DISTRICT COURT OF QUEENSLAND

CITATION:	*Swindells v Hosking & Anor (No 2)* [2012] QDC 17
PARTIES:	**NORMAN LEE SWINDELLS** **(Plaintiff)** **v** **PHILLIP HOSKING AND KRISTEN HOSKING** **(Defendants)**
FILE NO/S:	D 189/10
DIVISION:	Civil
PROCEEDING:	Claim
ORIGINATING COURT:	Maroochydore
DELIVERED ON:	22 February 2012
DELIVERED AT:	Maroochydore
HEARING DATE:	On the papers
JUDGE:	Dorney QC, DCJ
ORDERS:	**The plaintiff pay the defendants' costs of the proceeding to be assessed on the standard basis.**
CATCHWORDS:	Costs – Where plaintiff unsuccessful – Whether *Personal Injuries Proceedings Act* 2002 (Qld), though inapplicable, is "relevant" – Where defendants self-represented *Personal Injuries Proceedings Act* 2002 (Qld) s 13(3), s 39, s 40, s 40(3), s 40(5), s 40(6), s 40(7), s 40(8), s 45(3), s 48, s 56, s 56(1), s 56(2), s 56(7) *Personal Injuries Proceedings Regulation* 2002 (Qld) s 13(3) *Uniform Civil Procedure Rules* 1999 (Qld) r 680, r 681(1), r 681(2) *Amos v Brisbane City Council* [2006] 1 Qd R 300 *Cachia v Hanes* (1995) 179 CLR 403 *CAR & Anor v Department of Child Safety* [2010] QCA 49 *Henderson v Taylor*, *Information Commissioner for Queensland* [2006] QCA 267 *Oshlack v Richmond River Council* (1998) 192 CLR 72

Swindells v Hosking and Anor [2012] QDC 6

COUNSEL:	T Nielsen for the plaintiff
	P and K Hosking (self-represented)
SOLICITORS:	Schultz Toomey O'Brien for the plaintiff

Introduction

[1] On 31 January 2012, amongst other orders I made in this proceeding, I ordered both that the defendants have judgment against the plaintiff and that both parties have leave to file, and serve, written submissions on costs "on or before 4 pm on 7 February 2012".

[2] The defendants duly filed their written submissions on costs on 7 February 2012. Belatedly, the plaintiff filed his written submission on 17 February 2012. Despite the latter's significant lateness, I will take account of the submissions so made by the plaintiff.

[3] Although the plaintiff has asserted that he does not know whether the defendant filed a sealed envelope containing a copy of the defendant's mandatory final offer, the Court file contained a sealed envelope filed 5 December 2011 containing both the "Final Offer to Settle" of the plaintiff, dated 8 July 2010 and pursuant to s 39 of the *Personal Injuries Proceedings Act* 2002 ("*PIPA*") for the sum of $80,000.00, plus stated costs orders, and the defendants' "mandatory final offer", also dated 8 July 2010. Although the defendants' mandatory final offer makes no reference to s 39 of *PIPA,* it does refer expressly to that Act, offering the sum of $0.00.

Legislation

[4] Beginning with s 40 of *PIPA*, s 40(5) states that, if the claimant starts a proceeding in a court based on the claim, the claimant must, at the start of the proceeding, file at the court a sealed envelope containing a copy of the claimant's mandatory final offer. As noted, that did not occur until the offers were filed on 5 December 2011. Returning, then, to s 40(6), it states that that the respondent must, before or at the time of signing a defence, file at the court a sealed envelope containing a copy of the respondent's mandatory final offer. Again, that did not occur within the time frame although again, as is noted, it was filed on 5 December 2011. In accordance with s 40(7), the court did not read those mandatory final offers until it decided the claim, only having opened them after receiving both the plaintiff's and the defendants' written submissions on costs. Finally, with respect to s 40, s 40(8) states that the court must, if relevant, have regard to the mandatory final offers in making a decision about costs.

[5] For reasons which will become clear soon, even though I have looked at both sides of the mandatory final offers – and although on the outcome the plaintiff's would be irrelevant - despite them being filed out of time, in the end, the offers do not matter because the determining section, s 56 of *PIPA*, has not been triggered in the circumstances.

