

SUPREME COURT OF QUEENSLAND

CITATION: *Butler & Ors v The State of Queensland* [2014] QSC 19

PARTIES: **DOUGLAS AND CHRISTINE BUTLER**
JOHN BYRNES
RONALD DAINTITH
ROBYN AND RALF DANIEL
MICHAEL AND LYNDA DONOHUE
JASON DOYLE AND TERRI DIXON
JOANNE AND JASON GOODMAN
BRIGITTE KRAFT
JEANETTE AND DUDLEY NAYLOR
ROWAN NOBES
ALEX AND LIDIA PARDO
AARTI PRABHA AND RICHARD WATSON
LESLEY AND DEREK SAVAGE
NICHOLAS AND TAMARA STOREY
MICHELLE AND PETER STUART
CAROL TOMLINSON
TODD WEBSTER
SHARON WILLIAMS
(plaintiffs)
v
THE STATE OF QUEENSLAND
(defendant)

FILE NO/S: BS 10258/2009
BS 10255/2009
BS 10278/2009
BS 10259/2009
BS 10274/2009
BS 10271/2009
BS 10272/2009
BS 10262/2009
BS 10253/2009
BS 10265/2009
BS 10280/2009
BS 10277/2009
BS 1216/2010
BS 10254/2009
BS 10266/2009
BS 10269/2009
BS 10273/2009
BS 10309/2009

DIVISION: Trial Division

PROCEEDING: Claim – Further Orders

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 18 February 2014

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Boddice J

ORDER: **The parties are to prepare orders in accordance with the reasons for judgment delivered on 19 December 2013 and these further reasons.**

CATCHWORDS: INTEREST – RECOVERABILITY OF INTEREST – IN GENERAL – where six of eighteen plaintiffs were successful in a claim in negligence – where the successful plaintiffs contend that interest ought to be awarded pursuant to s 47(1) of the *Supreme Court Act 1995*, from the date of valuation of the subject properties to the date of judgment – where the defendants contend that the plaintiffs ought not be awarded interest as the plaintiffs were compensated for a diminution in the value of properties still owned by the plaintiffs rather than for loss suffered as a result of being kept out of his or her money - whether the Court should exercise its discretion to award the plaintiffs interest

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF ISSUES – where the plaintiffs contend that the Court ought to consider costs on an issues basis as each plaintiff was successful on the existence of duty of care, on the breach of that duty, and on causation, with the unsuccessful plaintiffs failing on whether they suffered loss – where the defendant contends there is no proper basis upon which the Court would conclude it is appropriate to determine costs on an issue basis – where the defendant contends there are no factors which place the case in an exceptional category such as to justify denying a defendant who has been successful at trial from recovering its costs – whether costs should follow the event or are to be determined on an issue basis

Supreme Court Act 1995, s 47(1)

MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657
Emanuel Management Pty Ltd v Fosters Brewing Group Ltd (2003) QSC 299

COUNSEL: No appearance for the plaintiffs, the plaintiff's submissions were heard on the papers
 No appearance for the defendant, the defendant's submissions were heard on the papers

SOLICITORS: Shine Lawyers for the plaintiffs

Crown Law for the defendant

- [1] The plaintiffs brought separate proceedings claiming damages for economic loss allegedly occasioned by the negligence of the defendant. The trial of each of those proceedings was heard jointly.
- [2] Reasons for judgment in the proceeding were delivered on 19 December 2013. The parties agree that in accordance with those reasons, six plaintiffs are entitled to judgment in an amount calculated by reference to evidence given by the valuer Gillespie, with the claims of the remaining plaintiffs to be dismissed.
- [3] Two issues remain in dispute. First, whether the successful plaintiffs are entitled to interest. Second, what orders should be made as to costs.

