

# SUPREME COURT OF QUEENSLAND

CITATION: *Holdway v Arcuri Lawyers (A Firm)* [2008] QCA 302

PARTIES: **MARGARET ELIZABETH HOLDWAY**  
(plaintiff/respondent)  
v  
**ARCURI LAWYERS (A FIRM)**  
(defendant/appellant)

FILE NO/S: Appeal No 407 of 2008  
SC No 3255 of 2004

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal - Further Order as to Costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered 1 August 2008  
Further Order delivered 30 September 2008

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: McMurdo P, Keane JA and Mackenzie AJA  
Judgment of the Court

FURTHER ORDER: **1. No order is made as to the costs of the proceedings in the Trial Division**  
**2. The plaintiff pay the defendant's costs of the appeal to be assessed on the standard basis, save for the defendant's costs relating to the inclusion of section 13 of the appeal record book, which is to be assessed on the indemnity basis**  
**3. The plaintiff is granted a certificate under s 15 of the *Appeal Costs Fund Act 1973 (Qld)* in respect of the appeal to this Court, save for the defendant's costs relating to the inclusion of section 13 of the appeal record book which is to be assessed on the indemnity basis**

CATCHWORDS: PROCEDURE – COSTS – CONDUCT OF PARTIES – where early in the proceedings the defendant made an offer to compromise the plaintiff's claim on terms more advantageous to the plaintiff than those ultimately achieved – where the defendant at trial acted unreasonably by pursuing points that were not reasonably arguable – where the plaintiff insisted upon the inclusion of material in the appeal record which was of no relevance to the matters in issue in the appeal – whether an order as to costs of proceedings in the Trial Division should be made – whether the plaintiff should be ordered to pay the defendant's costs of the appeal on the indemnity basis

PROCEDURE – COSTS – where the proceedings at trial miscarried as a result of an error of law – whether in the circumstances the plaintiff should be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act 1973* (Qld)

*Appeal Costs Fund Act 1973* (Qld), s 15

COUNSEL: R M Derrington SC for the appellant  
N M Cooke RFD QC, with D J Morgan, for the respondent

SOLICITORS: Sparke Helmore for the appellant  
PhilipRoberts Lawyers for the respondent

- [1] **THE COURT:** The defendant's appeal in this matter was successful.<sup>1</sup> The defendant now seeks orders for costs in its favour which reflect that success, both in respect of the appeal and the proceedings at first instance.
- [2] The defendant relies upon the usual rule that costs should follow the event,<sup>2</sup> to seek an order for costs on the standard basis in respect of the appeal and the proceedings at first instance. The defendant also draws attention to a further circumstance which would warrant an order in its favour on the indemnity basis in respect of part of the proceedings on appeal.
- [3] The circumstances which led this Court to conclude that the judgment obtained by the plaintiff at first instance should be set aside, and that judgment should be entered for the defendant, are unusual. Those circumstances are set out at length in the Court's reasons for its decision of the substantive appeal, and we do not propose to repeat them. It is sufficient for present purposes to say that the defendant's success on appeal proceeded from this Court's view that the learned trial judge erred in holding the defendant to an admission made in its amended defence notwithstanding his Honour's findings to the contrary.
- [4] The defendant points out that, early in the proceedings, the defendant made an offer to compromise the plaintiff's claim on terms which would have resulted in a payment, albeit modest, to the plaintiff. It is said that this circumstance and the difficulties which emerged in the plaintiff's case demonstrate the unreasonableness of the prosecution of that case to trial.
- [5] The plaintiff argues that the point on which the defendant succeeded was not pleaded and that the defendant failed on issues on which time and money were expended in preparation for, and at the hearing of, the trial. For example, the defendant disputed the plaintiff's status as an eligible applicant and the allegation of negligence on its part. These issues were rightly resolved in favour of the plaintiff.
- [6] In the very unusual circumstances of this case, we consider that the usual rule that the costs of the proceeding at first instance, and of the appeal, should follow the event, should not apply.
- [7] We consider that there should be no order for costs in relation to the proceedings at first instance. That order would balance the unreasonable aspects of the conduct of

<sup>1</sup> *Holdway v Arcuri Lawyers (A Firm)* [2008] QCA 218.

<sup>2</sup> Rule 681 of the *Uniform Civil Procedure Rules 1999* (Qld).

the defence against the unreasonableness involved in the prosecution of the plaintiff's claim. The defendant should, however, recover its costs of the appeal: it had no choice but to bring the appeal, and it was substantially successful.

- [8] That having been said, we are of the view that the circumstances of the case also warrant the grant to the plaintiff of a certificate under s 15 of the *Appeal Costs Fund Act 1973 (Qld)* in respect of the appeal to this Court. The plaintiff should not be required to bear sole responsibility for the error which necessitated the defendant's appeal.
- [9] The kind of subvention contemplated by s 15 of the Act is available where proceedings have miscarried at the trial stage as a result of an error of law. In this case, there was such an error on the part of the learned trial judge and, although his Honour was not discouraged by the plaintiff from taking the erroneous course which he did, the plaintiff was not responsible for opening up the issue on which the defendant was ultimately found to be entitled to succeed. It would not be fair to require the plaintiff to bear the expense of correcting that error.
- [10] Next, the defendant submits in relation to the costs of the appeal that the plaintiff should be ordered to pay the defendant's costs relating to the inclusion of section 13 of the appeal record book on the indemnity basis. At the outset of the hearing of the appeal, when Counsel for the defendant drew attention to this material in the record and queried its relevance, it was conceded by Counsel for the plaintiff that these materials were unlikely to be of any relevance to the matters in issue in the appeal; Counsel for the plaintiff did not at any stage, in the course of the hearing of the appeal, seek to suggest that these materials were in any way relevant to the matters in issue. Indeed, the plaintiff has not sought, in her submissions in relation to costs, to suggest any basis on which these materials might have been thought to be relevant.
- [11] This Court has often expressed its concern at the inclusion of unnecessary material in appeal records. Litigants must understand that the inclusion of unnecessary material is unacceptable. The plaintiff's insistence on including these irrelevant materials in the record was plainly unreasonable. We consider that it warrants an order that the costs recoverable by the defendant in respect of the inclusion of these materials in the record should be assessed on the indemnity basis.
- [12] Accordingly, in relation to the costs of the proceedings, the Court orders that:
- (a) there be no order as to the costs of the proceedings in the Trial Division;
  - (b) the plaintiff pay the defendant's costs of the appeal to be assessed on the standard basis, save for the defendant's costs relating to the inclusion of section 13 of the appeal record book, which is to be assessed on the indemnity basis; and
  - (c) the plaintiff is to be granted a certificate under s 15 of the *Appeal Costs Fund Act 1973 (Qld)* in respect of the appeal to this Court, save for the defendant's costs relating to the inclusion of section 13 of the appeal record book which is to be assessed on the indemnity basis.