

SUPREME COURT OF QUEENSLAND

CITATION: *Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd & Ors (No 2)* [2018] QSC 129

PARTIES: **BIRBILIS BROS PTY LTD (ACN 115 942 311)**
(plaintiff)
v
CHUBB FIRE AND SECURITY PTY LTD
(ACN 000 067 541)
(first defendant)
and
ASSETINSURE PTY LTD (ACN 066 463 803)
(second defendant)
and
AAI LIMITED (ACN 005 297 807)
(third defendant)

FILE NO/S: BS 9882 of 2013

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 1 June 2018

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Brown J

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

- 1. Sixty per cent of the costs of the application of 10 May 2017 be the plaintiff's costs in the proceedings.**
- 2. There be no order as to costs in respect of the application of 21 June 2017.**
- 3. The costs of the applications of 26 June 2017 be the plaintiff's costs in the proceeding.**
- 4. There be no order as to the costs of the application of 30 June 2017.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – where the plaintiff was granted leave to file the fifth further amended statement of claim – where the fifth further amended statement of claim was subsequently amended – where leave was opposed by the defendants – where the first

defendant applied for security for costs – where the defendants made applications for a permanent stay or dismissal – whether costs should follow the event for each of the applications –whether any order required as to amendments to the fifth further amended statement of claim

Uniform Civil Procedure Rules 1999 (Qld), r 378, r 692(2)

COUNSEL: R Bain QC with M Hodge QC for the plaintiff
P Franco QC with C Wilson for the first defendant
S Couper QC with J Sweeney for the third defendant

SOLICITORS: Piper Alderman for the plaintiff
Wotton & Kearney for the first defendant
Carter Newell for the third defendant

- [1] Following the delivery of reasons on 15 January 2018 in respect of five applications, I invited further submissions to be made as to costs. The parties provided those submissions on 9 March 2018. I set out my orders and reasons.

Overview of proceedings

- [2] The history of the proceedings has been set out in the reasons of 15 January 2018.
- [3] Applegarth J’s order of 31 March 2016 provided that while Birbilis had to obtain leave to amend the fifth further amended statement of claim, if the defendants, Chubb Fire and Security Pty Ltd (**Chubb**) and AAI Limited (**Vero**) consented to such leave, Birbilis had leave to file the draft. His Honour ordered a stay of proceedings pending various costs being paid. That order had not been lifted when the hearing of this matter occurred. By an order of 23 March 2017, Birbilis was given leave to deliver any draft fifth further amended statement of claim and had to seek leave to make the amendments by filing and serving any application for leave to amend, to be heard in the week of 22 May 2017.
- [4] An application for leave to amend was filed by Birbilis on 10 May 2017. Leave was opposed by both defendants. On 21 June 2017, Chubb filed an application for security for costs. On 26 June 2017, Vero filed an application to have the proceedings dismissed for want of prosecution or a permanent stay. On 17 July 2017, Chubb filed an application to permanently stay Birbilis’ claim for lost profits.

- [5] Ultimately, Birbilis was given leave to file the fifth further amended statement of claim, subject to the provision of some particulars and pleading some additional material facts. Subsequent to the hearing, including for reasons separate from the issues determined by me, Birbilis amended the fifth further amended statement of claim twice before leave was granted on 23 February 2018. Orders were made in respect of the other applications on 15 January 2018.

Parties' contentions as to costs in respect of the applications heard on 17 July 2017

- [6] Birbilis submits that the appropriate order is that the defendants, Chubb Fire and Security Pty Ltd (**Chubb**) and AAI Limited (**Vero**), pay all or part¹ of Birbilis' costs of the applications heard on 17 July 2017, on the basis that it enjoyed overall success. It submits that alternatively, if the Court formed the view that the parties had mixed success on their applications, the Court could award a proportion of Birbilis' costs. It further submitted that if the Court wished to ensure that the parties progressed the matter without distraction towards a trial, the appropriate order is to defer enforcement of the said costs order in favour of Birbilis or that the costs of the applications be Birbilis' costs in the proceedings.
- [7] Chubb submits that the appropriate order is that the costs of all applications involving Chubb's costs be costs in the proceedings given the varying degrees of success of the parties and the circumstances leading to leave being given for the fifth further amended statement of claim.²
- [8] Vero submits that Birbilis should pay Vero's standard costs on Birbilis' application for leave to amend filed on 10 May 2017, because it failed to obtain the relief it sought in that application. It contends there should be no order as to costs on Vero's cross-application for an order that the proceedings be dismissed for want of prosecution, as that was a reasonable response to the application for leave and there were no significant costs incurred by either party by the maintenance of that cross-application.

