SUPREME COURT OF QUEENSLAND

CITATION:	*Digby v The Compass Institute Inc and another [No 2]* [2015] QSC 361
PARTIES:	**MELANIE DIGBY** (plaintiff) **v** **THE COMPASS INSTITUTE INC (ABN 74 168 383 378)** (first defendant) and **STATE OF QUEENSLAND** (second defendant)
FILE NO:	SC No 3490 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	6, 11, 12, 18 November 2015
JUDGE:	Atkinson J
ORDER:	**1. The plaintiff pay 50 per cent of the second defendant's costs of and incidental to the proceeding on the standard basis.** **2. The first defendant pay 50 per cent of the second defendant's costs of and incidental to the proceeding on the standard basis.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – CO-DEFENDANTS – where the plaintiff brought a claim primarily in negligence against the first defendant and the second defendant – where the first defendant had been the plaintiff's employer and was represented in the proceedings by its insurer, WorkCover – where the parties had each made offers of settlement prior to the trial, none of which was accepted – where the plaintiff was successful against the first defendant – where the plaintiff's claim against the second defendant was dismissed – where the quantum of damages awarded to the plaintiff at trial was greater than the first defendant's final offer but less than the plaintiff's final offer – where provisions of the *Workers' Compensation and Rehabilitation Act* 2002 (Qld)

affected the making of any costs orders – whether the plaintiff or first defendant should pay the second defendant's costs of the proceedings – whether any other orders as to costs as between the parties should be made

Personal Injuries Proceedings Act 2002 (Qld)
Uniform Civil Procedure Rules 1999 (Qld) r 353
Workers' Compensation and Rehabilitation Act 2003 (Qld) s 233, s 292, s 315, s 316, s 316A, s 318A, s 318B, s 318D, s 318E

Duong v Versacold Logistics Ltd [2011] QSC 35
Gould v Vaggelas (1984) 157 CLR 215
Lackersteen v Jones [No 2] (1988) 93 FLR 442
Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330
Sanderson v Blyth Theatre Co [1903] 2 KB 533

COUNSEL: GR Mullins with JM Harper for the plaintiff
BF Charrington for the first defendant
MT O'Sullivan for the second defendant

SOLICITORS: Maurice Blackburn for the plaintiff
MacDonnells Law for the first defendant
Crown Solicitor for the second defendant

[1] **ATKINSON J:** On 30 October 2015, judgment was delivered in *Digby v The Compass Institute and another* [2015] QSC 308. The orders made in the substantive proceeding were as follows:

1. Judgment for the plaintiff against the first defendant in the sum of $158,045.

2. Case dismissed against the second defendant.

[2] The parties subsequently provided written submissions as to costs.

The orders sought

[3] The plaintiff and the second defendant (in its primary submission) concurred in the orders they each sought, namely that the first defendant pay the second defendant's costs of and incidental to the proceeding, to be assessed on the standard basis, from the date of its written final offer. In the alternative, the second defendant sought an order that the plaintiff be ordered to pay the second defendant's costs of and incidental to the proceeding, and an order that the first defendant pay the second defendant's costs of and incidental to the contribution proceeding.

[4] The order sought by the first defendant, in contrast, was that the plaintiff pay the second defendant's costs of and incidental to the action to be assessed on the standard basis. It sought no orders as to costs as between the plaintiff and the first defendant, or as between the first defendant and the second defendant.

[5] In its reply, the plaintiff clarified that it also sought that there be no order as to costs as between the plaintiff and the first defendant. It was accepted by all parties that the plaintiff had no entitlement to costs because the judgment sum fell between the written final offers of the plaintiff and the first defendant (and judgment was dismissed against the second defendant).

The final offers

[6] On 14 August 2012, the parties attended a mediated compulsory conference, on which date offers were exchanged. The offers were as follows:

1. The plaintiff offered to settle the claim by accepting $702,000 from the first defendant (taking no account of the refund to WorkCover) and $850,000 from the second defendant.
2. The first defendant offered to settle the claim by paying the plaintiff $120,000 (inclusive of the refund to WorkCover, although that was eventually greater than this amount).
3. The first defendant offered to settle the claim against the second defendant by contributing $120,000 (inclusive of the refund to WorkCover) to any settlement.
4. The second defendant offered to settle the claim by paying nil to the plaintiff and the first defendant.

