

SUPREME COURT OF QUEENSLAND

CITATION: *Muckermann v Skilled Group Limited & Anor* (No 2) [2013] QSC 194

PARTIES: **Lawrence Muckermann**

(Plaintiff)

V

Skilled Group Limited (ACN 005 585 81)

(First Defendant)

And

Vinindex Pty Ltd (ACN 000 664 942)

(Second Defendant)

FILE NO: S446 of 2011

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 18 July 2013

DELIVERED AT: Townsville

HEARING DATE: Written submissions

JUDGE: North J

ORDER: **1. The Respondent (First Defendant) pay the Applicant's costs of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – JURISDICTION – GENERAL – where the plaintiff's application for a declaration was granted – where the plaintiff has sought costs of the application – where the application for costs is opposed by the defendant on the ground there is no power to make an order for costs against it – whether s 316(1) and s 318C of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) applies to the plaintiff's application so as to exclude the Court's general discretion to award costs under r 681 of the *Uniform Civil Procedure Rules 1999*

LEGISLATION: *Workers' Compensation and Rehabilitation Act 2003*

CASES: *Artahs Pty Ltd v Gall Stanfield & Smith* (A Firm) (2011) QSC 273
Brown v Marine Contracting Pty Ltd (ACN 010093651) & Ors (No 2) [2012] QSC 345

Hall v Nominal Defendant (1966) 117 CLR 323 340; ex parte *Britt* [1987] 1 Qd R 221, 226-227

Kidd v Toll North Pty Ltd [2012] QSC 220

Muckermann v Skilled Group Limited & Anor [2013] QSC 51

COUNSEL: Mr J Greggery for the Applicant/Plaintiff
Mr K Holyoak for the Respondent/First Defendant

SOLICITORS: Connolly Suthers Lawyers for the Applicant/Plaintiff
Bruce Thomas Lawyers for the Respondent/First Defendant

- [1] The issue is whether the plaintiff is deprived of an entitlement to costs following a successful application for a declaration by reason of the *Workers' Compensation and Rehabilitation Act* 2003 ("the Act").
- [2] In this action the plaintiff sues his employer and another party for damages for personal injury. On 25 October 2012 he filed an application for a declaration, the respondent to the application being the first employer.
- [3] On 6 March 2013 I made the declaration and published reasons.¹ I ordered the parties make submissions in writing concerning costs.
- [4] In my reasons² I summarised the essential particulars of the allegations of personal injury and its alleged cause. The claim and accompanying statement of claim were filed on 24 June 2011. Notwithstanding that the plaintiff's alleged injuries were suffered in 2007 and 2008 it was common ground that because before 1 July 2010 the plaintiff had not started proceedings for damages and a compulsory conference under Part 6 of Chapter 5 of the Act had not been held the sections concerning costs which came into force on 1 July 2010 fall to be considered.³ In particular in the circumstance that the assessment of plaintiff's WRI⁴ was less than 20% section 316(1) and 318C are relevant.
- [5] Among the authorities that I was referred to, two judgments of Peter Lyons J offer guidance, *Kidd v Toll North Pty Ltd*⁵ and *Brown v Marine Contracting Pty Ltd (ACN 010 093 651) & Ors (No 2)*⁶
- [6] In *Kidd v Toll North Pty Ltd* his Honour held that in the circumstance where proceedings for damages had not been commenced, that the application that he had determined concerned an issue that had arisen before proceedings were filed s 318C did not apply. In his reasons his Honour said:

[6] In my view, s 318C is a further qualification on the power of the court to make an order for costs under Division 2 of Part 12 of Chapter 5. Effectively, therefore it is a qualification on the power of the court to make an order for costs, otherwise controlled by s 316 of

¹ *Muckermann v Skilled Group Limited & Anor* [2013] QSC 51.

² *Muckermann v Skilled Group Limited & Anor* [2013] QSC 51 at [2].

³ Reprint 5.

⁴ "Work Related Impairment".

⁵ [2012] QSC 220.

