

SUPREME COURT OF QUEENSLAND

CITATION: *Thompson v Cavalier King Charles Spaniel Rescue (Qld) Inc*
[2022] QSC 300

PARTIES: **JAMES BOYD THOMPSON**
(plaintiff)

v

**CAVALIER KING CHARLES SPANIEL RESCUE (QLD)
INC**
(first defendant)

AND

~~**LAURENCE JOHN PITTS**~~
(second defendant)

AND

KATHERINE LEPELAAR
(third defendant)

AND

~~**BEVERLEY ANN HUSH**~~
(fourth defendant)

AND

~~**CAROLYN SHEPHERD**~~
(fifth defendant)

AND

~~**ELIZABETH (LIZA) MCMILLAN**~~
(sixth defendant)

AND

~~**SHIRLEY SMITH**~~
(seventh defendant)

FILE NO: 9148 of 2013

DIVISION: Trial Division

PROCEEDING: Application filed 15 March 2022.

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 23 December 2022

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2022

JUDGE: Jackson J

ORDER: **1. The cost assessor’s certificate dated 18 December 2020 be corrected by adding “order 33 of” before “the Orders” at paragraph 4.**

2. The Registrar’s Order for Costs dated 11 January 2021 be corrected by adding “order 33 of” before “the order”.

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – CORRECTION UNDER SLIP RULE – COSTS ORDER – where there were orders in favour of the applicant for costs of an application and costs of the proceeding – where the applicant applied for orders for a costs assessment and for appointment of a costs assessor– where the application was not confined to the costs of the application – whether the applicant’s solicitor made a mistake in the form of the application – whether the slip rule applies to mistakes made by legal representatives

Uniform Civil Procedure Rules 1999 (Qld) r 388, r 686, r 710, r 713, r 737, r 740

Gallagher v Boylan (2013) 1 Qd R 204

Raybos Australia Pty Ltd v Tectran Corp Pty Ltd (No 2) (1988) 62 ALJR 151.

COUNSEL: The plaintiff appeared on his own behalf
C Templeton for the former sixth defendant

SOLICITORS: The plaintiff appeared on his own behalf
ACLG Lawyers for the former sixth defendant

JACKSON J:

- [1] This is an application by the former sixth defendant against the plaintiff to vary a costs assessor’s certificate dated 18 December 2020¹ (“December 2020 certificate”) and a corresponding order for costs dated 11 January 2021.² The certificate assessed costs payable by the respondent plaintiff to the [former] sixth defendant applicant pursuant to the orders of Mullins J dated 12 February 2016 in an amount which is now settled by the order. The order is that the plaintiff pay the [former] sixth defendant’s costs pursuant to the order of the Court dated 12 February 2016 and the certificate of the costs assessor assessed at \$69,649.19 (“January 2021 costs order”).

¹ *Uniform Civil Procedure Rules 1999 (Qld)*, r 737.

² *Uniform Civil Procedure Rules 1999 (Qld)*, r 740.

- [2] The variation sought by the applicant is that each of the December 2020 certificate and the January 2021 costs order be varied by confining any reference in them to the order of the Court dated 12 February 2016 to order 33 of the orders made on that day.
- [3] On 12 February 2016, Mullins J made orders including the following numbered paragraphs:
- “33. The plaintiff pay the costs of the first and sixth defendants of the application filed on 27 January 2016 on an indemnity basis.
- (“Order 33”)
- ...
35. The plaintiff otherwise pay the costs of the proceeding of the fifth, sixth and seventh defendants on the standard basis.”
- (“Order 35”)
- [4] On 2 April 2020, the applicant served a costs statement on the respondent under cover of an email dated 2 April 2020 from the applicant’s solicitor to the respondent. The email drew attention to Order 33 and attached a costs statement drafted and settled by a costs assessor on the indemnity basis. The costs statement said that the authority for the assessment of the costs was the order of the Court by Mullins J made on 12 February 2016. However, its subject was confined to the costs ordered to be paid under Order 33.
- [5] On 13 July 2020, the applicant filed an application against the plaintiff for orders by the Registrar that a costs assessment in respect to the costs order against the plaintiff to the benefit of the sixth defendant ordered by Mullins J dated 12 February 2016 be completed,³ and that the Registrar appoint a costs assessor⁴ to assess the costs ordered by Mullins J dated 12 February 2016 and by the costs statement served on the plaintiff by the sixth defendant on 2 April 2020 (“July 2020 application”). The application was not confined to Order 33.
- [6] On 5 August 2020, the Registrar ordered that a costs assessor be appointed to conduct the assessment of the sixth defendant’s costs payable by the plaintiff pursuant to the order of Mullins J made on 12 February 2016 at a nominated hourly rate (“August 2020 order”).⁵ The August 2020 order was not confined to Order 33.
- [7] On 24 September 2020, the appointed costs assessor pointed out that the costs statement did not include the costs that would be assessable under Order 35. He invited the [former] sixth defendant to submit a compliant costs statement for those items within 14 days to which objection could be made by the plaintiff within a further 14 days.

³ *Uniform Civil Procedure Rules 1999* (Qld), r 710; curiously, r 686(a), provides that costs may be assessed without an order if the costs have been ordered to be paid.

