SUPREME COURT OF QUEENSLAND

CITATION:	*Zuecker v Bruggmann (No 2)* [2016] QSC 115
PARTIES:	**NICOLETTA IRENE ZUECKER** (plaintiff) **v** **RUTH BRUGGMANN** (defendant)
FILE NO/S:	SC No 8751 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application for Costs
DELIVERED ON:	30 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **(a) The plaintiff's costs thrown away by the adjournments of the trial on 3, 4 and 5 November 2015 be the plaintiff's costs in the proceeding.** **(b) The plaintiff's costs of its application for a costs order in respect of those costs be the plaintiff's costs in the proceeding.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – OTHER PARTICULAR CASES AND MATTERS – where trial listed for five day hearing – where self-represented defendant became ill on the second day of trial – where trial adjourned and costs of adjournment reserved – appropriate costs order in the circumstances *Earp Woodcock Beveridge & Co Ltd v Gordon & Ors* (1927) 44 WN(NSW) 123, cited *Pell v Linnell* (1868) LR 3 CP 441, cited *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd & Ors* [2012] QSC 102, cited *State of Queensland v Brooks & McCabe* [2006] QCA 523, considered *Zuecker v Bruggmann* [2016] QSC 53, cited
COUNSEL:	P W Hackett for the plaintiff

R J Clutterbuck for the defendant

SOLICITORS: Rose Litigation Lawyers for the plaintiff
Turnbull Mylne for the defendant

[1] This matter came on for trial before me on 2 November 2015. It had been set down for a 5 day hearing.

[2] The trial concerned a property in Mudgeeraba and claims concerning money spent in relation to –

(a) the acquisition of a half share of the property;

(b) expenses incurred in relation to the property; and

(c) the development of the property.

[3] The plaintiff pursues the defendant for damages, the largest part of which is an amount of $750,000, said to have been spent consequent upon representation that the amount was half what was needed to do development work in relation to the property. The case has some factual complexity. There will be a significant credit dispute between, at least, the evidence given by the plaintiff and the evidence given by the defendant

[4] The plaintiff was represented by counsel and an instructing solicitor. The defendant appeared on her own behalf. She is a 74 year old woman. At the commencement of the trial I ruled that the defendant could have the assistance of her friend, Dr Von Moltke, by having him sit with her at the bar table, but not by his being permitted to appear on her behalf. Although Dr Von Moltke was not legally qualified, he had qualifications in science and business administration and was more conversant in the English language than was the defendant.

[5] On 3 November 2015, the second day of the trial, the defendant became ill. Dr Von Moltke appeared before me and told me that he and the defendant had been working until the small hours of the morning, but that when he woke up he found that the defendant seemed distressed and that she had been admitted to hospital. Nothing occurred on that day which advanced the disposition of the trial.

[6] Medical evidence was not received as to her condition until 4 November 2015, which should have been the third day of the trial, and such evidence as was received was ambiguous. The defendant did not appear. Dr Von Moltke described her as appearing to him to be dishevelled, only partially responding to questions and answers, and only partially coherent. In any event, nothing occurred on that day which advanced the disposition of the trial. Rather, I acceded to an adjournment application which I permitted Dr Von Moltke to make on the defendant's behalf and in her absence. I made the following orders and directions:

1. I will adjourn this trial until 10am tomorrow.

2. I direct that the defendant file and serve on the plaintiff, by 9.30am tomorrow, a report from a qualified medical practitioner identifying:

   a) the defendant's present symptomology as observed by that doctor;

   b) whether in that doctor's opinion the defendant is able to continue to represent herself in the current Supreme Court proceedings or, at least, to provide instructions to someone else who could appear as her advocate in those proceedings; and

   c) if, in the doctor's opinion, she is not presently able to do either of those two things, when she might be able to do so.

