

SUPREME COURT OF QUEENSLAND

CITATION: *Coles Group Limited v Costin* [2015] QCA 165

PARTIES: **COLES GROUP LIMITED**
ACN 004 089 936
(appellant)
v
DEBORAH ANNE COSTIN
(respondent)

FILE NO/S: Appeal No 9350 of 2014
DC No 1886 of 2014

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders
Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane – Unreported, 5 September 2014

DELIVERED ON: 4 September 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Holmes and Gotterson JJA and Applegarth J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The order for costs made on 5 September 2014 be set aside and it be ordered instead that, subject to the costs order of 30 May 2014, the costs of and incidental to the application be costs in the proceeding for damages in the District Court of Queensland.**

CATCHWORDS: LIMITATION OF ACTIONS – GENERAL MATTERS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – where grant of an extension of time in which to bring a personal injury claim – where the order was upheld on the basis that the respondent would undertake not to litigate an allegation found on appeal to prejudice the appellant – whether the undertaking proffered by the respondent was adequate

PROCEDURE – COSTS – RECOVERY OF COSTS – where appellant had limited but significant success in the appeal – where respondent was successful at first instance in obtaining an order for an extension of time – where that order was maintained on appeal although on a different basis than at first instance – what orders as to costs should be made

Limitation of Actions Act 1974 (Qld), s 31

Coles Group Limited v Costin [2015] QCA 140, related
Grove v Bestobell Industries Pty Ltd [1980] Qd R 12, 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: Dibbs Barker for the appellant
 Shine Lawyers for the respondent

- [1] **HOLMES JA:** I agree with the reasons of Applegarth J and the orders he proposes.
- [2] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.
- [3] **APPLEGARTH J:** On 31 July 2015 this Court ordered that:
1. The respondent's application filed on 16 April 2015 to adduce further evidence be granted.
 2. The application for an extension of time in which to bring an application for leave to appeal be granted.
 3. The application for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld) be granted.
 4. The appeal be allowed.
 5. The parties file and serve within 14 days any undertaking by the respondent and submissions on further orders, including costs orders.

The undertaking

- [4] Ms Costin proffers the following undertaking:

“The Respondent undertakes to the Court not to litigate (claim or plead) any allegation against the Appellant that she did not receive adequate training or instruction in respect of the manual handling of any load or the stacking of a pallet or pallets.”

This form of undertaking is suitably-worded to address the possibility of Coles suffering significant prejudice in relation to its defence of Ms Costin's claim insofar as it related to instruction and training.¹

- [5] Coles submits that the form of undertaking is inadequate. It seeks to argue that it may at trial encounter significant prejudice in relation to other aspects of Ms Costin's claim, namely her being required to work alone and Coles' alleged failure to undertake a job safety analysis to identify potential hazards and assess risks. I am not persuaded that this is the case. The focus of Coles' argument to this Court was that it would be prejudiced in relation to an alleged breach of duty in respect of the adequacy of the training or instruction it provided in respect of manual handling. The real possibility of significant prejudice in respect of other aspects of Ms Costin's proposed action for breach of duty has not been shown.

¹ *Coles Group Ltd v Costin* [2015] QCA 140 at [53].

