SUPREME COURT OF QUEENSLAND

CITATION:	*Brown v Marine Contracting Pty Ltd (ACN 010 093 651) & Ors (No 2)* [2012] QSC 345
PARTIES:	**ROBERT BROWN** (plaintiff/applicant) **v** **MARINE CONTRACTING PTY LTD (ACN 010 093 651)** (first defendant) **and** **BOWEN TUG & BARGE PTY LTD (ACN 008 867 565)** (second defendant/first respondent) **and** **STRADBROKE FERRIES LIMITED (ACN 009 725 713)** (third defendant/second respondent)
FILE NO/S:	6844 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	14 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2012
JUDGE:	Peter Lyons J
ORDER:	**1. The applicant have the costs of the application as against the second defendant, to be assessed on the standard basis;** **2. The costs of the plaintiff's application against the third defendant, limited to one hearing day, be costs in the cause**
CATCHWORDS:	PROCEDURE – COSTS – JURISDICTION – GENERAL – where the plaintiff's application for the extension of the limitation period for the plaintiff's action for damages for personal injury under the *Limitation of Actions Act 1974* (Qld) was granted – where the plaintiff has sought costs of the application – where the application for costs is opposed by the second defendant on the ground there is no power to make an order for costs against it – where the third defendant submitted that, if there is discretion to order costs, no order should be made against it – whether s 316 (4) of the *Workers'*

Compensation and Rehabilitation Act 2003 (Qld) applies to the plaintiff's application so as to exclude the Court's general discretion to award costs under r 681 of the *Uniform Civil Procedure Rules 1999*

Workers' Compensation and Rehabilitation Act 2003 (Qld), ss 236, 240, 316, 668
Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010 (Qld)
Uniform Civil Procedure Rules 1999, r 681

Clarkson v Australian Meat Holdings Pty Ltd [2003] 2 Qd R 122, cited
Edmunds v D Dunn Industries Pty Ltd (No 2) [2002] 2 Qd R 128, cited
Ex parte Britt [1987] 1 Qd R 221, cited
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 748, cited
Hall v Nominal Defendant (1966) 117 CLR 423, followed
Karaka v Woolworths Ltd, unreported, Daubney J, 15 June 2009, cited
Kidd v Toll North Pty Ltd [2012] QSC 220, cited
Knight v F.P. Special Assets Ltd (1992) 174 CLR 178, followed
Mansfield v Director of Public Prosecutions (WA) (2006) 226 CLR 486, cited
Woolworths Ltd v Rodionov [2011] QDC 169, cited

COUNSEL: K Wilson SC for the plaintiff
N Lythall *(sol)* for the second defendant
C Harding for the third defendant

SOLICITORS: McCowans for the plaintiff
Bruce Thomas Lawyers for the second defendant
Thynne & Macartney for the third defendant

[1] On 22 August 2012 I made an order for the extension of the limitation period for the plaintiff's action for damages for personal injury under the *Limitation of Actions Act 1974* (Qld) (*Limitation Act*). The plaintiff has sought the costs of the application. The application for costs is opposed by the second defendant, on the ground that there is no power to make an order for costs against it. The third defendant additionally submits that, if there is a discretion to order costs, no order should be made against it.

Background

[2] The plaintiff was injured on 22 September 2004. At that time, he was employed by the second defendant. He commenced the present action on 21 July 2008. That happened, apparently, on the basis that the claim against the second defendant was regulated by the *Personal Injuries Proceedings Act* 2002 (Qld) (*PIPA*). It was subsequently recognised that the plaintiff's claim against the second defendant was regulated by the *Workers' Compensation and Rehabilitation Act* 2003 (Qld)

(*WCRA*). I was told that it was common ground that a compulsory conference under the *WCRA* had not been held by 1 July 2010.

[3] The costs provisions of the *WCRA* were amended by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act* 2010 (Qld) (*2010 Amendment*), relevant provisions of which came into force on 1 July 2010. They included amendments to s 316, and the introduction of s 318C, potentially relevant to the costs application.

Relevant legislation

[4] There was debate about whether the *2010 Amendment* contained the provisions regulating the power to make orders for costs in the present proceedings. That Act introduced s 668 of the *WCRA*. Section 668 includes the following:

> "**668 Provisions about conferences, offers and costs**
>
> (1) This section applies for the application of each provision as amended or inserted by a relevant amending section in relation to a claim made by a claimant and in existence immediately before the commencement of the relevant amending section.
>
> (2) The provision as amended or inserted has effect in relation to the claim if, before the commencement of the relevant amending section –
>
> (a) the claimant has not started proceedings in a court for the claim; and
>
> (b) the compulsory conference required under chapter 5, part 6 has not been held."

[5] Subsection (3) defines "relevant amending section" to include the sections which introduced s 316 and s 318C.

[6] For the plaintiff, it was submitted that the legislation as amended by the *2010 Amendment* was the relevant version of the legislation. For the second defendant, the contrary view was advanced.