3. I will reserve the question of the costs which have been thrown away by events yesterday and today.

[7] On 5 November 2015, which should have been the fourth day of the trial, I received a brief handwritten report from, Dr Katz, a psychiatrist who had that day been retained to treat the defendant. He gave brief oral evidence over the telephone on the question and was cross examined by counsel on behalf of the plaintiff but maintained his views. His evidence was that when the defendant attended before him she was in a severely distressed emotional state. He described her demeanour as extremely tense, agitated, anxious, and distraught. He thought she was suffering an adjustment disorder, which, though he expected it would be transient, could last for several months. He concluded that in his opinion the defendant was not then capable of representing herself in court or giving instructions to an advocate until early 2016. In response to a cross-examination question which enquired whether the symptoms he had observed were symptoms which someone was capable of feigning, he said that in his professional opinion the defendant was genuinely and severely distressed.

[8] Nothing occurred on that day which advanced the disposition of the trial. I made the following orders:

1. The further hearing of this trial be adjourned to a date to be fixed.
2. By 29 January 2016, the Plaintiff provide to the Defendant by email:
    a) any proposed amended Statement of Claim;
    b) any proposed amended Reply and Answer;
    c) a list of further documents proposed to be tendered in the trial together with copies of those documents.
3. By 26 February 2016 the Defendant provide to the Plaintiff by email:
    a) any proposed amended Defence and Counterclaim;
    b) a response to the Plaintiff's list of further documents which identifies whether the Defendant objects to the admissibility of any of the documents on the list (and if so which) and the grounds for those objections;
    c) a list of the documents which the Defendant proposes to be tendered in the trial supplementary to those tendered or proposed to be tendered by the Plaintiff together with copies of those documents.
4. If the Defendant is unable to comply with the direction in the preceding order because of ill health, she must provide by 26 February 2016, a report by a qualified medical practitioner (which complies with the UCPR provisions concerning expert opinion evidence), which identifies:
    a) the Defendant's present symptomology as observed by a medical practitioner;
    b) whether in that doctor's opinion the Defendant is able to continue to represent herself in this proceeding or, at least, to provide instructions to someone else who could appear as her advocate in this proceeding; and
    c) if, in the doctor's opinion, she is not presently able to do either of those two things, when she might be able to do so.
5. By 9 March 2016, the Plaintiff provide a response to the Defendant's list of documents which identifies whether the Plaintiff objects to the admissibility of any of the documents on the list (and if so which) and the grounds for those objections.
6. The proceedings be listed for directions before Bond J on 14 March 2016 at 10:00am at which time, among other things, the questions of:
    a) leave for the proposed amended pleadings; and
    b) the trial date for the further amended hearing of the trial

    will be addressed.
7. The plaintiff's application for an order that the Defendant pay the costs thrown away by the adjournment on 3, 4 and 5 November be adjourned to be determined on 14 March 2016 at 10:00am.

[9] The matter came back before me on 14 March 2016. The defendant had not done what she had been directed to do. She had left Australia and returned to her home in Switzerland. She was represented before me by a solicitor. The solicitor had sought and obtained a report from a Dr Danka, a Swiss psychiatrist, on the defendant's health difficulties and Dr Danka had advised as follows on 11 March 2016:

> Mrs Bruggmann consulted me first time on 29 February 2016 in a distressed emotional state and with medical conditions due to the enduring stress of the complex legal proceedings. After a 2 hour consultation for the first time and further consultations on a weekly basis it is obvious and it is my opinion that Mrs Bruggmann is not capable to respond to the current legal proceedings. Further consultations and treatment are necessary in short intervals. It is my opinion that in relation to the above, Mrs Bruggmann is not capable to travel back from Switzerland to Australia, and Mrs Bruggmann is not capable of attending to complex legal matter, and to give further instructions to her appointed advocate. I will reassess the development of her conditions on weekly basis. I expect the recovery to be midyear or later this year.

[10] On 15 March 2016, for reasons upon which I elaborated in my reasons for judgment on that date[1], I ordered, amongst other things –

(a) the proceeding be adjourned to a date to be fixed before me for the determination of the following issues:

(i) Whether the defendant is a person with impaired capacity at the present time so that any further step in the proceedings may only be taken with the leave of the Court pursuant to UCPR 72;

(ii) If such leave is necessary, whether it should be granted and, if so, on what terms, including in relation to the appointment of a litigation guardian for the defendant.

(b) I reserved my decision on the plaintiff's application for an order that the defendant pay the costs thrown away by the adjournment on 3, 4 and 5 November.

