SUPREME COURT OF QUEENSLAND

CITATION:	*Sochorova v Commonwealth of Australia* [2012] QCA 152
PARTIES:	**TEREZIE SOCHOROVA** (appellant) **v** **COMMONWEALTH OF AUSTRALIA** (respondent)
FILE NO/S:	Appeal No 5451 of 2011 SC No 659 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	8 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Muir and Fraser JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Amend the orders made on 13 April 2012 by the addition of the following:** **"1A. Set aside the order giving judgment pursuant to r 658 of the *UCPR* for the defendant against the plaintiff".** **2. The appellant is to pay half of the respondent's costs of and incidental to the appeal on the standard basis, but those costs are not to be assessed until the proceeding ends;** **3. The respondent's costs caused by the amendment of the statement of claim pursuant to leave granted by this Court on 13 April 2012 are not to be assessed until the proceeding ends.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where appellant represented by non-lawyer – where several issues argued on appeal – where the appellant succeeded on appeal only to the extent that leave was granted to file and serve an amended statement of claim in respect of claim for damages for negligence, but on a limited basis – where the appellant sought order that the respondent pay her costs of and incidental to the proceeding on the indemnity

basis – where respondent sought order that appellant pay 66 percent of the costs of and incidental to the appeal on the standard basis – whether general rule that costs follow the event should be displaced – meaning of event – where appellant ordered to pay a proportion of the respondent's costs

Supreme Court Act 1995 (Qld), s 209, s 221
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684, r 692

Alborn & Ors v Stevens & Ors [2010] QCA 58, cited
Harold v Smith (1860) 5 H & N 381; (1860) 157 ER 1229; [1860] EngR 516, cited
Hughes v Western Australian Cricket Association (Inc) (1986) ATPR 40-748; [1986] FCA 382, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: The appellant prepared the documents on her own behalf
Clayton Utz for the respondent

[1] **MUIR JA:** I agree with Margaret Wilson J's reasons and proposed orders.

[2] **FRASER JA:** I agree with the reasons for judgment of Margaret Wilson J and the orders proposed by her Honour.

[3] **MARGARET WILSON J**: The primary judge struck out the appellant's claim and statement of claim, gave judgment for the respondent against her, and ordered her to pay the respondent's costs. This Court allowed her appeal, set aside the order striking out her claim and statement of claim, ordered instead that the statement of claim be struck out, and gave her leave to file and serve an amended statement of claim in respect of her claim for damages for negligence, but on a limited basis.[1]

Final orders on the appeal

[4] The orders made by this Court on 13 April 2012 should be amended to include an order setting aside the order of the primary judge giving judgment for the defendant (the respondent to the appeal).[2]

Direction that the parties make written submissions on costs

[5] Pursuant to a direction given when the judgment was delivered, the parties have now made written submissions on costs.

[6] The appellant seeks the following order:

> that the respondent pay the appellant all costs of the proceedings on an indemnity basis.

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1 [2012] QCA 92.
2 See this Court's reasons for judgment on the appeal: [2012] QCA 92 at [16].

[7] The respondent seeks the following order:

> that the appellant pay 66% of the respondent's costs of and incidental to the appeal, on a standard basis, to be assessed if not agreed.

The power to award costs

[8] The Court has power to award costs pursuant to s 221 of the *Supreme Court Act* 1995 (Qld).

[9] Rule 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> "**681 General rule about costs**
>
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> (2) Subrule (1) applies unless these rules provide otherwise."

[10] Rule 766(1)(d), which specifically relates to appeals, provides that the Court of Appeal:

> "(d) may make the order as to the whole or part of the costs of an appeal it considers appropriate."

In *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)*[3] the Court of Appeal said of this provision:

> "Although r 766(1)(d) does not express the general principle under which a successful appellant is usually given costs in its favour, that general principle remains applicable."

[11] In *Alborn & Ors v Stephens & Ors*[4] Muir JA said of r 681-

> "[8] The 'event' is not to be determined merely by reference to the judgment or order obtained by the plaintiff or appellant, but is to be determined by reference to 'the events or issues, if more than one, arising in the proceedings'.[5] However, a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs.[6]"

[12] Rule 684 provides:

> "**684 Costs of question or part of proceeding**
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> (1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
>
> (2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."

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3 [2009] QCA 239 at [3].

4 [2010] QCA 58 at [8].

5 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 615; and *Byrns v Davie* [1991] 2 VR 568 at 570, 571.

6 *Waterman v Gerling (Costs)* [2005] NSWSC 1111; *Todrell Pty Ltd v Finch (No 2)* [2007] QSC 386.

[13] In *Hughes v Western Australian Cricket Association (Inc)*[7] Toohey J explained the effect of cognate rules when he said:

> "1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order.[8]
>
> 2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed.[9]
>
> 3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or law.[10]"

The compensatory nature of an award of costs

[14] An award of costs as between parties to litigation is intended to compensate the successful party for the legal costs incurred by reason of the proceeding.[11] As Branwell B said in *Harold v Smith*:[12]

> "Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained. Of course, I do not say that there are not exceptional cases in which certain arbitrary rules of taxation have been laid down, but as a general rule costs are an indemnity, and the principle is this, find out the damnification, and then you find out the costs which should be allowed."