[7] The legislation itself specifies claims to which the amended legislation applies. In the present case, the proceedings had commenced before the *2010 Amendment* came into force. The consequence is that the provisions as amended by the *2010 Amendment* were not the relevant provisions.

[8] The only alternative position advanced at the hearing was that the legislation as it stood before that amendment was the applicable legislation. I propose to proceed on that basis[1].

Power to order costs

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[1] Subsequent references are to reprint 4A of the *WCRA*.

[9] Division 2 of pt 12 of ch 5 applies if a claimant is a worker with a WRI of less than 20 percent, or no WRI[2]. It was common ground that the plaintiff had a WRI of less than 20 percent.

[10] Division 2 includes s 316, as follows:

> "**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.
>
> (4) An order about costs for an interlocutory application may be made only if the court is satisfied that the application has been brought because of unreasonable delay by 1 of the parties.
>
> (5) If an entity other than the worker's employer or the insurer is joined as a defendant in the proceeding, the court may make an order about costs in favour of, or against, the entity according to the proportion of liability of the defendants and the justice of the case.
>
> (6) The court may make an order for costs against the worker's employer or the insurer under subsection (5) only if -
>
> (a) the order is in favour of the entity; and
>
> (b) the worker's employer or the insurer joined the entity as a defendant."

[11] The second defendant submitted that the application for the extension of the limitation period was an interlocutory application; and that s 316(4) had the consequence that an order for costs could be made only if the court was satisfied the application had been brought because of unreasonable delay by one of the parties.

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[2] See s 315 of the *WCRA*.

The plaintiff submitted that s 316(4) applied only to interlocutory applications made in a claimant's proceeding in court for damages; and that its application for an extension of time was, in substance, not such an application.

[12] It may be accepted that the application is interlocutory in character, as it does not finally determine the rights of the parties[3]. The plaintiff's submissions depend upon the propositions that s 316(4) applies only to interlocutory applications which are made "in the claimant's proceeding", as stated in s 316(1); that the proceeding referred to is the action for the recovery of damages; and that an interlocutory application is one "in the claimant's proceeding" if, as a matter of substance, it is an application which, by its nature, forms part of the progression from claim to final judgment in that proceeding.

[13] It seems to me that the first of these propositions is made out. Section 316(4) can not sensibly be read in isolation from s 316(1). Otherwise, its language is, on its face, broad enough to encompass any interlocutory application made in a court. It seems to me that s 316(4) was plainly not intended to have this effect. Rather, the subsection is one of a number of provisions which spell out the types of orders that can be made about costs "in the claimant's proceeding". The context provided by the balance of s 316 provides supports this conclusion.

[14] In my view, the second proposition is also made out. To identify the basis for this conclusion, it is necessary to refer to some other provisions of the *WCRA*. The *WCRA* provides, in chapter 3, a statutory right to compensation for a worker who suffers injury; and regulates, in chapter 5, the worker's right to bring an action for damages for the injury. A number of provisions of chapter 5 warrant closer consideration.

[15] Thus div 1 of pt 2 of ch 5 sets out limitations on the persons entitled to seek damages for injuries to a worker. Division 2 states the consequences, relating to costs, of seeking damages, in s 240, which includes the following:

> "**240 Consequences, to costs, of seeking damages**
> (1) If the claimant is a worker and the claimant's notice of assessment states that the claimant's WRI is 20% or more, part 12, division 1 applies in relation to costs in the claimant's proceeding for damages.
>
> (2) If the claimant is a worker and chapter 3, part 3, division 5 applies to the worker, part 12, division 1 applies in relation to costs in the claimant's proceeding for damages.
>
> (3) If the claimant is a worker and the claimant's notice of assessment states that -
> (a) the claimant's WRI is less than 20%; or
> (b) the claimant has an injury that does not result in any WRI of the claimant; part 12, division 2 applies in relation to costs in the claimant's proceeding for damages.

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[3] See *Hall v Nominal Defendant* (1966) 117 CLR 423, 440; *Ex parte Britt* [1987] 1 Qd R 221, 226-227

(4) If the claimant is a dependant, part 12, division 1 applies in relation to costs in the claimant's proceeding for damages."

[16] Subsection (3) is the relevant provision in the present case. Its relationship to s 316 of the *WCRA* is self-evident. It is difficult to think that the reference to "the claimant's proceedings" in s 316(1) is a reference to anything other than "the claimant's proceeding for damages" referred to in s 240(3).

[17] Additional support for this conclusion is again to be found in the context of s 316 taken as a whole, the other provisions of which plainly deal with a claimant's proceeding for damages.

