# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Duong v Versacold Logistics Ltd & Ors* [2011] QSC 35 |
| PARTIES: | **TUAN VAN DUONG**<br>(plaintiff)<br>**v**<br>**VERSACOLD LOGISTICS LIMITED ACN 008 626 793**<br>(first defendant)<br>**NMHG MARKETING PTY LTD (formerly known as NATIONAL FLEET NETWORK PTY LIMITED) ACN 094 802 141**<br>(second defendant)<br>**APS GROUP (INDUSTRIAL) PTY LTD ACN 096 423 086 TRADING AS AUSTRALIAN PERSONNEL SOLUTIONS**<br>(third defendant) |
| FILE NO/S: | SC No 8393 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial – Further Orders |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 16 March 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | Matter dealt with on written submissions |
| JUDGE: | Chief Justice |
| ORDERS: | **1. That the first defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on the indemnity basis; and**<br>**2. That the first defendant pay the second defendant's costs of and incidental to the proceeding to be assessed on the standard basis.** |
| CATHWORDS: | PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where case was factually complicated – where plaintiff seeks indemnity costs due to prior formal offer to settle – where amount awarded to plaintiff was greater than the settlement offer, but apportioned between defendants – whether the plaintiff acted unreasonably in prosecuting his claim – whether a mandatory final offer made under the *Personal Injury Proceedings Act* 2002 should be considered when a formal offer to settle was made at a later date – whether these factors should affect the operation of r 360 *Uniform Civil Procedure Rules* 1999 – |

whether the plaintiff acted reasonably in commencing claim in the Supreme Court and was entitled to Supreme Court costs

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – CO-DEFENDANTS – where case was factually complicated – where the first defendant introduced the second defendant into proceedings – whether a costs order should be made against the unsuccessful defendant in favour of a successful defendant

*Altamura v Victorian Railways Commissioners* [1974] VR 33, cited
*Bullock v London General Omnibus Co* [1907] 1 KB 264, cited
*Di Carlo v Dubois* [2002] QCA 225, cited
*Sanderson v Blyth Theatre Co* [1903] 2 KB 533, cited
*Theden v Cook Shire Council* [2005] QSC 73, cited

*Personal Injury Proceedings Act* 2002 (Qld), s 4, s 40(8)
*Uniform Civil Procedure Rules* 1999 (Qld), r 360
*Workers Compensation and Rehabilitation Act* 2003 (Qld), s 316(3)

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| COUNSEL: | J O McClymont for the plaintiff<br>R A Myers for the first defendant<br>R C Morton for the second defendant<br>G O'Driscoll for the third defendant |
| SOLICITORS: | Shine Lawyers for the plaintiff<br>Thynne & Macartney for the first defendant<br>DLA Philips Fox for the second defendant<br>Mullins Lawyers for the third defendant |

[1] **CHIEF JUSTICE:** I published my reasons for judgment on 14 December 2010, inviting the presentation of minutes for judgment, and subsequently, submissions on costs. I received the submissions on costs, and after that the agreed minutes of judgment. I enter judgment in accordance with those minutes, which I have initialled and placed on the file. I turn now to the issue of costs.

**Plaintiff's costs**

[2] The plaintiff seeks indemnity costs, on the Supreme Court scale, against Versacold. Because of s 316(3) of the *Workers Compensation and Rehabilitation Act* 2003, the plaintiff is precluded from seeking costs against APS.

[3] The basis of the plaintiff's claim for indemnity costs is his formal offer to settle served on the defendants on 16 April 2010. The plaintiff then offered to accept $150,000 together with standard costs.

[4] The plaintiff has secured judgment against Versacold in the amount of $179,363.76. Mr Myers referred to an amount of $125,554.63, calculated by reference to the

70:30 apportionment as between Versacold and APS. Counsel for the plaintiff points out the correct amount is $132,605.24. But that apportionment did not operate to diminish the amount of the judgment to which the plaintiff was entitled as against Versacold: that affected only the respective liabilities of Versacold and APS as between themselves.

[5] Mr Myers also referred to the court's obligation, under s 40(8) of the *Personal Injury Proceedings Act* 2002, in determining costs, to have regard to mandatory final offers. The sub-section refers to such offers "if relevant". In this case the formal offer to settle came after and effectively superseded the plaintiff's mandatory final offer. (That was an offer made on 2 July 2009 to accept $275,000 and costs, with Versacold offering only $60,000.)