[6] For the sake of its completeness, it should be noted that s 40(3) of *PIPA* states that, even though a respondent denies liability altogether, the respondent must nevertheless make a mandatory final offer but, in that event, the offer is expressed to be as an offer of "$nil". Again, it cannot be said that there is any misleading of the claimant by an offer of "$0.00" instead, if it should otherwise be held to have been relevant.

[7] Turning, then to s 56 of *PIPA*. Section 56(1) states that s 56 applies if the Court "awards" an amount equal to the "upper offer limit" or less, "in damages", in a proceeding based on a claim. The reference to an "upper offer limit" draws in s 13(3) of the *Personal Injuries Proceedings Regulation* 2002 (Qld), by way of its definition in *PIPA* in the Schedule, so defining the term to mean the amount prescribed under a regulation as the declared upper offer limit. For an injury that occurred, here, on 24 May 2005, the amount prescribed is $50,000.00.

[8] Section 56(2) of *PIPA* states that, if the Court "awards" an amount equal to the "lower offer limit" or less, in damages, the Court then applies certain stated outcomes. Further, s 56(3) states that, if the Court "awards" more than an amount equal to the "lower offer limit" but not more than an amount equal to the "upper offer limit", in damages, the Court applies other stated outcomes.

[9] Section 56(7) of *PIPA* states that s 56 does not limit the Court's power under s 48. Neither party has asked that the Court consider such a power under s 48.

Judicial consideration of *PIPA* provisions

[10] In *Amos v Brisbane City Council* [2006] 1 Qd R 300, the Court of Appeal undertook a detailed consideration of s 56. It was a case in which the Magistrates Court had found against the applicant/plaintiff on liability after a trial of the proceeding. The applicant/plaintiff was ordered to pay the respondent/defendant's costs fixed at an ascertained figure. Thus, the interpretation is directly applicable to the present circumstances. Muir J (as he then was) speaking for the Court, held that the words of s 56(1) of *PIPA* are clear and unambiguous, such that the words of the subsection dealing with an "award" of "damages" are "quite incapable of accommodating an order dismissing a proceeding, with or without an assessment of damages to assist in the final disposition of the matter by an appellate Court": at 304 [17]. As stated by Muir J, in those circumstances, there are *no* damages and it follows that there can be *no* award of damages: at 304 [17].

[11] Muir J went on to remark, for better or worse, that the legislative focus is on the circumstances in which a plaintiff commences proceedings and "succeeds", "at least to the extent of obtaining some damages", adding that s 56 says "nothing about costs in cases where there is no award of damages": at 304 [19]. Thus, Muir J concluded that, presumably, the legislative intention was that costs in other cases could be left for determination "in the normal way": at 304 [19]. Lastly, Muir J held that the argument that the section provides a complete code governing awards of costs is "unsustainable": at 304 [20]. Although later amendments have now been made, nothing in them changes the meaning of s 56.

Arguments

[12] The defendants, unsurprisingly as they are self-represented litigants, have undertaken no consideration of *PIPA*. They simply ask that costs "follow the event", stating, correctly, that the event was the finding against the plaintiff on liability. I will deal with other aspects of their submissions on costs, later.

[13] With respect to *PIPA*, the plaintiff's submissions, after noting that s 40(8) states that the Court must, "if relevant", have regard to the mandatory final offers, assert that, despite *Amos*, it is appropriate to look at what the situation would have been, based

on "the quantum of the claim", had an offer been "beaten in the normal sense". That argument led to a submission that the Court should have reference to s 56(3)(c), dealing with damages greater than $30,000.00 but less than $50,000.00, "which is the case here". The latter is a reference to my conclusion, for appellate purposes, that, had the plaintiff been successful, I would have awarded damages in the sum of $49,665.40: at [163] of my Reasons.

[14] On that reasoning, the plaintiff's submissions contend that, since the "declared costs limit" for matters under $50,000.00 is $2,500.00, an amount should be ordered for that sum up to and including 24 August 2010, as the plaintiff's Claim and Statement of Claim were filed on 25 August 2010. Further, it was contended that for five stated reasons – essentially dealing with why it was "reasonable" for the plaintiff to proceed with the claim – it is not appropriate for the Court to set any sum for costs and that, beside the $2,500.00, the plaintiff should pay the defendants' costs on the standard basis from 25 August 2010 to date on the Magistrates Court Scale G.