The relevant provisions

[7] The plaintiff accepted that, *prima facie*, she would be obliged to pay the second defendant's standard costs, to be assessed, in accordance with the *Personal Injuries Proceedings Act* 2002 (Qld) ('PIP Act'). However, she submitted that the provisions of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ('WCR Act') altered that position. The plaintiff initially submitted that the applicable version of the WCR Act was as at 1 July 2008 (Reprint 3A), particularly s 316. However, the first defendant argued that, because a provision of a legislative instrument relating to costs is procedural, it cannot infringe substantive rights. As a result, any amendment to such a provision (including WCR Act s 316) applies retrospectively, unless the opposite is clearly stated.[1] The first defendant observed that the WCR Act was relevantly amended with effect from 15 October 2013. The effect of a transitional provision in the amending Act was that the version of the WCR Act as in force between 23 September 2013 and 14 October 2013 applied to the circumstances of this case. The second defendant supported the first defendant's submissions as to the applicable version. In her reply, the plaintiff accepted the applicability of the WCR Act as in force at 23 September 2013, but denied that this would change the result.

[8] Section 316 of the WCR Act (as at 23 September 2013) applies if the claimant in a proceeding is a worker who has suffered a work related impairment of less than 20% or has suffered no work related impairment.[2] The degree of impairment assessed, expressed as a percentage of the maximum statutory compensation,[3] represents a worker's entitlement to lump sum compensation.[4] An amended Notice of Assessment

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1 The First Defendant relies on the authorities of *Maxwell v Murphy* (1957) 96 CLR 261 at 285 (Fullagar J), *Galvin v Forests Commission of Victoria* [1939] VLR 284 at 297-298 (Mann CJ, Lowe and Martin JJ), and *Jackman v Dandenong Sewerage Authority [No 2]* (1967) 20 LGRA 413 (Barber J) on this point, with reference also to Pearce & Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis, 2011 at 339 [10.24].

2 See s 315.

3 See s 183.

4 See s 180.

issued to the plaintiff on 18 October 2011 had shown a work related impairment of 12 per cent.[5] Section 316 as at the relevant date was in the following form:

> "**316 Principles about orders as to costs**
> (1) No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding.
> (2) If a claimant or an insurer makes a written final offer of settlement that is refused, the court must, in the following circumstances, make the order about costs provided for—
> (a) if the court later awards an amount of damages to the worker that is equal to or more than the worker's written final offer—an order that the insurer pay the worker's costs on the standard basis from the day of the written final offer;
> (b) if the court later dismisses the worker's claim, makes no award of damages or awards an amount of damages that is equal to or less than the insurer's written final offer—an order that the worker pay the insurer's costs on the standard basis from the day of the final offer.
> (3) If an award of damages is less than the claimant's written final offer but more than the insurer's written final offer, each party bears the party's own costs."

[9] The first defendant submitted that s 316 contains a clear prohibition on any costs order in favour of the plaintiff against the insurer of an employer where the sum of damages awarded falls between the written final offers of the worker and the insurer. The second defendant submitted that s 316 relates only to costs as between the worker and the insurer. This is the correct interpretation of the effect of subsections (1) and (3). There should be no order as to costs between the plaintiff and the first defendant as to the plaintiff's costs of her proceedings and against the first defendant.

The contribution claim

[10] Section 316A of the WCR Act is in the following form:

> "**Division 2A Costs when offers made for a contribution claim**
> **316A Principles about order as to costs**
> (1) This section applies to the extent proceedings in a court relate to a contribution claim.
> (2) Subsections (3) to (5) apply if the contributor or other party (including an insurer) made an offer that was not accepted.
> (3) If the court later awards an amount of contribution that is equal to or more than the other party's written final offer, the court must order the contributor to pay the other party's costs on the indemnity basis from the day the written final offer was made.
> (4) If the court later—
> (a) dismisses the contribution claim; or
> (b) makes no award for the contribution; or
> (c) makes an award of contribution of an amount that is equal to or less than the contributor's written final offer;

[5] First Defendant's Submissions, [2].

