

SUPREME COURT OF QUEENSLAND

CITATION: *Tolteca Pty Ltd v Lillas & Loel Lawyers Pty Ltd* [2015] QSC 148

PARTIES: **TOLTECA PTY LTD in its personal capacity and as trustee of the TREVOR F PETTETT FAMILY TRUST**
ACN 096 926 519
(plaintiff)
v
LILLAS & LOEL LAWYERS PTY LTD
ABN 96 064 450 255
(first defendant)
PAUL GUTHRIE
(second defendant)

FILE NO: BS 9938/13

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 4 June 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Bond J

ORDERS: **The orders of the court are that:**

- 1. There be no order as to the plaintiff's costs of and incidental to its application to consolidate proceedings BS 9938/13 and BS 1001/14.**
- 2. The first defendant's costs of and incidental to the plaintiff's application to consolidate proceedings BS 9938/13 and BS 1001/14 be the first defendant's costs in proceeding BS 9938/13.**

CATCHWORDS: PROCEDURE – COSTS – INTERLOCUTORY PROCEEDING – CO-DEFENDANTS – where the first defendant did not oppose the plaintiff's substantive application – where the first defendant sought to bring about a position in which it would not be necessary for it to appear – where the plaintiff failed to respond to this information – where the first defendant consequently appeared – where the plaintiff's application was, in part, denied – whether the first defendant is entitled to recover its costs

PROFESSIONS AND TRADES – LAWYERS – RIGHTS AND PRIVILEGES – OTHER RIGHTS AND PRIVILEGES – where the first defendant was an incorporated legal practice

pursuant to Part 2.6 of the *Legal Profession Act 2007* – where the first defendant was self-represented – whether the first defendant is entitled to recover its costs

Legal Profession Act 2007 (Qld), s 4

Guss v Veenhuizen (No 2) (1976) 136 CLR 47; [1976] HCA 57, cited

Murphy v Legal Services Commissioner (No 2) [2013] QSC 253, cited

COUNSEL: N Ferrett, with B Le Plastrier, for the plaintiff
M Byrne (*sol*) for the defendant
N Pearce (*sol*) for Mr Paul Guthrie

SOLICITORS: Turner Freeman for the plaintiff
Lillas & Loel Lawyers for the defendant
Carter Newell for Mr Paul Guthrie

- [1] **BOND J:** In Proceeding 9938 of 2013 (“the Tolteca proceeding”) Tolteca sued its former solicitors, Lillas & Loel Lawyers Pty Ltd (“Lillas & Loel”), seeking to recover damages which it said it suffered consequent upon entering into a joint venture land development transaction. Its case was that but for various breaches of duty by the defendant firm it would not have entered into the transaction.
- [2] In Proceeding 1001 of 2014 (“the Stacks proceeding”) Stacks Managed Investments Limited (“Stacks”) sued Tolteca seeking an order for recovery of possession of the land at 9847 Mt Lindesay Highway. Stacks had lent the monies which Tolteca used for the joint venture land development transaction, Tolteca was in default and the land at 9847 Mt Lindsay Highway was security for that loan. Tolteca had counterclaimed for relief founded on “unconscionable conduct” by Stacks in the giving of the loan in breach of section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (“the Act”).
- [3] My judgment of 10 April 2015, dealt with interlocutory applications in respect of the two proceedings.
- [4] In the Tolteca proceeding:
- (a) Tolteca applied
 - (i) to join its mortgage broker, Mr Guthrie, as a second defendant to its claim in the Tolteca proceeding;
 - (ii) for an order consolidating the Stacks proceeding with the Tolteca proceeding; and
 - (iii) for an order that the costs of the application be costs in the proceeding;
 - (b) Tolteca, Lillas & Loel, and Mr Guthrie (by his solicitor) all appeared before me. At the outset Lillas & Loel and Mr Guthrie informed me that they did not take a substantive position in relation to the applications.
- [5] In the Stacks proceeding:

- (a) Stacks applied for an order dispensing with the need for Tolteca's signature on the request for trial date or, alternatively, an order that the matter be set down for trial;
 - (b) Tolteca resisted that application and instead applied –
 - (i) to join its mortgage broker, Mr Guthrie, as a second defendant to its counterclaim;
 - (ii) for an order consolidating the Stacks proceeding with the Tolteca proceeding;
 - (c) Stacks, Tolteca and Mr Guthrie (by his solicitor) all appeared before me. Again, at the outset Mr Guthrie informed me that he did not take a substantive position in relation to the applications.
- [6] At the beginning of the hearing I directed that the evidence in each application was evidence in all of them. As I have indicated, only Stacks and Tolteca were the protagonists and they both agreed to that course. I heard argument from each of them. In accordance with their indication at the outset, Lillas & Loel and Mr Guthrie did not seek to be heard on any issue during the hearing.
- [7] In the Stacks proceeding, I made the following orders:
- (a) Tolteca's application to join Mr Guthrie as a second defendant to its counterclaim be dismissed;
 - (b) Tolteca's application to consolidate the two proceedings be dismissed;
 - (c) The proceeding be set down for trial;
 - (d) Tolteca pay Stacks' costs of and incidental to Stacks' application to be assessed on the standard basis; and
 - (e) Tolteca pay Stacks' costs of and incidental to Tolteca's applications to be assessed on the standard basis.
- [8] In the Tolteca proceeding:
- (a) I made the following orders:
 - (i) Tolteca's application to consolidate the two proceedings be dismissed;
 - (ii) Mr Guthrie be joined as the second defendant; and
 - (iii) The costs of Tolteca, Lillas & Loel and Mr Guthrie of and incidental to Tolteca's application to join Mr Guthrie be reserved.
 - (b) I directed that the parties who wished to make submissions as to the costs orders which should be made in relation to the costs of Tolteca's application to consolidate the two proceedings should provide me with written submissions on that subject according to the timetable which I set.

