

SUPREME COURT OF QUEENSLAND

CITATION: *National Australia Bank Limited v Bluanya Pty Ltd & Anor (No 2)* [2018] QSC 93

PARTIES: **NATIONAL AUSTRALIA BANK LIMITED**
ABN 12 004 044 937
(plaintiff)

v

**BLUANYA PTY LTD ACN 113 609 626 AS TRUSTEE
FOR THE WILLIAMS FAMILY TRUST NO 2**
(first defendant)

and

TANYA LYNETTE WILLIAMS
(second defendant)

FILE NO/S: BS No 7979 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 May 2018

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Brown J

ORDER: **The order of the Court is that:**

- 1. The costs of the application for summary judgment be reserved; and**
- 2. The defendants pay the plaintiff's costs of the application to strike out the defence and counterclaim on a standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the plaintiff applied for summary judgment – where summary judgment was refused – where the plaintiff applied to strike out the defence and counterclaim – where the strike out application was granted – where the Court determined that it was in the interests of the future conduct of the proceedings that the defendants file a

fresh defence and counterclaim – where the defendant submits that each party bear its own costs – where the plaintiff applies for its costs of the applications on a standard basis – whether costs should follow the event

National Australia Bank Ltd v Bluanya Pty Ltd & Anor
[2018] QSC 49

Queensland Rail v Amaca (No 2) [2011] QSC 317

COUNSEL: M S Trim for the plaintiff
The second defendant appeared on her own behalf

SOLICITORS: Gadens Lawyers for the plaintiff
The second defendant appeared on her own behalf

- [1] On 12 March 2018, the Court made orders refusing an application for summary judgment but striking out the defence and counterclaim. The Court determined that the whole of the defence and counterclaim should be struck out on the basis that the plaintiff had been successful in its complaints about a significant number of the paragraphs and that it was in the interests of the future conduct of the proceedings that the defendants file a fresh defence and counterclaim.
- [2] I invited the parties to make further submissions as to costs in light of my reasons.
- [3] The plaintiff has applied for its costs of the summary judgment and the strike out applications on a standard basis to be paid by the defendant.
- [4] The defendant requests that the Court order that the parties bear their own costs in relation to the summary judgment hearing given that the application was ultimately unsuccessful. It was also submitted on behalf of the defendants that consideration be made of the effort gone to in obtaining disclosure, which has been resisted by the plaintiff to date. The defendants also contend that given the cooperative manner in which the defendants have acted, the plaintiff should bear its own legal costs.
- [5] In relation to the strike out application, the plaintiff was largely successful in the application which it brought. The defects in the pleadings which resulted in the Court being satisfied that allegations should be struck out cannot be attributed to a lack of disclosure. The defendants had notice of the plaintiff's complaints about the defence and counterclaim and had previously consented to an order that they replead the defence

and counterclaim in an earlier application, which was the pleading under consideration. None of the other matters raised by the defendants justify a departure from the usual rule that costs follow the event.

- [6] The plaintiff does not seek the costs of the application to strike out on an indemnity basis but rather on a standard basis. Given that the plaintiff has been largely successful in the strike out application, there is no reason for a departure from the ordinary rule that costs follow the event and I order that the first and second defendant pay the costs of the plaintiff's application to strike out the defence and counterclaim on a standard basis.
- [7] In relation to summary judgment the plaintiff was not successful and the application was dismissed. It is true, as was submitted by the plaintiff, that the Court found that the plaintiff had met its threshold for summary judgment and was prima facie entitled to summary judgment. The Court was ultimately not satisfied that the case was one where it was appropriate to grant summary judgment. One of the factors that weighed against the grant of summary judgment was that matters raised in the counterclaim could arguably give rise to a defence to the plaintiff's claim.¹ The Court did not accept, insofar as it was contended by the plaintiff, that there was no evidential basis for the pleading by the second defendant² that the defendant had otherwise provided some factual basis for the allegations made. The Court did however consider, in relation to some of the contentions of lack of evidence by the plaintiff, that there was some prospect that disclosure may supplement the evidential basis of the second defendant's claim. The plaintiff submits that the second defendant has been provided with a further opportunity to plead a case that she would have been able to avoid the home loan facility being in default by taking particular steps and, given that indulgence, the plaintiff should be awarded its costs. That 'indulgence' was however based on matters raised in the counterclaim which was not the subject of the summary judgment.
- [8] While I was not satisfied that summary judgment should be granted, as was noted by Boddice J in *Queensland Rail v Amaca (No 2)*,³ resolution of the costs involve a consideration of all the circumstances, including that such an application may fail even

¹ See *National Australia Bank Ltd v Bluanya Pty Ltd & Anor* [2018] QSC 49 at [50].

² See *National Australia Bank Ltd v Bluanya Pty Ltd & Anor* [2018] QSC 49 at [50].

³ [2011] QSC 317 at [7]; see also *State of Queensland v Nixon* [2002] QSC 296 at [6]-[7].

though the applicant has good prospects of ultimately succeeding in the action. Such a consideration may justify a conclusion that the appropriate costs order in the circumstances is that the costs be reserved or made the parties' costs in the cause. While the second defendant has been provided with an opportunity to replead, the defendants are to pay the plaintiff's costs of the strike out application. The refusal to grant summary judgment was not solely on the basis of granting the second defendant an indulgence.⁴

[9] I do not consider that the plaintiff should be presently awarded its costs of the application of the summary judgment, but I do consider that the circumstances are such that it is appropriate that the costs of the plaintiff's application await determination of the final proceedings. In the circumstances, I consider that the appropriate order to be made is that the costs of the summary judgment application be reserved.

[10] Accordingly I make the following orders:

- (1) That the costs of the application for summary judgment be reserved; and
- (2) That the defendants pay the plaintiff's costs of the application to strike out various paragraphs of the defence and counterclaim on a standard basis.

⁴ Cf *Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd (No 3)* [2016] QSC 150 at [6].