[15] The appellant was not legally represented in the appeal proceeding. Pursuant to s 209 of the *Supreme Court Act* 1995 (Qld), the Court allowed her brother Mr Moder to appear on her behalf. That section provides:

> "**209 Appearance to be in person or by lawyer or person allowed by the judge**
>
> (1) In all matters and proceedings in the Supreme Court a party may appear in person or by a lawyer or by any person allowed by special leave of the judge in any case.
>
> (2) A person who is not a lawyer is not entitled to claim or recover or receive directly or indirectly a sum of money or

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7 (1986) ATPR 40-748 at 48,136.

8 *Ritter v Godfrey* [1920] 2 KB 47.

9 *Forster v Farquhar* [1893] QB 564; (1983) 1 QB 564.

10 *Cretazzo v Lombardi* (1975) 13 SASR 4 at p 12.

11 See *Oshlack v Richmond River Council* (1980) 193 CLR 72 at [67] – [68] per McHugh J.

12 (1860) 5 H & N 381 at 385; 157 ER 1229 at 1231. See also Dal Pont, *The Law of Costs* 2nd ed at [7.5].

other remuneration for appearing or acting on behalf of another person in the Supreme Court.

(3) In this section –

lawyer means an Australian lawyer who, under the *Legal Profession Act 2007*, may engage in legal practice in this State.

party includes a person served with notice of or attending a matter or proceeding although not named in the record."

[16] The term "costs" includes fees paid to a lawyer for professional skill and time spent in the preparation and presentation of the case, and also disbursements such as court filing fees.[13] A successful party who is not legally represented cannot recover compensation for time spent by him or her or by a person who is not a lawyer in preparing and conducting the case.[14] He or she may recover disbursements.

[17] Because the basis of a costs order is compensatory rather than punitive, the fact that an unsuccessful party is not legally represented or is impecunious or otherwise disadvantaged is not in itself a ground for refusing to make a costs order in favour of the successful party.[15]

Submissions

[18] The appellant was unable to afford legal representation, and none of the lawyers she approached was willing to represent her pro bono. She submitted, in effect, that her impecuniosity and consequent inability to secure legal representation were caused by the negligence of the respondent, which is the very matter in issue in the proceeding.

[19] Counsel for the respondent submitted:

"2. The Appellant's previous amended claim and statement of claim sought to advance claims against:

(a) the [Migration Review Tribunal]; and
(b) the Department of Immigration & Multicultural & Indigenous Affairs, now the Department of Immigration and Citizenship ('the Department').

3. These claims were based on the following causes of action:

(a) negligence;
(b) misfeasance in public office; and
(c) false imprisonment or deprivation of liberty.

4. The Appeal, in so far as it sought to re-instate any cause of action against the MRT was unsuccessful. These matters remain struck-out.

5. Further, the Appeal in so far as it sought to re-instate any cause of action against the Department was unsuccessful for negligence for personal injuries, misfeasance in public office and any claim of deprivation of liberty.

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13 See *Potter v Dickenson* (1905) 2 CLR 668 at 678 – 679 per Griffith CJ; [1905] HCA 26.

14 *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14; See also Dal Pont op.cit. at [7.21] – [7.27].

15 See Dal Pont op. cit. at [8.28], [8.29], [8.31] and [8.32] and the cases cited therein.

…

7. As outlined, there were three issues, being the three causes of action identified above. The Appellant has been granted leave to re-plead one issue (negligence), on a limited basis (that is, without a claim for personal injuries).

8. Both in terms of the quantum claimed, and the issues involved, the Appellant has only enjoyed limited success."

Discussion

[20] The appellant had some success, albeit limited, in relation to the appeal.

[21] In considering costs, the starting point should, I think, be that the respondent should pay the appellant's costs of the issue on which she succeeded. On that basis, in the interests of keeping the assessment as simple and as inexpensive as possible, I would be inclined to order the respondent to pay the appellant one third of her costs of the appeal.

[22] Conversely, the appellant should pay the respondent its costs of the issues on which it succeeded. Again, in the interests of simplicity and economy, I would be inclined to order the appellant to pay the respondent two-thirds of its costs of the appeal.

[23] But, perhaps fortuitously for the respondent, the appellant was not legally represented, and so the costs she might recover would be limited to disbursements. Moreover, the parties would be entitled to have their costs assessed forthwith and to enforce the order upon the completion of the assessment. The effect of the respondent's exercising those rights might well be the stifling of the further prosecution of the appellant's claim.

[24] On balance, the appellant should be ordered to pay a proportion of the respondent's costs, but the respondent should not be able to enforce the order until the conclusion of the litigation by judgment or compromise. I would order that the appellant pay half of the respondent's costs of and incidental to the appeal on the standard basis, those costs not to be assessed until the proceeding ends.

[25] The appellant has been given leave to file and serve an amended statement of claim. Pursuant to r 692 of the *UCPR* she must pay the respondent's costs caused by the amendment, unless the Court otherwise orders. I would order that the respondent's costs caused by the amendment of the statement of claim pursuant to leave granted by this Court on 13 April 2012 not be assessed until the proceeding ends.

Orders

(1) Amend the orders made on 13 April 2012 by the addition of the following:

"1A. Set aside the order giving judgment pursuant to r 658 of the *UCPR* for the defendant against the plaintiff".

(2) The appellant is to pay half of the respondent's costs of and incidental to the appeal on the standard basis, but those costs are not to be assessed until the proceeding ends;

(3) The respondent's costs caused by the amendment of the statement of claim pursuant to leave granted by this Court on 13 April 2012 are not to be assessed until the proceeding ends.