> the court must order the other party to pay the contributor's costs on the standard basis from the day the written final offer was made.
> (5) If an award of contribution is less than the other party's written final offer but more than the contributor's written final offer, each party bears the party's own costs.
> (6) This section applies to a written final offer whether or not it is made as a separate offer or as part of a joint or consolidated offer.
> (7) In this section— ***written final offer*** means a written final offer under section 292."

[11] Subsection 316A(1) indicates that s 316A applies to the extent that a proceeding relates to a contribution claim. Under s 233, for the purposes of Chapter 5 (under which s 233 to s 320 fall), "contribution claim" means:

> "A claim for contribution or indemnity made against another person by an insurer who adds the person as a contributor under s 278A."

[12] The first defendant submitted that s 316A does not allow a costs order as between the defendants, first, because it would be inconsistent with s 316 and secondly, because it contends that the second defendant did not make a written final offer (in accordance with s 292) to the first defendant pursuant to s 316A. Instead, the second defendant's offer of 14 August 2012 is said to have been a joint offer pursuant only to PIP Act s 39 and s 40.

[13] In relation to the first issue, the first defendant contended that the extent of the contribution claim (for the purposes of subs 316A(1)) is very narrow in the circumstances that occurred, where:

a) the first defendant issued a contribution notice only against the second defendant;
b) the first defendant called no witnesses to address any case against the second defendant; and
c) the second defendant called only one witness to address the allegations made by the plaintiff against it.

[14] The first defendant submitted that the extent to which the proceeding related to the second defendant's third party statement of claim was therefore limited to the issuing of that statement and perusal of the defence to it.

[15] With due respect to this argument, the issue of contribution between the defendants and their respective liability for the plaintiff's injury was central to the liability issue in the trial.

[16] As to the second issue, the second defendant's offer of 14 August 2012 did not expressly provide that it was made pursuant to the WCR Act as well as the PIP Act. Nonetheless, the second defendant asserted that it was such a written final offer on the basis that it was addressed to 'WorkCover Queensland' and the claimant plaintiff; was made to WorkCover Queensland at the mediated compulsory conference; and complied with other applicable subsections of s 292 of the WCR Act. Moreover in the second defendant's submission, s 292 does not require a written final offer to state that it is made under that provision, in contrast with an offer under r 353 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[17] It appears that the second defendant is correct as to the characterisation of its offer and s 316A(4) is enlivened.

[18] However, it is not a foregone conclusion that the first defendant must pay all of the second defendant's costs in accordance with that subsection: s 318B(1)(c) gives the court greater discretion as to the order to be made in this situation. A party ordered to pay costs is able to avail itself of that section to show the court that another order is appropriate in the circumstances.

[19] The second defendant submitted, that subsection 316A(4) should not be seen to limit any costs order that the second defendant might be entitled to where the claims against it were unsuccessful, such that the first defendant should be made to pay the second defendant's costs, given that the circumstances otherwise fall under subss 316A(2) and (4)(a).

[20] In her reply, the plaintiff said that, despite the first defendant's submissions, the Sanderson[6] order sought by the plaintiff is permitted by WCR Act s 318D, which is in the following form:

> **"318D Order for costs if more than 1 person liable for the same costs**
> If more than 1 party in a proceeding for damages has a liability to pay the same costs under this part, or under this part and another law about costs, the court may apportion the costs payable by each party according to the proportion of liability of the parties and the justice of the case."

[21] This section applies notwithstanding s 316 and s 316A because of s 318A, which is in the following terms:

> **"318A General application of costs provisions in part**
> (1) A court may make no order about costs to which division 1, 2 or 2A applies except the orders for costs provided for in the division.
> (2) Subsection (1) applies subject to this division."

Sections 316 and 316A are in divisions 2 and 2A respectively, while s 318 to s 318E are contained in division 3. Section 318A therefore renders s 316 and s 316A subject to s 318D.

[22] Also relevant to the court's discretion as to costs is s 318B which provides that a court may make an order for costs other than the order prescribed in s 316A if the party ordered to pay costs shows the other order is appropriate in the circumstances.