- [6] As a result of Ms Costin's undertaking, the adequacy or otherwise of the training or instruction will not be placed in issue by her. The case may proceed to trial on the basis that she received adequate training and instruction in respect of the manual handling of any load or the stacking of a pallet or pallets. One question will be whether, in those and all the other circumstances, it was a breach of duty for her to be required to work on her own.
- [7] Next, in respect of Coles' alleged breach of duty in failing to undertake a job safety analysis to identify potential hazards and assess risks, it either undertook such an analysis or it did not. Coles is not significantly prejudiced in respect of that alleged breach of duty by its inability to call detailed evidence about the training or instruction it provided to Ms Costin. Again, it may be assumed that Ms Costin received adequate training and instruction. The issue will be whether, in all the circumstances, Coles was obliged to undertake a job safety analysis to identify potential hazards and assess risks.
- [8] Coles opposes the reception at this stage of Ms Costin's undertaking, arguing that this course was not raised during the hearing of the appeal, and that the undertaking should not be received because it was not offered to the primary judge and was not offered in this Court until after reasons were published and certain orders were made, including an order that any undertaking by Ms Costin be filed and served within 14 days.
- [9] The vagueness and lack of particularity of Ms Costin's allegations about training and instruction were raised during the hearing of the appeal. This included whether, in the event that the evidence in Ms King's affidavit was received, Ms Costin would accept that she was given the basic training that Ms King outlined. Counsel for Ms Costin indicated that if the Court concluded that this was a critical aspect then he would obtain instructions from her. As appears from its reasons for judgment, this Court concluded that this was a critical aspect, which required, in the circumstances, a suitably-worded undertaking which precludes Ms Costin from litigating the issue of training and instruction.²
- [10] Because, after considering the matter, the Court concluded that there was actual and presumptive prejudice in relation to the adequacy of Ms Costin's training and instruction, she was given an opportunity to remove that prejudice by an undertaking which precluded her from litigating that issue. Having directed any undertaking to be filed and served within 14 days of the delivery of its reasons in order to determine whether the order for an extension of time should stand or be set aside, it is appropriate for the Court to receive the undertaking.
- [11] A suitably-worded undertaking having been given by Ms Costin which precludes her from litigating the issue of training and instruction, the order granting her an extension of time should stand.
- [12] Finally, in its further submissions Coles notes that s 31 of the *Limitation of Actions Act 1974* (Qld) does not permit a conditional extension. This is true. However, it is not proposed that the existing order should be varied, so as to make it conditional.
- [13] The essential problem posed in this case is the proper identification of the cause of action or causes of action which Ms Costin should be permitted to litigate by an order for an extension of time. Section 31 of the *Limitation of Actions Act 1974* (Qld) provides for an order that the period of limitation "for the action" be extended so that it expires

² Ibid at [55].

at a certain date and that, for the purposes of “the action” brought by the applicant, the period of limitation is extended accordingly. The terms of s 31 require some clarity about “the action” for which an extension of time is ordered.

- [14] Before the enactment of legislation creating procedures which have to be undertaken prior to commencing an action for personal injuries, the position was relatively simple. An application under s 31 could be made either before or after an action had been commenced.³ If the action had been commenced, then the statement of claim served to identify the right of action the applicant claimed to have and the cause of action or causes of action which were subject to a relevant period of limitation. If an action had not been commenced, then a draft statement of claim might identify “the action” in respect of which an extension of time was sought.
- [15] Different procedures which now require a notice of claim to be given and for parties to provide information to each other may make it hard to define the proposed “action”, as this case illustrates.
- [16] An applicant for an order for an extension of time under s 31 who suitably defines the right of action claimed by her so as to remove the risk of significant prejudice to the respondent thereby defines “the action” in respect of which an order may be made. If an applicant for an extension of time, claiming to have a right of action, identifies certain alleged breaches of duty and disclaims reliance on other matters as constituting a breach of duty, then the action for damages will be defined. If on the hearing of an application, the applicant resiles from one or more of the allegations of breach which were included in the notice of claim, and makes clear that such matters will not form part of her cause of action, then the prejudice, if any, which litigation of that aspect might occasion the respondent will have been addressed and the proposed “action” defined so as to preclude such prejudice.
- [17] In this case, Ms Costin has belatedly done so in the form of her undertaking. She thereby defines the causes of action for negligence and breach of duty upon which she intends to rely in her action by reference to breaches of duty which do not give rise to a real risk of significant prejudice. She has now defined the right of action she wishes to litigate in the action, and for which she requires an extension of time, by excluding any allegation against Coles that she did not receive adequate training or instruction in respect of the manual handling of any load or the stacking of a pallet or pallets.
- [18] Upon analysis, the present issue does not involve the making of a conditional order. It concerns the identification of the right of action and “the action” in respect of which an order under s 31 is made. My earlier reference to “conditions” and an “appropriate condition”⁴ requires this clarification. It was not intended to mean the making of a conditional order.
- [19] Ms Costin’s proposed action was not defined by a pleading which identified the material facts which were the essential elements of the proposed action for damages which she intended to pursue. It was necessary for her to identify the cause of action or causes of action she intended to pursue, and for any order to be clear about the scope of “the action” for which an extension of time was granted.
- [20] Rather than setting aside the existing order and making a new order which defined the extension of time as being in relation to an action which does not include allegations of

³ *Grove v Bestobell Industries Pty Ltd* [1980] Qd R 12 at 16.