¹ If the court considers that Birbilis had mixed success.

² While they used the term "costs in the cause" the more common terminology under the *Uniform Civil Procedure Rules 1999* (Qld) is "costs in the proceedings".

Relevant Principles

- [9] Jackson J in *Mio Art Pty Ltd v Macequest Pty Ltd (No 2)*,³ reiterated the relevant approach to costs in light of the provisions of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)*. Rule 681 of the *UCPR* sets out the general position that costs are in the discretion of the Court, but follow the event, unless the Court orders otherwise. Rule 684 provides for an order to reflect the success of particular parties in respect of separate events or issues decided in the proceedings.⁴
- [10] This matter has been delayed significantly since the first trial was adjourned. In formulating the appropriate orders as to costs, I consider that it is appropriate that the matter progress towards trial without further distraction with respect to disputes as to costs in relation to these applications, while ensuring appropriate costs orders are made.⁵

Costs of the application for leave to amend the fifth further amended statement of claim

- [11] While Birbilis was ultimately successful in obtaining leave, it was leave contingent on it having to address three relatively minor issues.⁶ The fifth further amended statement of claim upon which I made my ruling, however, was amended from that which was attached to the application for leave in May 2017 prior to the day of hearing, including making some amendments which addressed some of the matters raised by the defendants in their outlines of argument. While Birbilis enjoyed success insofar as it obtained leave, its success was limited insofar as leave was subject to it having to address the matters outlined in the reasons. The defendants' opposition was therefore warranted to some extent. Further, the fifth further amended statement of claim which was ultimately given leave was amended subsequently on two occasions by Birbilis.
- [12] While Vero submits that it should obtain its costs of the application for leave, it was largely unsuccessful in its opposition. Similarly, Chubb was largely unsuccessful in its opposition to leave being given. Birbilis was not however entirely successful in relation

³ [2013] QSC 271.

⁴ At [25]; In relation to r 684 see also *BHP Coal Pty Ltd v O&K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [7].

⁵ *Sochorova v Commonwealth of Australia* [2012] QCA 152 at [24] to [25].

⁶ [125] and [126] of reasons.

to this application. Given that and the fact that the fifth further amended statement of claim was amended prior to the hearing of the application and amended further after the application for leave was filed, including for reasons not the subject of the decision of 15 January 2018, I do not consider Birbilis is entitled to all of its costs of the application. I consider that the appropriate costs order is that sixty per cent of Birbilis' costs of the application of 10 May 2017 be Birbilis' costs in the proceedings.

Costs of the applications for permanent stay or dismissal

[13] Chubb's application of 17 July 2017 sought a permanent stay of the claim for lost profits if leave was not granted. That was not separately addressed by Birbilis in its submissions and was addressed in the context of Chubb's opposition to leave to amend. As such, no further costs order is appropriate and I make no order as to costs in respect of the application of 17 July 2017.

[14] As is evident from the reasons given on 15 January 2018, the application made by Vero extended beyond the matters raised in opposition to leave being granted and required Birbilis to respond to those matters and was subject to separate consideration in the judgment. I am not satisfied that no additional costs were incurred by Birbilis in relation to the application. In relation to Vero's application of 26 June 2017, Vero was not successful in any respect of its application and there is no reason why costs should not follow the event.

[15] I order that the costs of the applications filed on 26 June 2017 by Vero be Birbilis' costs in the proceedings.

Security for costs

[16] On 21 June 2017, Chubb filed an application for security for costs. On 11 July 2017, Birbilis offered to give an undertaking. Ultimately Chubb's application for security for costs was dismissed subject to undertakings being given in the form offered on 11 July 2017. While there was one issue that was clarified at the hearing in terms of the deed poll and when costs are "incurred", that argument did not form any significant part of the contentions of Chubb.

