendments. It is common ground that there is no significant alteration to the terms of s.325 as a result of those amendments.

[6] Section 325 (as it stood immediately post the amendments) provides as follows:

> *"(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 written final offer – an order that WorkCover pay the worker's costs on the standard basis from the day of the written final offer;*
> >
> > *(b) if the amount of damages awarded is equal to or less than the WorkCover's written final offer – an order that the worker pay WorkCover's costs on the standard basis 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 written 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."*

[7] Section 325 forms part of Division 2 of Part 11 of Chapter 5 of the Act. This division is concerned with workers with a non-certificate injury. It was common ground that the provisions of Division 2 are applicable in this case.

[8] For the Respondent it was contended that the application did not fall within the description of "the claimant's proceeding" in s.325(1) and that being so the court's power as to costs is unfettered by the legislation and costs should follow the event.

[9] On the other hand the Applicant argued that the application did fall within this description and that the court's powers were circumscribed by those provisions and no order for costs could be made.

[10] It was also argued that the court in any case would exercise its discretion against an order for costs.

[11] On this issue I think that the provisions of Part 5 support the Respondent's argument. The references in s. 302 to 306 inclusive as well as those in s.308 suggest that the term "claimant's proceeding" in s.325(1) refers to the claim for damages made by the claimant.

[12] The provisions of subsections (1) to (3) of s.325 are concerned with the final outcome of such proceedings. Such a conclusion is certainly consistent with what Jerrard JA said in *Calvert v Mayne Nickless Ltd (No 2)* [2005] QCA 303 and is not inconsistent with what the Court of Appeal said in *Sheridan v Warrina Community Cooperative Limited & Anor* [2004] QCA 308.

[13] After the receipt of the written submissions which were directed to the effect of s.325(1) and the issue that I have referred to above, I raised with counsel the question of whether s.325(4) had any application and if so how it was to be applied.

[14] The parties have each contended that s.325(4) has no application but for different reasons. The Respondent contended that the sub-section was concerned only with applications made in the course of "the claimant's proceeding" and relied upon the judgment of Helman J in *Clarkson v Australia Meat Holdings Pty Ltd* [2003] 2 Qd.R 122. In that case Helman J said at pages 123 and 124:

> *"As I construe the scheme the restrictions on orders for costs provided for at pt 11 of ch. 5 applied only in a proceeding for damages by a claimant. Once such a proceeding has been begun, pt 11 applied to it. Part 11 constituted a code which restricted the awarding of costs to the circumstances provided for in that part. This application was not a proceeding for damages, but rather an*

> *application made prior to, and with a view to, the applicant's beginning a proceeding for damages. Accordingly, in applying for the costs of the application, the applicant can rely on the power conferred on this court by s.221 of the* Supreme Court Act *1995, unconstrained by the code provided for in pt 11 of ch. 5 of the WorkCover Queensland Act."*

[15] In *Re: Lankheet* [1999] QSC 73 Atkinson J reached a similar conclusion. She said:

> *"There are no such proceedings here on foot. Neither is this an interlocutory application, since that must be in the proceeding, and therefore s.325(4) does not apply."*

[16] The authorities dealing with the nature of interlocutory applications generally do not however support the proposition that they are limited to applications in pending proceedings. In *Ex parte Britt* [1987] 1 Qd.R 221 McPherson J (as he then was) rejected an argument that an application to the court was not of an interlocutory character because it was not made in any proceedings presently pending before the court. He referred to the judgment of Taylor J in *Hall v The Nominal Defendant* (1966) 117 CLR 423 at 440:

> *"It is not, however, of the essence of an interlocutory order that it is one made in the course of a pending action or suit ---."*

[17] The proper test to use the words of McPherson J in *Britt* at page 226 is:

> *"---whether the decision of the application will finally dispose of the rights of the parties, not merely as to the subject-matter of the particular application in question but also as to the ultimate dispute between the parties, irrespective of whether it is already the subject of litigation and independently of whether the outcome of the application may, in a practical sense, spell an end to all prospect of initiating such litigation."*

[18] These authorities do not seem to have been raised before either Helman J or Atkinson J.

[19] The Applicant on the other hand contended that the order made in this case dismissing his application finally determined the rights of the parties and thus was not interlocutory. This may be the practical effect of the order but the cause of action remains although statute barred and unenforceable if, as would be expected, the plea is raised in any proceedings.

[20] If it was intended to limit interlocutory applications referred to in subsection (4) of s.325 to applications in pending proceedings then it would have been a simple matter to provide expressly for this.

[21] The legislature enacted s.325(4) against the background of the judgments that I have referred to.

[22] The scheme for which Chapter 5 provides is extensive and not without its complexities. Experience shows that many applications are made to the court prior to action being instituted. If the Respondent is correct the Act makes no provision for the costs of these.

[23] In my view there is nothing in the language of s.325, or its context within the Act which would justify the restriction of interlocutory applications in subsection (4) to applications in pending proceedings.

[24] I note that in *Re: Reeves* [2000] 2 Qd.R 665 Derrington J (in a case concerned with s.325) reached this conclusion. He said at page 666:

> *"Learned counsel for the applicant alternatively argued for the inherent jurisdiction of the Court to order costs, but in a case such as this where costs are specifically dealt with by the statute it is not appropriate to invoke the Court's inherent jurisdiction. It is a matter of construction of the Act. Normally the concept of interlocutory applications relates to applications made within the parameters of a trial.*
>
> *However the whole of the scheme to which these sections apply involves the setting up of a system whereby there are several mandatory steps required of the various parties antecedent to the commencement of litigation and indeed s.291 anticipates an approach to the Court antecedent to the commencement of the action.*
>
> *In those circumstances and because of the absence of any reference elsewhere to a situation such as this in which the issue of costs is of considerable significance, the appropriate construction to put on the reference to interlocutory proceedings is one that reads it in the context of the whole of the procedure set up by the Act including the pre-trial procedure.*
>
> *Consequently, the general prohibition in relation to an order for costs in a non-certificated claim does not apply because the present case comes within the exception to that prohibition, that is, pursuant to subs. (4) which is both relevant and applicable and it might be said that it is also very logical that it should do so."*

[25] This is also the conclusion which I have reached although I would, with respect, take a different starting point to the construction of the subsection. The concept of an interlocutory application in accordance with the authorities that I have referred to is not normally limited to applications made within the parameters of a trial. This is not the test of an interlocutory application.

[26] Explanatory notes to the original bill which later became the *WorkCover Queensland Act* 1996 might be thought to provide some support for the Respondent's contention and reliance was placed upon these. Referring to the clause that became s.325 the explanatory statement said:

> *"The section also contains provisions for costs orders where parties to an action are required to make necessary court applications to enforce progress or supply information in an action and where another party is joined in the proceedings. Any costs order for the pre-proceeding stage will be as prescribed under a regulation.*"

[27] No provision for costs in relation to pre-proceeding applications has been made by regulation.

[28] I do not think however that the terms of the explanatory statement justify the conclusion urged by the Respondent in the light of the language of s.325 and cases such as *Britt* and *Hall.*

[29] This being so s.325(4) limits the power of the court to make an order on an interlocutory application such as this to the circumstances for which it provides, namely where an application is brought because of unreasonable delay on the part of one of the parties.

[30] The circumstances of this case do not meet the terms of s.325(4) and there is in my view thus no power to make an order for costs.

[31] There will be no order as to costs.