Submissions

- [4] The successful plaintiffs contend s 47(1) of the *Supreme Court Act* 1995 permits this Court to award interest in proceedings for the recovery of damages, from the date of accrual of the cause of action until judgment. As this Court has determined that each successful plaintiff is entitled to an award of damages, the successful plaintiffs contend interest should be allowed from the date of Gillespie's 2010 valuation, until the date of judgment.
- [5] The defendant contends interest ought not be awarded as the function of an award of interest is to compensate a plaintiff for the loss or detriment suffered by being kept out of his or her money during the relevant period.¹ As each successful plaintiff is being compensated for a diminution in the value of properties still owned by the plaintiffs, rather than for out-of-pocket loss, this Court ought to decline to order interest on the judgment amounts.
- [6] The plaintiffs further contend that having regard to the nature of the issues in dispute between the parties, and the way in which the trial was conducted, it is appropriate, in the exercise of the Court's discretion, for the Court to consider costs on an issues basis rather than by having regard to the outcome achieved by each plaintiff. They contend that as each plaintiff was successful on the existence of a duty of care, on breach of that duty, and on causation, with the unsuccessful plaintiffs failing on whether there was any loss suffered as a consequence of the 2008 subsidence event, each of the plaintiffs should have received an order for costs in their favour. The plaintiffs accept that as each of the plaintiffs failed in respect of the remaining issue, namely the remediation case, there should also be apportionate cost orders in favour of the defendant.
- [7] The plaintiffs contend that as each issue was discrete, and as the first three issues consumed the bulk of the hearing time, it is appropriate the defendant be ordered to

¹ *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 663.

pay the majority of each plaintiff's costs, with the successful plaintiffs being ordered to pay a small proportion of the defendant's costs, and the unsuccessful plaintiffs being ordered to pay a higher proportion of the defendant's costs.

- [8] The defendant contends there is no proper basis upon which this Court would conclude it is appropriate to determine costs on an issue basis. The Court ought to order costs in accordance with the success or otherwise of the plaintiff. Further, there are no factors which place the case in an exceptional category such as to justify denying a successful defendant at trial from recovering its costs.²

Interest

- [9] Whilst each of the successful plaintiffs claimed interest in accordance with the Act, the awarding of interest is, ultimately, a discretionary matter for the Court. A relevant factor in the exercise of that discretion is the nature of the damage awarded in favour of the successful plaintiff.
- [10] Here, damage was a diminution in the value of property still owned by the plaintiff. As the damage claimed does not relate to monies for which the successful plaintiff is actually out-of-pocket, there is good reason for this Court to be slow to award interest on those damages.
- [11] Having regard to the nature of the damages awarded, I decline, in the exercise of my discretion, to award interest in respect of any of the successful plaintiffs.

Costs

- [12] There is substance in the plaintiffs' contention that each of the issues in dispute was discrete. However, that fact in itself is not of sufficient magnitude to displace the ordinary rule that costs should follow the event.
- [13] Further, the plaintiffs have not demonstrated any good reason why this Court ought not award costs having regard to the outcome of the litigation. Whilst each of the plaintiffs' cases was heard together, each involved a separate action. In the case of the unsuccessful plaintiffs, the defendant was successful in resisting a judgment in the plaintiff's favour. That resistance included a successful defence against a late plea in respect of the so called remediation case. That involved substantial work and evidence.
- [14] To apportion the costs in the present case on the basis of issues would not lead to a costs order which is properly reflective of the success achieved by the defendant in respect of aspects of the plaintiffs' claims. For example, whilst each plaintiff succeeded in establishing a breach of duty, those plaintiffs did not succeed in establishing all of the bases for the alleged breach of duty. The defendant's

² *Emanuel Management Pty Ltd v Fosters Brewing Group Ltd* (2003) QSC 299 [85].

successful resistance of those other bases involved cost, and time within the trial. An apportionment of costs on the basis of success on the issue of breach of duty would not properly reflect the defendant's success on those aspects.

- [15] By contrast, orders that costs in each proceeding follow the outcome of that proceeding are just and equitable having regard to the relative successes of the plaintiffs and the defendant on the various discrete issues, and having regard to the overall result that only a limited number of plaintiffs were successful.
- [16] Such orders will not result in a windfall gain to the defendant. A costs assessor, undertaking an assessment in accordance with that assessor's obligations, can properly apportion the costs of the trial between the successful plaintiffs, and the successful defendant.
- [17] I decline, in the exercise of my discretion, to apportion costs. The just and equitable costs order in each case is an order which reflects the success achieved by those plaintiffs who were ultimately successful, and the success achieved by the defendant in resisting the claims of the plaintiffs who were unsuccessful. That order is an order which has the effect of costs following the event, allowing for the effects of earlier costs orders.