[11] The question of whether the defendant was a person with impaired capacity and whether a litigation guardian should be appointed was ultimately dealt with by consent orders on 22 April 2016 in the following way:

(a) by ordering the defendant, by her solicitors, to cause to be filed the consent of Benjamin Michael Twomey, solicitor, to act as her litigation guardian in these proceedings; and

(b) upon the filing of that consent, granting leave to proceed in accordance with the directions in that order.

[12] The question of argument on the plaintiff's application for an order that the defendant pay the costs thrown away by the adjournment on 3, 4 and 5 November was adjourned for hearing on 20 May 2016. Ultimately it was agreed that I would determine the question on the papers, in light of the written submissions which I had received.

[13] The defendant contended I should reserve the costs again. I reject that contention. I am well placed now to determine the competing arguments.

[14] The plaintiff's argument is straightforward. Through no fault of the plaintiff's own, the trial which was expected to take place was adjourned. Costs were incurred on 3, 4 and 5 November 2015 which may be regarded as having been thrown away. The plaintiff says she should have the costs as costs thrown away by the adjournment sought and obtained by the defendant.

[15] I accept that the adjournment was not caused in any way by conduct of the plaintiff. I accept that the plaintiff incurred costs on the days concerned, through no fault of her own and those

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1 *Zuecker v Bruggmann* [2016] QSC 53.

costs should be regarded as thrown away by the adjournment. What those costs actually are, is obviously a question for subsequent assessment.

[16] The plaintiff invites me to make an order that the costs be required to be paid now, in effect treating them as costs occasioned by the default of the defendant. The plaintiff invites me to conclude that the defendant's emotional fragility only impacts on events when it suits the defendant. The plaintiff points to the facts that –

(a) on occasions the defendant has been able to have some communications with her solicitors;

(b) she had been competent enough to pack up her residence on the Gold Coast and travel to Switzerland; and

(c) she had been able to engage new solicitors to act on her behalf in February 2016,

and says that the plaintiff's consent to the appointment of a litigation guardian was occasioned purely for practical and commercial reasons.

[17] The plaintiff's suspicion is, perhaps, understandable, but I am not prepared to make the finding that the plaintiff invites me to make. In November 2015, Dr Katz specifically rejected the notion that the defendant's emotional distress had been feigned by her. It was that distress which had justified his conclusion that she was not then capable of either representing herself in court or giving instructions to an advocate. A Swiss psychiatrist had a similar conclusion in March 2016 and, whatever the plaintiff's motives might have been, ultimately the parties consented to my appointing a litigation guardian on behalf of the defendant.

[18] There are cases in which, when an adjournment is occasioned through an event which occurs without the fault of either party (sometimes described as an "Act of God", and encompassing sickness or death of critical witnesses, lawyers, parties and even members of the Court), the Court determines that there should be no order as to costs[2].

[19] On the other hand, in *State of Queensland v Brooks & McCabe* [2006] QCA 523, Keane JA (with whom Jerrard JA and Jones J agreed) permitted a successful appellant to recover costs including costs of an adjourned hearing which had to be abandoned because of the indisposition of one of the members of the Court. His Honour observed (at [5]):

> It is true that neither party was responsible for the circumstances which led to the vacation of the first hearing. But that is no reason to deny the successful party costs necessarily incurred by it in relation to the determination of the appeal in its favour. There is no principle of law that a successful party should recover only those costs which it has incurred by reason of the default of the other party.

[20] A similar approach should be taken here, although I am determining the question in advance of a decision as to the merits of the trial. The trial will reconvene on 17 October 2016. If the plaintiff ultimately succeeds she should have her costs, but not if she ultimately fails. It seems to me that the appropriate order in the circumstances of this case is to order that –

(a) the plaintiff's costs thrown away by the adjournments of the trial on 3, 4 and 5 November 2015; and

(b) the plaintiff's costs of its application for a costs order in respect of those costs,

be the plaintiff's costs in the proceeding.

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2 *Earp Woodcock Beveridge & Co Ltd v Gordon & Ors* (1927) 44 WN(NSW) 123; *Pell v Linnell* (1868) LR 3 CP 441; *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd & Ors* [2012] QSC 102.