SUPREME COURT OF QUEENSLAND

CITATION:	*Henderson & Anor v The Body Corporate for Merrimac Heights (No 2)* [2012] QSC 79
PARTIES:	**PETER GARTH HENDERSON AND KEIREN DEBORAH HENDERSON AS TRUSTEES FOR THE HENDERSON FAMILY TRUST AND ROBYN DAVIES AS TRUSTEE FOR THE PEARL FAMILY TRUST** (plaintiffs) **v** **THE BODY CORPORATE FOR MERRIMAC HEIGHTS CTS 19563** (defendant)
FILE NOS:	BS 1792 of 2010 and BS 14479 of 2009
DIVISION:	Trial Division
PROCEEDING:	Costs determination
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2011
JUDGE:	McMurdo J
ORDER:	**In each of the proceedings the defendant to pay the plaintiffs' costs of the proceedings, including reserved costs, excepting the first day of trial, for which the plaintiffs will pay the defendant's costs.**
CATCHWORDS:	*Henderson & Anor v The Body Corporate for Merrimac Heights* [2011] QSC 336
COUNSEL:	C J Carrigan for the plaintiffs P A Ahern for the defendant
SOLICITORS:	Short Punch and Greatorix for the plaintiffs Teys Lawyers for the defendant

[1] In these two proceedings, which were heard together, the plaintiffs were entirely successful. They seek their costs of the proceedings, including reserved costs. The defendant resists that outcome in only two respects, which were the costs reserved on the second and fourth days of the trial.

[2] The case was originally set down for trial for five days. The case should have been completed within that period. But it emerged that neither side was properly prepared for trial. On the first morning, the plaintiffs applied to amend their statement of claim and for leave to adduce evidence from two experts whose reports

had been signed as late as the previous working day. There were some documents which were referred to in the experts' reports but which had not been disclosed by the plaintiffs. The plaintiffs' applications were put over until the afternoon in order for those documents to be disclosed. The rest of the morning was taken up with an opening of the plaintiffs' case. In the afternoon, I dismissed that application for leave to amend and to call the expert evidence. The immediate response of the plaintiffs was to apply to split the issues of liability and quantum, so that they could rely upon that new case on an adjourned date. That application was also dismissed. Counsel for the plaintiffs then asked for the case to be adjourned for the day, as it was at 4.00pm.

[3] At the beginning of day two of the trial, the plaintiffs applied to adjourn the entire trial, in consequence of the failure of their applications on the previous day. By the time that application had been argued and dismissed, another hour had been wasted. Counsel for the defendant then asked for the costs of the first day and of the second day to that point. They were reserved. The defendant now renews that application for costs.

[4] The balance of day two of the trial was more productive. There was evidence from Mrs Henderson until midway through the afternoon when she was to be cross-examined. At that point, counsel for the defendant sought to defer her cross-examination until the following morning.

[5] In effect, about a quarter of the day was spent on the plaintiffs' unsuccessful application for an adjournment. It can also be said that about the same proportion of the first day was spent productively, in the opening of the plaintiffs' case. In effect, about one day was lost through these unsuccessful applications. The plaintiffs submit that the defendant also caused serious delays at times during the trial. That may be accepted but those periods of delay will be covered by the plaintiffs having their costs of the proceedings. That does not answer the defendant's point about the costs reserved on the second day of the trial. In my conclusion, the plaintiffs should be ordered to pay the defendant the costs of the first day of the trial.

[6] The next issue concerns the costs reserved on day four of the trial. The day was lost because the defendant applied to amend its defence and counterclaim, in reliance upon a document which it had not disclosed. That was a deed executed by both sides and, as I then said, the failure of each side to disclose the document was not satisfactorily explained. The amendment was allowed. The plaintiffs sought their costs of the adjournment occasioned by the amendment. They were reserved. The defendant now submits that each party was at fault for failing to locate and disclose this document and that had it been disclosed in the ordinary course, an adjournment would not have been required in order for the parties to investigate the circumstances of it. There are two reasons for rejecting that submission. The first is that the adjournment was required because of an amendment to the defendant's case. It was the defendant which caused the adjournment by belatedly relying upon a document which it had held. Secondly, the amendment was to further the defendant's then pleaded case that the two contracts in question had not been extended in their duration until 2022. But subsequently, the defendant conceded

that they had been extended, a concession which I said was rightly made.[1] Therefore, the defendant should bear the costs of that adjournment.

[7] There were some other occasions on which costs were reserved but for which the defendant accepts that the plaintiffs should have their costs.

[8] Accordingly, the order in each of these two proceedings will be that the defendant pay to the plaintiffs their costs, including reserved costs, of the proceedings save for the first day of the trial for which the plaintiffs will pay the defendant's costs.

[9] The plaintiffs made a further submission out of a concern that the defendant will levy them as lot owners to contribute to the defendant's burden from these orders for costs. That submission was not developed by any evidence as to the likely levy upon the plaintiffs. This is a scheme consisting of 150 dwellings, so that it is likely that the contribution which would be required from the plaintiffs as lot owners would be a very small percentage of the overall costs. The plaintiffs did not seek a similar order in relation to the recovery from lot owners of the defendant's own costs.

[10] There were no submissions as to the Court's power to make an order of this kind. Conceivably, the orders for costs in the plaintiffs' favour could be varied to avoid the consequence of such a levy upon them. But that was not the order which was sought. Nor have they sought in any respect indemnity costs, to compensate them for this potential levy or upon some other basis. To do that, the Court would have to act upon evidence of the likely amount of the levy. I will not make the order which was sought in respect of a levy.

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1 *Henderson & Anor v The Body Corporate for Merrimac Heights* [2011] QSC 336 at [11].