

SUPREME COURT OF QUEENSLAND

CITATION: *Hall v WorkCover Queensland* [2014] QCA 202

PARTIES: **KAREN LESLEY HALL**
(appellant)
v
WORKCOVER QUEENSLAND
(respondent)

FILE NO/S: Appeal No 12304 of 2013
SC No 5919 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 August 2014

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P and Muir JA and Atkinson J
Judgment of the Court

ORDER: **The orders made on 6 June 2014 be varied by the addition of the words, “on the indemnity basis” after the words “The respondent should pay the appellant's costs of the appeal and of the hearing below”.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant is the widow of the deceased who died of mesothelioma – where the appellant appealed the primary judge’s finding that her dependency claim was barred by statute – where the appeal was allowed by this Court – where the appellant seeks an order that her costs of the appeal and at first instance be paid by the respondent on the indemnity basis – where the litigation represented a test case on a matter of public interest – whether it is appropriate that costs be ordered on the indemnity basis

Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd (1991) 100 ALR 568; [1991] FCA 154, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Suncorp Metway Insurance Ltd v Brown [2005] 1 Qd R 204; [2004] QCA 325, cited

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

SOLICITORS: Turner Freeman Lawyers for the appellant
BT Lawyers for the respondent

- [1] **THE COURT:** The appellant is the widow of the late Gregory Hall who died of mesothelioma on 28 May 1995. On 7 July 2011, the appellant commenced these proceedings on behalf of the deceased's estate (the estate claim) and on behalf of the deceased's dependents (the dependency claim). The question, "Is the [appellant's] claim for damages as pleaded in paragraphs 7, 8, 26, 27 and 28 of the statement of claim barred by reason of s 11(1) of the *Limitation of Actions Act 1974*?" was tried as a separate issue and answered in the affirmative by the primary judge on 6 December 2013. The appellant appealed against that decision. This Court allowed the appellant's appeal on 6 June 2014.
- [2] The appellant seeks an order that her costs of the appeal and at first instance be paid by the respondent, WorkCover Queensland, on the indemnity basis. Neither party complied with paragraph 52(2) of Practice Direction 3 of 2013, which prescribes that any party "wishing to make submissions or further submissions on costs after the hearing must apply for leave to do so in their written outlines of argument and/or orally at the hearing". Nor were submissions filed and served within the time required by paragraph 52(3) of the Practice Direction. Notwithstanding these procedural deficiencies, the Court entertained written submissions from both parties and is disposed to deal with them on the merits.
- [3] The respondent opposes the orders sought by the appellant on the bases that:
- (a) the respondent is a defendant. It acted reasonably in relying on a limitations defence "arising from novel and retrospective legislation";
 - (b) although determination of the question identified in the separate issue is of importance to the respondent in similar cases, there is "no basis for elevating this case to some special, unusual or exceptional category warranting payment of indemnity costs at trial, on appeal, and at first instance, compared to many others which the respondent has to deal with, which raise difficult questions of statutory construction on which minds might respectably differ"; and
 - (c) the fact that the respondent advised the appellant that it would not seek its costs against the appellant should the respondent be successful in the application should not be taken to advance the appellants' claim.
- [4] It was the respondent that sought determination of the subject question as a separate issue. In approaching the appellants' solicitors in this regard, the solicitors for the respondent stated:
- "As this is a scheme sensitive issue, we are instructed that our client will not seek its costs in the event it is successful in the application."
- [5] The question was thus identified as one that the respondent sought to have resolved not merely for the purposes of the subject litigation but generally. There is thus

substance in the contention that the litigation represented a test case on a matter of public interest and thus fell within that category of cases identified as ones in which it may be appropriate for the party seeking determination of a particular issue to pay the other party's costs on an indemnity basis.¹

- [6] The fact that the respondent did not commence these proceedings is not a particularly telling point. Claims such as the ones under consideration will arise, of their very nature, only as dependency claims or estate claims. That does not prevent the determination of questions, such as the subject one, as being for the benefit of the respondent or a matter of public or general interest. Determination of the question resolved the subject question of construction for all subsequent claims. That was expressly or implicitly conceded in the respondent's solicitor's letter dated 12 April 2013. The letter, as well as recognising the benefit for the respondent, and thus the public interest, of the subject determination, implicitly recognised the disparity in financial strengths and interests between the respondent and the appellant. Her interest was to have her claims determined as simply and as cheaply as possible.
- [7] For the above reasons it is appropriate that costs be ordered on the indemnity basis. Accordingly, it is ordered that the orders made on 6 June 2014 be varied by the addition of the words, "on the indemnity basis" after the words "The respondent should pay the appellant's costs of the appeal and of the hearing below".

¹ See e.g. *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568; *Suncorp Metway Insurance Ltd v Brown* [2005] 1 Qd R 204.