SUPREME COURT OF QUEENSLAND

CITATION:	*Clarkson v. Australia Meat Holdings Pty Ltd* [2002] QSC 347
PARTIES:	**IAN BRUCE CLARKSON** (applicant) **v** **AUSTRALIA MEAT HOLDINGS PTY LTD** **(ABN 14 011 062 338)** (respondent)
FILE NO:	6901 of 2002
DIVISION:	Trial
DELIVERED ON:	30 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2002
JUDGE:	Helman, J.
CATCHWORDS:	COSTS – POWER TO AWARD – whether court has power to award costs to worker in pre-proceeding application under *WorkCover Queensland Act* 1996 *Supreme Court Act* 1995, s 221 *WorkCover Queensland Act* 1996, ss 42, 43, 50-71, 98-131, 250-329, 588 *WorkCover Queensland Amendment Act* 2001
COUNSEL:	Ms C. Heyworth-Smith for the applicant Ms R.M. Treston for the respondent
SOLICITORS:	Murphy Schmidt for the applicant The respondent did not retain a solicitor

[1] This is an application for two principal orders, the second alternative to the first. The first order was sought under s. 305 of the *WorkCover Queensland Act* 1996, and at the hearing the application for it was dismissed by consent. The second order was sought under s. 291 of the Act: the applicant wanted an order that the respondent employer, a licensed self-insurer under part 5 (Employer's Self-Insurance, ss. 98-131) of chapter 2 (Employer's Obligations, ss. 50-71 and 98-131), forthwith issue a conditional damages certificate to him under s. 265 in respect of injuries to his lumbar spine sustained on 6 August 1999 in the course of his employment with the respondent. The application for the second order too was resolved by agreement of the parties when, at the hearing on 2 August 2002, the respondent, by its counsel Ms Treston, undertook to issue the conditional damages certificate by 2.00 p.m. on that day. Having heard submissions on 2 August 2002, I adjourned to a date to be fixed the application for the second order and the applicant's application for an order that the respondent pay his costs of and

incidental to the application. The application for the second order was adjourned of course from an abundance of caution in case the undertaking for some reason was not honoured. The application for the order for costs was adjourned because I wished to give further consideration to it, because it was argued on behalf of the respondent that the court had no power to make an order as to the costs of the application. Ms Treston also argued that even if the court had power to make an order as to the costs of the application I should refuse the order sought. She did not, however, ask for an order for the payment of her client's costs by the applicant. I should record now that there has been no suggestion that the respondent's undertaking was not honoured.

[2] On the costs question I have received further written submissions since the hearing from Ms Heyworth-Smith for the applicant, and Ms Treston.

[3] The argument for the respondent on the question of costs rests upon the provisions of part 11 (Costs, ss. 320-327) of chapter 5 (Access to Damages, ss. 250-329) of the *WorkCover Queensland Act* as it was before the enactment of the *WorkCover Queensland Amendment Act* 2001 because the event which gave rise to the applicant's claim happened before 1 July 2001: s. 588. The scheme of the Act was as I shall describe. Section 253(1) and (3) provided that the categories of people entitled to seek damages for an injury sustained by a worker were limited to four: first, the worker, if the worker had received a notice of assessment from WorkCover stating that the worker had sustained a certificate injury (as to which see s. 42) or that the worker had sustained a non-certificate injury (as to which see s. 43); secondly, the worker, if the worker's application for compensation was allowed and the injury sustained by the worker had not been assessed for permanent impairment; thirdly, the worker, if the worker had not lodged an application for compensation for the injury; and fourthly, a dependant of a deceased worker, if the injury sustained by the worker resulted in the worker's death. The applicant is in the third category of claimant provided for in s. 253. The effect of ss. 257, 260, 263, 266, and 271 was to provide that either division 1 or division 2 of part 11 of the Act applied in relation to costs 'in the claimant's proceeding for damages' (a phrase used in each of those sections) to all claims.

[4] Division 1 (ss. 320-323) of part 11 applied only if the claimant was a worker who had a certificate injury or was a dependant, and division 2 (ss. 324 and 325) applied if the claimant was a worker who had a non-certificate injury. I should add that division 3 (ss. 326 and 327) applied to all claimants, but the provisions of that division are of no relevance to the question before me. Section 321 provided for principles about orders of costs if a court had assessed damages 'in the claimant's proceeding for damages'. Section 322 applied in a case in which WorkCover's liability to the extent of at least seventy-five per cent. was established 'in a proceeding before a court'. Section 323 applied if a party had failed to comply with a provision of chapter 5, but of course only if the claimant was a worker who had a certificate injury or was a dependant. Section 325(1) provided that no order about costs, other than an order allowed under that section was to be made 'in the claimant's proceeding'. Section 325(4) provided that an order about costs 'for an interlocutory application' might be made in certain defined circumstances, but it was common ground, as might have been expected, that this application, being an originating application, could not be regarded as interlocutory.

[5] As I construe the scheme the restrictions on orders for costs provided for in part 11 of chapter 5 applied only in a proceeding for damages by a claimant. Once such a proceeding had been begun, part 11 applied to it. Part 11 constituted a code which restricted the awarding of costs to the circumstances provided for in that part. This application was not a proceeding for damages, but rather an application made prior to, and with a view to, the applicant's beginning a proceeding for damages. Accordingly, in applying for the costs of the application, the applicant can rely on the power conferred on this court by s. 221 of the *Supreme Court Act* 1995, unconstrained by the code provided for in part 11 of chapter 5 of the *WorkCover Queensland Act.*

[6] It was argued on behalf of the applicant that reliance for the power to make an order as to costs could also be placed on s. 291 of the Act which provides that if a party fails to comply with a provision of chapter 5, a court may order the party to comply with the provision, and may make consequential or ancillary orders that may be necessary or desirable in the circumstances of the case. It is arguable that an order for costs in favour of the applicant is an ancillary order of the kind referred to in the section. It is, however, not necessary for me to reach a conclusion on that matter since the applicant can rely on s. 221 of the *Supreme Court Act* 1995.

[7] The application was filed on 29 July 2002. There had been correspondence before that between the solicitors for the applicant and respondent, and by a letter dated 22 July 2002 to the applicant's solicitors, the respondent refused the applicant's request for a conditional damages certificate for the injury in question. Mindful of the imminent expiration of the limitation period, the applicant's solicitors proceeded to file the application. By the morning of the hearing of the application, the respondent had changed its position as I have related. In a letter dated 31 July 2002 to the applicant's solicitors, the respondent had offered to issue a conditional damages certificate provided the application was withdrawn and each party bore his or its own costs. The applicant did not agree to that, but, in a letter dated 1 August 2002 from his solicitors to the respondent, sought the certificate and his costs as agreed or as assessed on the standard basis – adding that if the respondent failed to comply with those requests he would seek his costs on the indemnity basis.

[8] I can see no proper ground for the respondent's refusal of the certificate on 22 July 2002. The applicant was therefore justified in bringing the application when he did and is entitled to have an order for costs. I am not persuaded, however, that he should have them on the indemnity basis. The costs point was one of some complexity the respondent was justified in arguing, I think, and the award of costs to the applicant should therefore be on the standard basis.

[9] The application for the second order sought will be brought to an end by its dismissal, and there will be an order that the respondent pay to the applicant his costs of and incidental to the application on the standard basis.