Costs and the event

By Phillipa Alexander

Part 42 r 42.1 of the *Civil Procedure Rules* 2005 (NSW) stipulates the general rule that costs follow the event, namely:

> 'Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.'

In the High Court decision of *Oshlack v Richmond River Council*,[1] McHugh J made the following observations:

> 'By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. A successful litigant is generally entitled to an award of costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure.'[2]

In what circumstances will a successful party be unable to recover all of their party:party costs? McHugh J considered[3] the traditional exceptions to the usual order as to costs focus on the disentitling conduct of a successful party, citing Devlin J's reference to 'misconduct' in *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*[4] as follows:

> '"Misconduct" in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; prosecutes the matter solely for the purpose of increasing the costs recoverable; or obtains relief which the unsuccessful party had already offered in settlement of the dispute.'[5]

In the recent decision of *Ahmad v Director of Public Prosecutions (No. 2)*,[6] Campbell J confirmed the onus of satisfying the court that there ought to be a departure from the general rule is borne by the unsuccessful party. While Campbell J did not entirely accept the plaintiff's case as to the order to be made in relation to a bail application, and there was no criticism of the DPP's approach, these factors were insufficient to displace the general rule that the plaintiff, having won his or her case, was entitled to have his or her costs paid by the defendant.

By way of contrast, in *Priestley v Priestley (No. 2)*,[7] the Supreme Court of NSW ordered that the defendant pay only 60 per cent of the plaintiff's costs, notwithstanding that the plaintiff had obtained judgment against the defendant for $334,080.06 including interest. The plaintiff submitted that he was entitled to a costs order as he had been successful in relation to a claim which the defendant had disputed. The plaintiff's claim was brought on three bases – the alternative bases of testamentary contract or proprietary estoppel; for a monetary sum secured by a mortgage; and in *quantum meruit*. The defendant succeeded on the first two bases and the plaintiff succeeded in *quantum meruit* although not for the full amount claimed.

The plaintiff argued that the issues on which he failed were not severable from that on which he was successful, and that the factual issues between the different claims were inextricably interwoven. White J considered[8] the different approaches which have been taken by the courts in the identification of the relevant 'event', concluding that:

> 'the relevant event for the purposes of the rule is primarily to be determined by reference to the outcome of the litigation and whether or not the plaintiff has obtained judgment in his favour and that that is so even if the defendant has defeated some claims and has succeeded on others, or has succeeded on some issues.'[9]

However, his Honour also acknowledged[10] that the question ultimately was one of fairness, approving the observations of Finkelstein and Gordon JJ in *Bowen Investments v Tabcorp Holdings Ltd (No. 2)*,[11] that:

> 'fairness dictates how the discretion as to costs should be exercised, and that if an issue by issue approach produces a result that is fairer than giving the successful party all of his or her costs notwithstanding his or her failure on particular issues, then the issue by issue approach should be adopted.'

While White J considered that the first and third of the plaintiff's claims were interwoven, his Honour noted that the Court of Appeal[12] had made it clear that special costs orders can be made where an otherwise successful party has failed on a particular issue or group of issues that was 'clearly dominant'. White J held that the first issue was the dominant issue involving quantum of $2 million, and that the quantum meruit issue was raised only in the alternative. On that basis, it was fair that a substantial discount of 40 per cent be made to the plaintiff's costs.

A departure from the usual order also occurred in *Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue (No. 2)*,[13] where a 'no order as to costs' order was made. The plaintiff had sought review of four land tax assessments and succeeded in having two of the assessments revoked, while two of the assessments were confirmed. However, White J was critical of the presentation of the plaintiff's case and did not consider that the issues advanced by the plaintiff were dominant or separable. The plaintiff's submission that there should be orders for each party to pay some proportion of the other's costs was rejected. The requirement for the plaintiff to have succeeded on dominant issues appears to go further than the judgments of the Court of Appeal[14] that special costs orders can be made where the unsuccessful party has succeeded on issues that were clearly dominant.

OFFER OF COMPROMISE NOT PROTECTIVE

A plaintiff who recovers damages in an amount no less favourable than the amount for which the plaintiff has offered to compromise their claim may normally expect to receive costs in accordance with r 42.14 of the *Uniform Civil Procedure Rules* 2005 (NSW) (UCPR); that is, an order against the defendant for the plaintiff's costs in respect of

the claim assessed on the ordinary and indemnity bases as applicable. However, this may not always be the case. An offer of compromise upon which the plaintiff was entitled to rely for the purposes of obtaining an indemnity costs order for the relevant period failed to protect her against a 20 per cent reduction in her overall costs, on the basis that she had been only partially successful in her family provision claims in *Misek v McBride (No. 2)*.[15] While the plaintiff obtained an order for a legacy of $460,000 out of the deceased's estate, which was substantially in excess of the offer of compromise in the sum of $349,000 plus costs, the defendant succeeded in relation to a secret trust claim and a power of attorney/constructive trust claim which the defendant argued occupied significant time (two out of four hearing days) and resources, and which were sufficiently severable from the other issues in the proceedings. The Court rejected the defendant's broad brush approaches that each party should bear their own costs or that the defendant should only pay one-third of the plaintiff's costs, ordering the defendant to pay 80 per cent of the plaintiff's costs.

