

# Who bears the costs of a successful defendant?

*VWA v Probuild & Ors (No 2)* [2016] VSC 615

Peter Moriarty & Anna Morris | October 2016 | Insurance & Financial Services

## Summary

A recent costs ruling in a s138 proceeding brought by the Victorian Workcover Authority ('VWA') serves as a reminder to parties to multi-defendant litigation that exposure to costs claims does not end with the plaintiff.

## Facts

The VWA had brought a s138 claim against three defendants:

- Probuild;
- Tubeway; and
- Higgins,

seeking recovery of medical and like expenses payable under the *Accident Compensation Act 1985* arising from an injury to a worker who was installing balustrades at a commercial building site. The worker had also brought common law claims against the same defendants, as well as his employer.

The worker's own claim was settled prior to trial, but the four defendants could not agree contribution and so the contribution claims raised by each went to hearing. Justice Zammit ultimately found that three of the four defendants were responsible (in varying degrees) for the incident, but that Higgins owed no liability. Tubeway was found 25% liable and Probuild 50%.

In the s138 proceeding, and consistent with Justice Zammit's finding in the common law claim, Higgins was found to have no liability after being added as

third defendant by an amended writ. Both Probuild and Tubeway filed defences alleging that Higgins was responsible for the worker's injuries.

The VWA then brought a costs application and sought orders that:

1. Probuild and Tubeway pay Higgins' costs of the proceeding ('a Sanderson order'); alternatively
2. Probuild and Tubeway indemnify the VWA for any costs it was liable to pay to Higgins ('a Bullock order')

## Issues

In its costs application, the VWA argued that when it commenced the s138 proceeding it was satisfied based on its inquiries that it had a basis to join Probuild and Tubeway as defendants to the proceeding.

In support of its application the VWA submitted:

- (i) The case against each defendant concerned the same facts and circumstances.
- (ii) Due to the matters pleaded in defence, and the representations made by Tubeway's solicitors, the VWA had concluded that it was necessary and appropriate to join Higgins as a third defendant.
- (iii) The VWA acknowledged that it could have negotiated separately with Higgins as each claim was apportionable, but that there was no evidence before the court to suggest that this had not been attempted.

Tubeway and Probuild opposed the application and in submissions argued:

- (i) The nature of s138 claims, namely that they are apportionable and not interdependent, meant that they could not attract Bullock or Sanderson orders. They are independent rights of indemnity.
- (ii) The VWA's joinder of Higgins was simply a reflex joinder done without any real forensic analysis of the cause of action and to bring its proceeding in line with the worker's claim.
- (iii) The pleaded causes of action against each defendant were identical with no distinction, or alternative causes of action, being made among any of the defendants.
- (iv) Given the apportionable nature of a s138 claim the VWA could have negotiated separately with each of the defendants and served separate offers on each defendant. It was unfair for the other defendants to have to bear the burden of Higgins' costs because the VWA chose not to resolve the proceeding against Higgins separately.

Probuild also argued that Tubeway took further and additional steps to convince the VWA that they should join Higgins as a defendant and to impress on the VWA that Tubeway itself had no liability. On this basis Probuild argued it was the 'less culpable' of these two defendants in the costs dispute.

## Findings

Justice Zammit agreed that the nature of a s138 proceeding did not of itself exclude the potential for the making of Sanderson or Bullock orders.

Her Honour noted that having regard to the circumstances of the worker's injury there was a substantial factual connection between the claims brought by the VWA against each defendant.

Her Honour also considered that it was reasonable for the VWA to have joined Higgins given that each of the defences delivered by Probuild and Tubeway alleged the liability of Higgins.

Justice Zammit accepted that Probuild had played a more limited role in encouraging the VWA to join Higgins, but nonetheless Probuild still raised Higgins' liability in its defence.

Justice Zammit ultimately found that it was appropriate that Probuild and Tubeway be ordered to pay Higgins' costs of the proceeding. These costs were apportioned 55% payable by Tubeway and 45% payable by Probuild.

## Implications

This decision serves as a reminder to all defendants in multi-party litigation of their potential exposure to third party costs claims, even in proceedings involving an 'apportionable' claim where the liability of each defendant is several such that there are no contribution proceedings on foot among the defendants.

Defendants who induce the joinder of another party either:

- by allegations made in their defence; or
- through other conduct, such as correspondence or calderbank offers, through which they make representations to justify why another party may in addition or instead be liable,

ought to be mindful that this will be a relevant factor in assessing whether their conduct justifies the making of a Bullock or Sanderson order against them where the proceedings brought against that other party fail.

In this instance both defendants pleaded in their defences the liability of a third party and maintained the position during the contribution hearing in the worker's common law proceeding. This course of action was considered sufficient conduct to induce the VWA to bring and maintain an action against Higgins.

This decision should provide any plaintiff or applicant with comfort in any proceedings involving apportionable claims where existing defendants are promoting the joinder of third parties in situations in which the plaintiff/applicant has little or no means of assessing the merit of the allegations raised.

For more information,  
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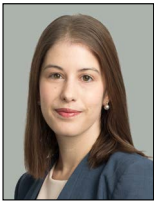
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