⁴ *Uniform Civil Procedure Rules 1999* (Qld), r 713(2)(a)

⁵ *Uniform Civil Procedure Rules 1999* (Qld), r 713(2)(b).

- [8] On 26 September 2020, the applicant’s solicitor responded to the effect that the delivery of a costs statement for Order 35 could not proceed.
- [9] On 7 October 2020, the appointed costs assessor renewed his invitation to submit a costs statement for Order 35.
- [10] On 8 October 2020, the solicitor for the applicant sent an email to the appointed costs assessor attaching submissions in respect of the costs assessment. Those submissions stated that the applicant had chosen to engage the benefit of Order 33 without engaging the benefit of Order 35 and submitted that did not strip the applicant of any benefit of Order 33 nor prevent further recovery or reliance on Order 35.
- [11] The December 2020 certificate and the January 2021 costs order followed.
- [12] On 7 December 2021, the applicant’s solicitor sent an email to the plaintiff referring to Order 35 and attaching by way of service a costs statement for Order 35.
- [13] Subsequently, the applicant applied for an order for a costs assessment and the appointment of a costs assessor for Order 35 (“Order 35 application”).
- [14] On 21 February 2022, the Registrar refused the Order 35 application on the basis that the Court record comprised in the August 2020 order, the December 2020 costs assessor’s certificate and the January 2021 costs order showed that the costs of the applicant pursuant to the order of Mullins J made on 12 February 2016 had already been assessed.
- [15] The basis of the application to vary the December 2020 certificate and January 2021 costs order so as to confine them to Order 33 is either that a clerical mistake was made in the certificate and order that resulted from an accidental slip or omission⁶ (“slip rule”), or that the order does not reflect the Court’s intention at the time it was made.⁷
- [16] For application of the slip rule, it is essential to identify the suggested mistake or error. In this case, it was a legal error made by the applicant’s solicitor that an order for a costs assessment and appointment of a costs assessor for could be made “in respect to the costs ... ordered by the Honourable Justice Mullins so dated 12 February 2016” for Order 33 without requiring an assessment of Order 35 to proceed at the same time. The application of 13 July 2020 sought the following orders:
- “1 That a costs assessment be completed pursuant to rule 710 of the *Uniform Civil Procedure Rules* 1999 (Qld), in respect to the costs order against the plaintiff to the benefit of the sixth defendant, ordered by the Honourable Justice Mullins so dated 12 February 2016;
 2. That the Registrar of this Honourable Court appoint a costs assessor to assess the costs under rule 713 of the *Uniform Civil Procedure Rules* 1999 (Qld), in respect to the costs

⁶ *Uniform Civil Procedure Rules* 1999 (Qld), r 388.

⁷ *Uniform Civil Procedure Rules* 1999 (Qld), r 667(2)(d).

order against the plaintiff, ordered by the Honourable Justice Mullins so dated 12 February 2016, and the costs statement served on the plaintiff by the sixth defendant on 2 April 2020; ...”

- [17] That was a mistake, because if the applicant wished to confine the orders for assessment and appointment of a costs assessor, and for the certificate of the costs assessor and the consequential costs order, to Order 33, the application of 13 July 2020 should have been made only in respect of the costs ordered to be paid by Order 33, but it was not. After the August 2020 order was made for the assessment and appointment of the assessor, the mistake was persisted in even though in effect it was drawn to the attention of the applicant’s solicitors before the costs assessor completed the assessment and in the face of the costs assessor’s invitation to serve a costs statement for the Order 35 costs.
- [18] Cognate rules to the Queensland slip rule that apply in the case of clerical mistakes in an order or certificate have been interpreted many times. The authorities that inform the rule’s operation include a statement that the rule extends to authorise an omission from an order or judgment resulting from the inadvertence of a party’s legal representative.⁸ Although the rule must be understood in the context of the fundamental principle favouring finality in litigation,⁹ the Court has power to correct an error of the kind described in the rule even where the error arose from the inadvertence of a party’s legal representative.¹⁰
- [19] Accordingly, in my view, the Court has power to make the orders applied for as clerical mistakes in an order or certificate that resulted from an accidental slip or omission.
- [20] In the present circumstances, there is no reason why such an order should not be made, if there is jurisdiction, apart from the persistence of the applicant’s lawyers in the error after being alerted to its existence in September 2020. The respondent has not been in any doubt that the application for a costs assessment originally made was intended to be for Order 33, because the email that covered the costs statement served on 2 April 2020 clearly identified that paragraph of Mullins J’s order. That point was reinforced on 7 December 2021, by the email that covered service of the costs statement for Order 35. There was delay from July 2020 to December 2021 in the applicant proceeding upon Order 35, but it does not on the evidence appear to have caused any actual prejudice to the respondent.
- [21] In my view, the application should be allowed.
- [22] The applicant has not applied for an order for costs. That is appropriate. The application was only made necessary because the applicant’s lawyers made the mistake of not confining the July 2020 application for an order for a costs assessment of Order 33 in the first place.

⁸ *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd (No 2)* (1988) 62 ALJR 151, 152.

⁹ *Gallagher v Boylan* (2013) 1 Qd R 204, 213 [18].

¹⁰ *Gallagher v Boylan* (2013) 1 Qd R 204, 214 [20].