- [9] Consequent upon those directions, I received written submissions from Tolteca, Lillas & Loel and Stacks.
- [10] Stacks pointed out that whilst it was served with a copy of Tolteca's application in the Tolteca proceeding, it was not named as a respondent to that application, did not appear in the Tolteca proceeding and filed all of its material in the Stacks proceeding. It submitted that its costs in resisting the consolidation of the two proceedings were incurred in the Stacks proceeding alone. I agree. Stacks has the benefit of a costs order in the Stacks proceeding and that is all that is required to give it the benefit of its success.
- [11] Lillas & Loel sought an order of costs in its favour. Alternatively, it sought an order that its costs be its costs in the proceeding. Tolteca opposed the making of any costs order in Lillas & Loel's favour. It suggested that there might be a "supervening" issue, namely whether Lillas & Loel is entitled to recover costs at all. It is appropriate to address that issue first.
- [12] Although the general rule is that self-represented litigants are not entitled to costs orders in their favour, there is an exception to that rule where the self-represented litigant is a solicitor: *Murphy v Legal Services Commissioner (No 2)* [2013] QSC 253 per Daubney J at [4] to [7]. As Daubney J pointed out, the reason for that exception was explained in the High Court decision of *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47 at 51-52:
- "... the litigant in person does not recover such costs in such circumstances in the capacity of a solicitor, but because he happening to be a solicitor, his costs are able to be quantified by the court and its officers."
- [13] Lillas & Loel is an incorporated legal practice pursuant to Part 2.6 of the *Legal Profession Act 2007* (Qld). It is a law practice as defined in s 4 of the *Legal Profession Act 2007* (Qld). The natural person who appeared on its behalf before me was Mr Byrne, who was a solicitor employee of Lillas & Loel. Lillas & Loel submitted that its incorporated status was no obstacle to its entitlement to recover a costs order in its favour, in accordance with the law as explained in *Murphy v Legal Services Commissioner (No 2)*. As would be the case if it was a self-represented, sole practitioner its costs are capable of being quantified by the court and its officers in the usual way. I agree.
- [14] I turn now to the question of the costs order which is appropriate in this case.
- [15] Prior to the hearing before me Lillas & Loel had sought to bring about a position in which it would not be necessary for it to appear. By email on 16 January 2015, it approached Tolteca's solicitors and indicated that it did not oppose the joinder or consolidation which Tolteca sought, but did oppose the costs order. It submitted that there ought to be no order as to the costs of Tolteca's application, at least with respect to Lillas & Loel. It sought a reasoned response. No substantive response on the question of costs or the need for its appearance was ever received and, accordingly, Lillas & Loel appeared at the hearing.
- [16] Lillas & Loel says that its appearance was required because it might have had to make submissions about prejudice to it, in the event that Stacks argument opposing Tolteca's application had not been successful. I reject that argument. It is

contradicted both by its email indication of lack of opposition to the application and by its indication at the hearing that it had no substantive position to take in relation to Tolteca's applications.

- [17] Tolteca's failure to respond substantively to the email of 16 January 2015, concerning costs and appearances means there is some merit to Lillas & Loel contention that by its conduct Tolteca unnecessarily and unjustifiably caused costs to Lillas & Loel. However, I do not think it is sufficient to justify an order that Tolteca should pay Lillas & Loel's costs of the consolidation application.
- [18] Tolteca, on the other hand, says that the appropriate order is that the costs of the application should be the parties' costs in the proceeding. I reject that argument. In the event Tolteca ultimately succeeds, no other party should bear Tolteca's costs of the failed consolidation application.
- [19] It seems to me the appropriate balance is, that there should be no order as to Tolteca's costs of the consolidation application, but that Lillas & Loel's costs of the consolidation application should be its costs in the proceeding.
- [20] I order that:
- (a) There be no order as to the plaintiff's costs of and incidental to its application to consolidate proceedings BS 9938/13 and BS 1001/14.
 - (b) The first defendant's costs of and incidental to the plaintiff's application to consolidate proceedings BS 9938/13 and BS 1001/14 be the first defendant's costs in proceeding BS 9938/13.