- [17] As is evident from the reasons of 15 January 2018, it was appropriate for Chubb to file the application for security for costs. Chubb did not however succeed in persuading the Court that it should have further security than the undertakings offered by Birbilis on 11 July 2017. In the circumstances, the appropriate order is that there should be no order as to costs in respect of the application of 21 June 2017.

Application to lift the stay order by Applegarth J on 31 March 2016

- [18] Chubb at the hearing indicated that it did not oppose the lifting of the stay in the event that the Court determined that it was appropriate to grant leave to file the fifth further amended statement of claim. Little time was spent in relation to this application and ultimately there was no determination of the merits of the dispute between Chubb and Birbilis. It is appropriate that there be no order as to the costs of the application of 30 June 2017.

Costs of the amendments to the fifth further amended statement of claim

- [19] Vero contends that specific orders must be made for the costs thrown away as a result of amendments on the basis that pursuant to r 386 of the *UCPR*, they are not costs of amendments made under r 378, because r 378 only applies to an amendment for which leave from the Court is not required, and in this case Birbilis had to obtain leave to make any amendments. Vero submits that, given the history of the matter, the order that should be made should be broader than the costs thrown away by the amendments and that Birbilis should pay Vero's "costs of and occasioned by"⁷ the amendments effected by the fifth further amended statement of claim and the allegations in the previous statement of claims which have been abandoned or not pursued (save where such costs are already the subject of the existing orders for costs).
- [20] Chubb does not seek a specific order in respect of the amendments.
- [21] Given leave was required, r 378 of the *UCPR* would not apply. Rule 692(2) of the *UCPR* provides that a party who amends a document must pay the costs thrown away by the amendment unless the Court orders otherwise. It is a provision of general application to amendments including amendments of pleadings. Birbilis submits

⁷ *Ziliotto v Dr Hakim (No 2)* [2012] NSWSC 1079.

correctly, in my view, that r 692(2) would apply to the costs of the defendants in responding to the amendments.

[22] In terms of the broader order sought by Vero, the proceedings were ordered to be stayed pending leave being given for the fifth further amended statement of claim. While there has been a number of versions of the fifth further amended statement of claim which have been the subject of negotiation, Vero did not have to plead to those versions. Further, if costs were incurred in commenting on those versions, they would be costs in the proceedings for which orders may be made by the trial judge. Vero will be entitled to the costs thrown away by the amendments to the fifth further amended statement of claim under r 692(2) of the *UCPR*.

[23] In those circumstances, I do not consider that it is appropriate that Birbilis be ordered to pay the costs of and occasioned by allegations in the previous fifth further amended statement of claim which ultimately were not pursued. Rule 692 will provide for the costs thrown away and otherwise the costs may be dealt with by the trial judge.

[24] Birbilis has been the subject of costs orders by Applegarth J in relation to the costs thrown away by the adjournment of the trial. Birbilis, however submits that given the onerous costs orders made against it previously and in order for the parties to advance the proceedings efficiently towards a trial date without unnecessary distraction, it is appropriate to order that Chubb's and Vero's respective costs caused by the amendments to the fifth further amended statement of claim not be assessed until the proceedings end. I accept that Birbilis has been subject to onerous costs orders arising out of the vacation of the trial dates, however that followed Birbilis not being in a position to proceed with the trial and conceding that it had to amend its statement of claim.

[25] While there is some merit in Birbilis' argument and the matter needs to be progressed by all parties to trial, I do not consider it is necessary to make such an order. I am not satisfied that the operation of r 692 will cause any further delay to the proceedings. In the present case, it may well be that the determination of the costs thrown away by the amendments to the fifth further amended statement of claim cannot be properly assessed unless informed by the way the trial is conducted. I am not satisfied it is appropriate to

make any specific order in this regard which alters the operation of r 692(2). I do not consider that any further order is required to be made in relation to the amendments to the fifth further amended statement of claim, given that I consider r 692(2) of the *UCPR* would apply.

Conclusion

[26] Based on the above, the orders that I make are as follows:

- (1) Sixty per cent of the costs of the application of 10 May 2017 be the plaintiff's costs in the proceedings;
- (2) There be no order as to costs in respect of the application of 21 June 2017;
- (3) The costs of the application of 26 June 2017 be the plaintiff's costs in the proceeding;
- (4) There be no order as to the costs of the application of 30 June 2017.