⁶ [2012] QSC 345.

the WCRA. Section 316 is concerned with an order for costs “in the claimant’s proceeding”; and specifies in what circumstances an order for costs may be made in favour of the claimant, the insurer, or neither. Because s 318C is a qualification of the court’s power to order costs in the claimant’s proceedings, in my view, it applies only to an interlocutory application in such proceedings. There being no such proceedings on foot, the qualification does not apply.”

- [7] I respectfully agree with his Honour’s discussion of the sections and with his Honour’s conclusion that in the particular circumstances they did not control the discretion of the court to order costs under the ordinary jurisdiction of the court.⁷
- [8] In *Brown v Marine Contracting Pty Ltd* his Honour had to consider section 316 of the Act before the amendments that came into force on 1 July 2010 were made.⁸ In *Brown* the plaintiff had applied by an application filed in the proceedings for damages for an order for an extension of the limitation period under the *Limitations of Actions Act* 1974. His Honour had granted the extension of time. Under s 316 of the Act as it was enforced it contained sub sections (1), (2) and (3) in identical terms to the current provision that I have to consider. Section 318C, one of the sections I have to consider was found in s 316(4) of the section his Honour had to consider.
- [9] Consistently with his Honour’s reasoning in *Brown* an application for declaratory relief of the nature sought by the applicant in this case in the context of the proceedings for damages that have been commenced should be understood as “interlocutory”⁹ as the declaration does not finally determine the rights as between the parties in the claim for damages. Consequently, as his Honour held in *Kidd v North Toll Pty Ltd*, s 318C is a qualification on the power of the court to make an order for costs under the Act which power is otherwise controlled by s 316.
- [10] In *Brown v Marine Contracting Pty Ltd* his Honour said of the statutory predecessor for s 318C:

“[12] It may be accepted that the application is interlocutory in character, as it does not finally determine the rights of the parties. The plaintiff’s submissions depend upon the propositions that s 316(4) applies only to interlocutory applications which are made “in the claimant’s proceeding”, as stated in s 316(1); that the proceeding referred to is the action for the recovery of damages; and that an interlocutory application is one “in the claimant’s proceeding” if, as a matter of substance, it is an application which, by its nature, forms part of the progression from claim to final judgment in that proceeding.”

- [11] In considering and ultimately accepting the plaintiff’s submissions, his Honour said of the Act and the provisions in the context of the Act:

⁷ See for example UCPR Rule 681.

⁸ See for example *Brown v Marine Contracting Pty Ltd* (ACN 010 093 651) & Ors (No 2) [2012] QSC 345 at [6] & [7]

⁹ See for example *Hall v Nominal Defendant* (1966) 117 CLR 323 340; ex parte *Britt* [1987] 1 Qd R 221, 226-227.

- [13] It seems to me that the first of these propositions is made out. Section 316(4) can not sensibly be read in isolation from s 316(1). Otherwise, its language is, on its face, broad enough to encompass any interlocutory application made in a court. It seems to me that s 316(4) was plainly not intended to have this effect. Rather, the subsection is one of a number of provisions which spell out the types of orders that can be made about costs “in the claimant’s proceeding”. The context provided by the balance of s 316 provides supports this conclusion.
- [14] In my view, the second proposition is also made out. To identify the basis for this conclusion, it is necessary to refer to some other provisions of the *WCRA*. The *WCRA* provides, in chapter 3, a statutory right to compensation for a worker who suffers injury; and regulates, in chapter 5, the worker’s right to bring an action for damages for the injury.
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- [16] Subsection (3) is the relevant provision in the present case. Its relationship to s 316 of the *WCRA* is self-evident. It is difficult to think that the reference to “the claimant’s proceedings” in s 316(1) is a reference to anything other than “the claimant’s proceeding for damages” referred to in s 240(3).
- [17] Additional support for this conclusion is again to be found in the context of s 316 taken as a whole, the other provisions of which plainly deal with a claimant’s proceeding for damages.
- [18] Much of ch 5 is directed towards ensuring that certain things happen before an action for damages is commenced. Thus the legislation generally requires that there be a notice of assessment for the worker, before the action commences. In addition, the Act specifics (sic) procedures to be undertaken before an action is commenced, by way of notice of claim and response, including to resolve the claim by way of compulsory conference. Thus the chapter distinguishes between, on the one hand a “claim for damages”; and, on the other, “the claimant’s proceeding for damages”; “the claimant’s proceeding”; “a proceeding in a court for damages”; and “a court proceeding”. The context provided by the Act, particularly by ch 5, strongly suggests that a distinction is to be drawn between the claim, and the “claimant’s action for damages, by way of a proceeding in court”. It seems to me that the general context provided by ch 3 and ch 5 supports the conclusion that s 316(4) applies to an interlocutory application in the claimant’s proceeding in a court for damages.
- [19] On balance, I accept the correctness of the third proposition. It might be observed that, as has been mentioned, the *WCRA* is concerned to regulate certain steps to be taken before an action is commenced by a worker against an employer or the employer’s insurer; as well as the action itself. In doing that, the *WCRA* generally excludes the provisions of the *Limitation Act* from its field of operation. Thus, s 236 provides that provisions of the *WCRA* do not affect the commencement of the