[18] Much of ch 5 is directed towards ensuring that certain things happen before an action for damages is commenced. Thus the legislation generally requires that there be a notice of assessment for the worker, before the action commences[4]. In addition, the Act specifics procedures to be undertaken before an action is commenced, by way of notice of claim and response, including to resolve the claim by way of compulsory conference[5]. Thus the chapter distinguishes between, on the one hand a "claim for damages"[6]; and, on the other, "the claimant's proceeding for damages"[7]; "the claimant's proceeding"[8]; "a proceeding in a court for damages"[9]; and "a court proceeding"[10]. The context provided by the Act, particularly by ch 5, strongly suggests that a distinction is to be drawn between the claim, and the "claimant's action for damages, by way of a proceeding in court". It seems to me that the general context provided by ch 3 and ch 5 supports the conclusion that s 316(4) applies to an interlocutory application in the claimant's proceeding in a court for damages.[11]

[19] On balance, I accept the correctness of the third proposition. It might be observed that, as has been mentioned, the *WCRA* is concerned to regulate certain steps to be taken before an action is commenced by a worker against an employer or the employer's insurer; as well as the action itself. In doing that, the *WCRA* generally excludes the provisions of the *Limitation Act* from its field of operation. Thus, s 236 provides that provisions of the *WCRA* do not affect the commencement of the period of limitation specified by the *Limitation Act*; which occurs as if the *WCRA* had not been enacted. The exception is found in s 302, which permits a claimant to bring a proceeding for damages outside the limitation period if certain things for which the *WCRA* makes provision have occurred.

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4 See s 237(1)(a)(i); s 250; s 237(1)(c) and s 254(1)(c); s 237(1)(d) of the *WCRA*. There are specific provisions dealing with urgent proceedings

5 See generally pt 5 and pt 6 of ch 5 of the *WCRA*

6 See for example s 273

7 See s 240

8 See s 316(1)

9 See s 275(1) and s 295. A similar distinction appears in s 668.

10 See s 294

11 There has been a difference of judicial opinion on this question in statutory settings which are very similar, but not identical, to that at present under consideration: See *Edmunds v D Dunn Industries Pty Ltd (No 2)* [2007] 2 Qd R 128; *Karaka v Woolworths Ltd*, Daubney J, 15 June 2009 unreported; *Clarkson v Australian Meat Holdings Pty Ltd* [2003] 2 Qd R 122; *Kidd v Toll North Pty Ltd* [2012] QSC 220; *Woolworths Ltd v Rodionov* [2011] QDC 169, where McGill DCJ referred to the earlier cases.

[20] The power to extend the limitation period, invoked in the earlier hearing in this case, is left intact by the provisions of the *WCRA*. Logically, its exercise is something anterior to a claimant's proceeding for damages, costs in which are regulated by s 316. A conclusion that s 316(4) applies in the present case would make its application somewhat arbitrary, depending upon whether an application for an extension of the limitation period was made before a claimant commenced a proceeding for damages; or in a separate proceeding, after the proceeding for damages had commenced; or in the proceeding for damages itself.

[21] The court has a general discretion to award costs[12]. For a grant of power to a court, "the most liberal construction" is favoured[13]. It would seem to follow that a narrower, rather than a broad, construction should generally be favoured of a statutory provision limiting the scope of such a power.

[22] Further, an interlocutory application made in a claimant's proceeding for damages regulated by ch 5 of the *WCRA*, directed to the progress of the proceeding, is one that is made after the pre-proceeding steps under the *WCRA* have been carried out. It is not surprising that the legislature would impose special rules for such an application. However, that consideration does not apply to an application made under the *Limitation Act*, such as the present one.

[23] I am therefore of the view that s 316(4) of the *WCRA* does not deny the court the power to make an order for costs under r 681 of the UCPR.

Costs application against second defendant

[24] The only basis on which the second defendant resisted the plaintiff's application for costs was that there was no jurisdiction to make such an order. It did not contest the submissions made on behalf of the plaintiff in support of his application. In those circumstances, I am prepared to accept the plaintiff's submissions.

[25] To that might be added the fact that it seemed to me that some of the matters advanced by the second defendant were barely arguable; and its opposition to the application for an extension of the limitation period was conducted in a way which unduly protracted the hearing, contrary to its implied undertaking, found in r 5(3) of the UCPR.

[26] Accordingly, I propose to order that the plaintiff have its costs of its application against the second defendant for the extension of the limitation period.

Application for costs against third defendant

[27] The third defendant's submissions were, to some extent, qualified by reference to the prospect that the second defendant's submission as to jurisdiction would be upheld. They also made reference to the fact that the application was the result of orders made without reference to it. It is not necessary to consider those matters further.

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12 See r 681 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*).

13 *Knight v F.P. Special Assets Ltd* (1992) 174 CLR 178, 205; and see, for example, *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [75]-[76]; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [10]

[28] For the third defendant, it was submitted that its opposition to the application was not unreasonable. Had the hearing been limited to the matters raised by it, the application could easily have been completed in one day, rather than two. In such cases, costs are made costs in the cause, or reserved.

[29] In my view, there is some force in the submissions made on behalf of the third defendant. It seems to me that an appropriate order to be made in respect of the costs of the plaintiff's application as against the third defendant is that those costs, limited to a one day hearing, be costs in the cause.

Conclusion

[30] I propose to order that the applicant have the costs of the application as against the second defendant, to be assessed on the standard basis; and that the costs of the plaintiff's application against the third defendant, limited to one hearing day, be costs in the cause.