[23] The plaintiff says that the plaintiff and the first defendant both have "a liability to pay the same costs … under [Part 12 of Chapter 5] and another law about costs". This is said to be for the reason that the plaintiff has a *prima facie* liability to pay the second defendant's costs under the general law, while the first defendant is liable to pay the second defendant's costs of the contribution claim under the WCR Act. As such, according to the plaintiff, "at least a portion of those costs will be the 'same costs'", which the court may apportion according to the justice of the case. The plaintiff said in reliance on its primary submissions and those of the second defendant that the justice of

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[6] The name of the order is taken from *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

the case demands that the first defendant pay the second defendant's costs on the standard basis, to be assessed.

Sanderson orders

[24] The plaintiff made submissions regarding the making of a costs order between the defendants as per *Sanderson v Blyth Theatre Co* and subsequent authorities, as applied to the facts of the present case. The second defendant endorsed the plaintiff's submissions in this regard.

[25] Those submissions refer first to the statement of Asche CJ in *Lackersteen v Jones [No 2]*,[7] setting out the preconditions for the making of a Sanderson order:

> 1. It must be seen to have been reasonable and proper for the plaintiff to have sued the successful defendant.
> 2. The causes of action against two or more defendants need not be the same but they must be substantially connected or dependent the one on the other.
> 3. While it is essential to find that the plaintiff has acted reasonably and properly, that alone is not sufficient. The Court must find something in the conduct of the unsuccessful defendant which makes it a proper exercise of discretion.
> 4. Finally, in considering whether to make such an order, the court should, in the exercise of its discretion, balance overall two considerations of policy: the first, that an unnecessary multiplicity of actions should not be forced on litigants, so that a plaintiff who acts reasonably in joining two or more defendants should not be penalised or lose the fruits of his victory in costs on the basis that he should have either elected or taken separate action; secondly, that an unsuccessful defendant should not have to pay more than one set of costs merely because he is unsuccessful.[8]

[26] It was contended by the plaintiff and accepted by the second defendant that the plaintiff acted reasonably in bringing the claim against both defendants, given the conflicting allegations at trial. The causes of action alleged against each defendant were substantially connected. The litigation largely came down to a contest between the two defendants, with each contending that the other bore full liability for the plaintiff's injuries. In respect of Asche CJ's fourth criterion, it was submitted that policy considerations generally weighed in favour of the Sanderson order, particularly as the first defendant would not in the circumstances of the case be exposed to a costs order in favour of the plaintiff as well.

[27] For its part, the first defendant submitted that a Sanderson order should not be granted, as such an order is not favoured in this case on the basis of the common law principles. The first defendant specifically relied on *Gould v Vaggelas*[9] and *Duong v Versacold Logistics Ltd*.[10] In essence, it was submitted that there was nothing in the first defendant's conduct to justify the exercise of the discretion in favour of the making of a Sanderson order. There is no reason, in the first defendant's submission, that the usual

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7 (1988) 93 FLR 442, with reference also to *Fennell v Supervision and Engineering Services Holdings Pty Ltd* (1988) 47 SASR 6, *Gould v Vaggelas* (1984) 157 CLR 215 at [229] (Gibbs CJ) and *Sharples v O'Shea and Hanson* [1999] QSC 190.

8 (1988) 93 FLR 442 at 449.

9 (1984) 157 CLR 215, particularly at 229-230 (Gibbs CJ), as cited with approval in *Robinson v Ware* [2012] QCA 70 at [16] (Muir JA, with Chesterman JA agreeing), and 260 (Brennan J).

10 [2011] QSC 35.

order as to costs ought not to be made as between the unsuccessful plaintiff and successful second defendant.

[28] In this case it appears to me that *prima facie* the first defendant should be ordered to pay the second defendant's costs of the contribution proceedings pursuant to s 316A; and the plaintiff should be ordered to pay the second defendant's costs of the proceedings by the plaintiff against the second defendant in conformity with the general law that costs follow the event. In view of the nature of the contest at trial, however, these costs will certainly at least overlap and, in my view, be more or less indistinguishable from one another. I will therefore exercise the power granted by s 318B(2) and s 318D of the WCR Act and order that the plaintiff and the first defendant each pay 50 per cent of the second defendant's costs of and incidental to the proceeding to be assessed on the standard basis.

Order

[29] The plaintiff and first defendant each pay 50 per cent of the second defendant's costs of and incidental to the proceeding to be assessed on the standard basis.