period of limitation specified by the *Limitation Act*; which occurs as if the *WCRA* had not been enacted. The exception is found in s 302, which permits a claimant to bring a proceeding for damages outside the limitation period if certain things for which the *WCRA* makes provision have occurred.”

(Footnotes omitted)

- [12] The Act does not contain provisions concerning the right of a party to apply to the court for declaratory relief in the circumstances of a dispute arising during the pre-court proceedings or concerning rights under the Act. The jurisdiction of this court to entertain applications for declaratory relief is not controlled by the Act. In *Brown v Marine Contracting Pty Ltd* Peter Lyons J said concerning an application concerning the limitation period:

“[20] The power to extend the limitation period, invoked in the earlier hearing in this case, is left intact by the provisions of the *WCRA*. Logically, its exercise is something anterior to a claimant’s proceeding for damages, costs in which are regulated by s 316. A conclusion that s 316(4) applies in the present case would make its application somewhat arbitrary, depending upon whether an application for an extension of the limitation period was made before a claimant commenced a proceeding for damages; or in a separate proceeding, after the proceeding for damages had commenced; or in the proceeding for damages itself.”

- [13] Similar considerations apply in the circumstances here.
- [14] Further as his Honour noted¹⁰ the court has a general discretion to award costs and that in the circumstances of a grant of power to award costs “the most liberal construction” is favoured. By parity of reasoning a narrower, rather than a broad, construction is to be favoured when considering a statutory provision designed to limit the scope of power.
- [15] There is a distinction between an application that might be made to force a “step” in an action or concerning a dispute about a “step” in the action¹¹ and an application seeking a declaration about rights that may in a general sense concern or touch upon the action. While s 316 does not contain the word “step”, in the view I take, s 316(1) of the Act when referring to a costs order “in the claimant’s proceeding” should be limited to the circumstances where an order for costs may fall to be made in the action for recovery of damages in the context of a “step” which by its nature in substance forms part of the progression from claim to final judgment in that proceeding.¹² Accordingly on the view I take s 316(1) has no application on the question of costs concerning the application for the declaration nor does s 318C apply as it is merely a qualification upon the power to be exercised under s 316(1).
- [16] In the circumstances UCPR Rule 681 applies and no ground has been shown nor suggested why costs should not follow the event. Accordingly I will make an order that the plaintiff recover his costs of and incidental to the application to be assessed on the standard basis.

¹⁰ *Brown v Marine Contracting Pty Ltd (ACN 010 093 651) & Ors (No 2)* [2012] QSC 345 at [21].

¹¹ *Consider Artahs Pty Ltd v Gall Stanfield & Smith (A Firm)* (2011) QSC 273 at [8] ff.

¹² Considering the statutory context s 233 which defines “claimant” to mean a person entitled to seek damages and see also sections 294, 295 and 300 which assist in giving content to the word “proceeding”.