Discussion

[15] The reference in s 40(8) of *PIPA* to relevancy must take account of *Amos*. It is clear from that decision that the provisions of *PIPA* have nothing to say in circumstances such as the present: at 304 [19]. As Muir J went on to hold, after considering that s 56 did not provide a complete code, there was no implication that the Courts' long-standing statutorily conferred powers to award costs are otherwise removed: at 204 [20].

[16] Thus, the approach in *Amos* means that if s 56 is inapplicable, as here, no consideration can be undertaken of the costs up to the day on which the proceeding started. That would appear to be the only logical consequence of s 56 being inapplicable and the Court's powers, under, for instance, the *Uniform Civil Procedure Rules* 1999 (Qld) *("UCPR")*, being applicable.

Cost apart from *PIPA*

[17] As noted in the plaintiff's submissions, there have been no relevant offers under the *UCPR*. It is not contended that any costs power is applicable apart from *PIPA* and the *UCPR*.

[18] Rule 680 of the *UCPR* states that a party to a proceeding cannot recover any costs of the proceeding from another party "other than under these rules or an order of the Court".

[19] Rule 681(1) of the *UCPR* states that costs of the proceeding, relevantly, are in the discretion of the Court "but follow the event, unless the Court orders otherwise", with Rule 681(2) stating that Rule 681(1) applies "unless these rules provide otherwise".

[20] Typically, this means that as between a plaintiff and a defendant, fairness and public policy dictate that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation : see *Oshlack v Richmond River Council* (1998) 192 CLR 72 at 97 [67].

[21] There is nothing that has been put before the Court which should disturb that *prima facie* position, certainly not anything to do with the making of offers under a statutory provision that is inapplicable.

[22] In determining what scale of costs is appropriate, given the fact that the plaintiff sued in the District Court, and thereby brought the defendants into that costs regime, it should not mean that when the plaintiff is unsuccessful the costs should be awarded on a scale appropriate to what the plaintiff might have been limited to if the plaintiff had, in fact, succeeded to the extent of the notionally assessed "damages".

[23] Finally, what is clear from the costs regime under the *UCPR* is that costs incurred prior to the commencement of the proceeding are not within the power of the Court, particularly where costs with respect to this Court can only be statutorily conferred.

Costs for self-represented litigants

[24] One of the matters that has not been addressed by either party is the limited extent to which self-represented litigants are entitled to costs.

[25] As found by the Court of Appeal in *Henderson v Taylor, Information Commissioner for Queensland* [2006] QCA 267, a "self-representing litigant" may have "difficulty" establishing assessable costs, referring to the High Court decision in *Cachia v Hanes* (1995) 179 CLR 403 at 410-413: at [8].

[26] Although concerned with costs on appeal, the Court of Appeal in *CAR & Anor v Department of Child Safety* [2010] QCA 49 held that "costs" spoken of those and "similar statutory provisions" are given by way of an indemnity, or partial indemnity, "for professional legal costs actually incurred by litigants in bringing or. defending litigation", also referring to *Cachia v Hanes*: at [4], in particular in reference to the costs claimed as set out at [3]. The Court stated that none of the items claimed possessed that character and that, in particular, the High Court decided that "costs" did not include a non-lawyer's own time expended in preparing and conducting litigation: at [4].

[27] Thus, despite the defendants in their submissions seeking, in total, $39,545.50, it is likely that very little of that sum will fall within the correct legal characterization of recoverable "costs".

[28] As contended for by the plaintiff in his submissions, the appropriate person to determine the actual costs is the assessing officer under the *UCPR*.

[29] Since neither side seeks specific orders concerning other types of costs within the purview of Division 1 of Part 2 of Chapter 17A of the *UCPR*, I will simply make the standard order.

Orders to be made

[30] The only order that I will make, given the above circumstances, is:

- The plaintiff pay the defendants' costs of the proceeding to be assessed on the standard basis.