⁴ *Coles Group Ltd v Costin* [2015] QCA 140 at [53] and [54].

breach in relation to the adequacy of Ms Costin's training and instruction, this Court's approach in disposing of the appeal was to invite Ms Costin to provide a suitably-worded undertaking which precludes her from litigating the issue of training and instruction.

- [21] In summary, this Court is not granting an extension of time on conditions. Instead the action for which she is entitled to an order for an extension of time in the light of Coles' evidence about prejudice has been defined. This should have occurred earlier in the light of the evidence of actual and presumed prejudice in respect of instruction and training. It has now been done in the form of an undertaking.
- [22] In future cases, it might be done in the form of a draft pleading if the notice of claim and other communications leave uncertain the breach of duty upon which the applicant for an extension of time wishes to pursue, thereby enabling a court to grant an extension of time, if persuaded to do so, in respect of that action, being an action which does not occasion the risk of significant prejudice by reason of the applicant's delay in commencing proceedings.
- [23] The primary judge might have made an order for an extension of time in respect of an action which does not include allegations by Ms Costin against Coles that she did not receive adequate training or instruction. Such an order would not have been a conditional extension. It would have been an order which defined the action in respect of which the extension of time was granted. The undertaking which Ms Costin has provided has the same practical effect. She is precluded from litigating in that action any allegation that she did not receive adequate training or instruction in respect to the manual handling of any load or the stacking of a pallet or pallets.

Costs

- [24] The parties have made written submissions on costs. Coles submits that Ms Costin should be ordered to pay its costs of the appeal since it was successful in demonstrating that there was substantial prejudice, and because the practical effect of the appeal is to vary, in a substantive way, the orders made at first instance. Ms Costin did not proffer an undertaking not to litigate an allegation that she did not receive adequate training or instruction until after the matter was raised in the course of the hearing of the appeal and after the Court gave its reasons.
- [25] Ms Costin submits that although Coles had some success, it was limited. Whereas Coles succeeded in respect of the issue of prejudice concerning training and instruction, she succeeded with respect to:
- (a) the absence of prejudice in respect of other parts of her claim;
 - (b) the issue of whether leave to appeal was required; and
 - (c) the admission of evidence on the appeal concerning Ms King and Ms Kelman.

As a result, Ms Costin submits that the appropriate order in respect of costs in this Court, given the success of each party, is that there be no order as to costs.

- [26] In my view, Coles' success was limited, but significant. It persuaded this Court about an issue of prejudice which was heavily contested and occupied a substantial part of the appeal. Coles was not successful, however, in having an order for an extension of time set aside, so as to thereby bar Ms Costin's entire claim. Given the issues that were raised in the appeal and the measure of success enjoyed by each party, I consider that the appropriate order is that there be no order as to the costs of and incidental to

the appeal, including the application for leave to appeal and the application to adduce further evidence.

- [27] It remains to consider the most appropriate order for costs at first instance. Coles accepts that the order for costs thrown away by the adjournment on 30 May 2014 should stand, but submits that there should otherwise be no order as to costs. It argues that, as a result of her undertaking, Ms Costin has succeeded on a substantially different basis to that advanced below, where she did not offer to confine her claim.
- [28] Ms Costin submits that where this Court has not disturbed the orders made by the primary judge, such that she has been successful in respect to her application to extend the limitation period and to have had the first notice of claim declared competent, the order that Coles pay her costs of the application should stand.
- [29] Ms Costin was successful at first instance in having her notice of claim declared compliant. She was also successful in obtaining an order for an extension of time, but that order was only maintained, on appeal, because she offered an undertaking which addressed the issue of prejudice upon which Coles was entitled to succeed at first instance. However, there is no suggestion that if she had offered the undertaking earlier or narrowed her proposed action by some other process, Coles would have accepted that position and consented to the granting of an extension of time. Coles' position at first instance was that no extension of time should be granted. It sought to stop any part of Ms Costin's claim from proceeding. In the circumstances, the most appropriate order is that the costs of and incidental to the application be costs in the proceeding for damages in the District Court of Queensland.
- [30] I would make no order as to the costs of and incidental to the appeal, including the application for leave to appeal and the application to adduce further evidence and would not vary the order made on 30 May 2014 that the appellant pay the costs thrown away by the adjournment on 30 May 2014.
- [31] I would make the following additional order:
- The order for costs made on 5 September 2014 be set aside and it be ordered instead that, subject to the costs order of 30 May 2014, the costs of and incidental to the application be costs in the proceeding for damages in the District Court of Queensland.