[6] Mr Myers points to the statement in s 4 of that Act of its purposes, "obliging parties to act reasonably in prosecuting a claim that is governed by the legislation". In my view, the plaintiff has (in respects I will elaborate upon), and the Act constitutes no barrier to the literal application of rule 360 of the Uniform Civil Procedure Rules.

[7] Mr Myers submitted that the plaintiff's conduct at the proceeding bears on the disposition of costs, including his maintaining the claim for future economic loss and about the alleged defect in the pallet jack, and his not relying in his notice of claim for damages on the possibility that a collision with debris caused the problem. The formal offer to settle likely reflected an acknowledgement that the claim for future economic loss would not succeed. The potential presence of debris was raised in an Intersafe report of 17 April 2009 prior to the institution of proceedings, and particularized on 19 February 2010. As to the cause of the incident, the plaintiff was not unreasonable, in a factually rather complicated case, in leaving all options for determination by the court. I consider the plaintiff's conduct of his claim to have been reasonable.

[8] Accordingly, in light of Rule 360, there should be an order that the first defendant Versacold pay the plaintiff's costs of and incidental to the proceeding, to be assessed on the indemnity basis.

[9] As to the appropriate court scale, there is no doubt that the plaintiff was entitled to commence the proceeding in the Supreme Court. Had his claim for future economic loss succeeded, the overall amount awarded would have fallen outside the jurisdiction of the District Court. Mr Myers submitted that there was no particular complexity about the case. But the reasons for judgment suggest the contrary, and as Ms McClymont points out, there were three defendants, all denying liability and each making cross-claims against the others. While obviously not suggesting that the determination of the claim could not have been effectively secured in the District Court, I consider that the plaintiff was reasonable to commence the proceeding in this court, and that it was not unreasonable of him to continue to pursue it here, so that he should not be denied Supreme Court costs because I happened to prefer the medical evidence which excluded the claim for future economic loss – where there was other evidence going the other way. I decline therefore to limit the costs to which the plaintiff is entitled to District Court costs.

**The costs of the second defendant NMHG**

[10] There is no question but that NMHG must have its costs. Mr Morton seeks them on the indemnity basis because there was never any case against NMHG: "there was never any basis for showing that the pallet jack was the subject of any flaw or defective maintenance". The issue is whether the plaintiff should never have pursued the allegation of a defect in the pallet jack (cf *Di Carlo v Dubois* [2002] QCA 225, para 37). I accept the plaintiff's counsel's submissions that the lack of any sufficiently comprehensive, proximate investigation of the circumstances by the defendants "put the plaintiff in an invidious position regarding attribution of fault for the circumstances of his accident". Indemnity costs are not warranted.

[11] The plaintiff seeks an order that Versacold bear those costs, by my imposing a Sanderson (*Sanderson v Blyth Theatre Co* [1903] 2 KB 533, 539) or Bullock (*Bullock v London General Omnibus Co* [1907] 1 KB 264, 272) type order. The plaintiff relies on these circumstances:

(a) The plaintiff served notice of claim on Versacold on 23 May 2007.
(b) Versacold served a contribution notice on NMHG on 2 August 2007, alleging that NMHG breached its duty or contract in supplying a defective pallet jack.
(c) The plaintiff issued a notice of claim to NMHG only after Versacold joined NMHG.
(d) In its defence, Versacold alleged that NMHG caused or contributed to the accident.
(e) Versacold instituted the third party proceedings against NMHG, necessitating its involvement in the proceeding.

[12] In these circumstances, Versacold should be seen as having introduced NMHG to the proceeding, pursuing a substantial claim against NMHG, rendering it prudent for the plaintiff to make his own claim. Versacold's approach rendered it just that it pay the costs of NMHG (cf *Altamura v Victorian Railways Commissioners* [1974] VR 33, 38 and *Theden v Cook Shire Council* [2005] QSC 73, para 31).

[13] The appropriate order is that Versacold pay the standard costs of NMHG, as well as the plaintiff's indemnity costs.

**Orders**

[14] There will therefore be orders:

1. that the first defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on the indemnity basis; and
2. that the first defendant pay the second defendant's costs of and incidental to the proceeding to be assessed on the standard basis.