PUBLIC INTEREST LITIGATION

The characterisation of litigation as 'public interest litigation' may be taken into account when considering whether the court should depart from the usual rule that costs follow the event, although this factor is not determinative.[16]

In *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd (No. 2)*,[17] the NSW Court of Appeal considered a motion by the appellant, People for the Plains, to vary a costs order in favour of Santos. The Court looked at whether the proceedings were properly to be characterised as 'public interest litigation' and whether there was 'something more' than such a characterisation to warrant departure from the general rule. Of interest was the argument on behalf of Santos that the appellant had made no submissions to the Court at any stage as to whether any costs order should be made in the event that it were to be successful in the proceeding based on public interest. This would suggest that it would be wise to make such submissions at an early stage. The Court held that even if the proceedings were to be characterised as 'public interest litigation' (which was debatable), the appellants could not demonstrate that the appeal involved 'something more' and the motion was dismissed with costs.

In contrast, the applicant was successful in varying a costs order on the basis of 'public interest litigation' in *Millers Point Fund Incorporated v Lendlease (Millers Point) Pty Ltd (No. 2)*.[18] The applicant, Millers Point Fund, was unsuccessful in judicial review proceedings relating to planning approval for the proposed Crown Casino Hotel Resort and was ordered to pay the costs of three of the respondents. The applicant then sought an order that each party pay its own costs pursuant to r 4.2(1) of the *Land and Environment Court Rules* 2007 (NSW) (LECR) which prevails over the UCPR.[19] LECR r 4(2)(1) empowers the court not to make an order for costs against an unsuccessful party if it is satisfied that the proceedings have been brought in the public interest. Robson J found that, firstly, the proceedings were brought in the public interest; secondly, that there were additional factors in the proceedings which raised novel issues, concerning a component of the environment of significant value and importance, and the development had generated significant controversy and public interest; and thirdly, that there were no countervailing factors, adopting the three-step approach set out in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No. 3)*.[20] The Court ordered that each party pay its own costs of the proceedings.

JURISDICTION

In *Amashaw Pty Limited v Marketform Managing Agency Ltd*,[21] the plaintiff obtained judgment for $274,000 plus interest in proceedings for indemnity under an insurance policy for the cost of restorative works. The plaintiff had brought the proceedings in the Supreme Court of NSW. UCPR r 42.34 provides that a costs order is not to be made in proceedings in the Supreme Court, other than defamation proceedings, unless the Court is satisfied that the proceedings have been brought in the appropriate court. Here, a primary consideration was the plaintiff's insistence on pressing a preventative works claim on which it did not succeed and which McDougall J did not regard as meritorious. The countervailing factors – that the plaintiff had succeeded and it was required to litigate because of the defendant's position as to non-disclosure and as to the unavailability of indemnity under the policy – were not persuasive because these were issues which could have been brought in the District Court. McDougall J inferred that the plaintiff's costs were likely to have exceeded the amount of the judgment. However, his Honour made no order as to the intent that each party should bear its own costs.

In summary, the above cases illustrate areas in which a plaintiff may be vulnerable to not recovering all or part of their costs. A major determinant appears to be the dominant or severable issue, which should be carefully assessed for a risk of failure before the claim is bought, in order to avoid an overall reduction in costs which may then outweigh the financial benefit obtained by the plaintiff on the claims in which success is achieved. ■

Notes: **1** (1998) 193 CLR 72. **2** *Ibid*, [66]. **3** *Ibid,* [69]. **4** [1951] 1 All ER 873. **5** *Ibid,* 874. **6** [2017] NSWSC 204 at [4], [10]. **7** [2016] NSWSC 1259. **8** *Ibid,* [10]. **9** *Ibid,* [49]. **10** *Ibid,* [50]-[51]. **11** [2008] FCAFC 107, [5]. **12** See *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373 at [6]; and *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 (Beazley, Ipp and Basten JJA) at [38], where the principles governing the making of an order as to costs so as to reflect the time taken in dealing with a particular issue in which the successful party in the proceedings or on the appeal did not succeed are discussed. **13** [2017] NSWSC 68. **14** See above note 11. **15** [2017] NSWSC 796. **16** *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72. **17** [2017] NSWCA 157. **18** [2017] NSWLEC 29. **19** See UCPR r 1.7 and Sch 2. **20** [2010] NSWLEC 59. **21** [2017] NSWSC 612.

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