

LEGAL BITES

13 February 2007

1. S.56 CIVIL PROCEDURE ACT – MODEL LITIGANT OBLIGATION

Priest v New South Wales, [2007] NSWSC 41

Supreme Court of New South Wales
02 February 2007
Johnson J

CATCHWORDS: PRACTICE AND PROCEDURE - discovery - application by Defendant for withdrawal of category of documents from order for discovery - failure by Defendant to comply with Court order - Defendant in breach of duty to assist Court to facilitate just, quick and cheap resolution of real issues in dispute on application - obligations of Defendant as model litigant - order for costs on indemnity basis **LEGISLATION CITED:** Civil Procedure Act 2005 **CASES CITED:** Priest v State of New South Wales [2006] NSWSC 1281 Priest v State of New South Wales [2006] NSWSC 12 Nelson v John Lysaght (Australia) Limited (1974-1975) [132 CLR 201](#) Scott v Handley (1999) 58 ALD 373 Wodrow v Commonwealth of Australia (2003) [129 FCR 182](#) Badraie v Commonwealth of Australia (2005) [195 FLR 119](#); [2005] NSWSC 1195 **DECISION:** See paragraphs 42 to 45 inclusive of judgment.

LBC Ref No 465032

The *Civil Procedure Act 2005* contains a number of provisions which are relevant to the present application. Section 56 of that Act says that the overriding purpose of the Act, and the rules in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s.56(1). The Court must seek to give effect to that overriding purpose when it exercises any power given to it under the Act or by the rules: s.56(2). A party to civil proceedings is under a duty to assist the Court to further that overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court: s.56(3). A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in s.56(3): s.56(4). A Court may take into account any failure to comply with s.56(3) or s.56(4) in exercising a discretion with respect to costs: s.56(5).

34 In a sense, s.56 has the result that every litigant in civil proceedings in this Court is now a model litigant. However, there is ample authority that governmental bodies, including the Commonwealth of Australia or the State of New South Wales, ought be regarded as having model litigant obligations extending in the past, at least, beyond those of private litigants. In this respect, see decisions such as *Scott v Handley* (1999) 58 ALD 373; *Wodrow v Commonwealth of Australia* (2003) [129 FCR 182](#); *Badraie v Commonwealth of Australia* (2005) [195 FLR 119](#) at 135; [2005] NSWSC 1195 at paragraph 94.

35 I am not satisfied, given the history that I have recited in this judgment, that the Defendant has discharged its obligations under s.56 *Civil Procedure Act 2005* or, indeed, under its model litigant obligations with respect to the Category 27 issue.

36 As I have observed, the Defendant bears the onus of proof on the application to exclude Category 27 from the order for discovery. I have given consideration to adopting an approach that, in effect, enough is enough. If the Defendant has not, despite the numerous opportunities it has had to date, demonstrated that the relief it seeks should be granted, then the line should be drawn at this time. I am satisfied, however, that the interests of justice do not call for that approach.

37 It seems to me there are real and significant issues remaining with respect to the discoverability of these documents. The problem is that I am in no better position to resolve the application now than I was on 28 November 2006. Indeed, I am in a worse position because 37 further boxes of documents, which have not been examined by counsel for the Defendant and which are not the subject of any evidence on the part of the Defendant beyond the fairly superficial affidavit of Mr McGillicuddy, now lie in my control.

38 The course which I propose to take with respect to the outstanding question of discovery is to direct, in the first instance, that the Defendant comply with the first direction given on 14 December 2006 and I have in mind that this step ought be satisfied by 5 pm next Wednesday. If there is any default in orders I make today, then a question may arise as to whether the Court ultimately takes the view that the Defendant has had ample opportunity to demonstrate a basis for the relief it seeks and has failed to do so. I will expect that directions I give will be strictly complied with.

2. COST ORDER WHEN SUBSTANTIVE DISPUTE RESOLVED BY CONSENT BUT WITHOUT AGREEMENT AS TO COSTS

Cannon v Cannon, [2007] NSWSC 40

Supreme Court of New South Wales
06 February 2007
Barrett J

CATCHWORDS: PROCEDURE - costs - where no determination on the merits - no matter of principle
LEGISLATION CITED: CASES CITED: Edwards Madigan Torzillo Briggs Pty Ltd v Stack [2003] NSWCA 302 Fordyce v Fordham [2006] NSWCA 274 Foukkare v Angreb Pty Ltd [2006] NSWCA 335 Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission of NSW [2006] NSWCA 129
DECISION: No order as to costs

LBC Ref No 465033

While the parties were eventually able to agree on these substantive outcomes, they were not able to agree on the matter of costs. The plaintiff says that the defendant should pay the plaintiff's costs of the claim and that the costs of the defendant (cross-claimant) incurred solely on the amended cross-claim should be paid by the plaintiff (cross-defendant) in the fixed sum of \$200 plus GST. The defendant's position is that the parties should bear their own costs of both the claim and the cross-claim and that there should accordingly be no order as to costs.

3 The plaintiff's principal contentions are that he obtained, upon his claim, the relief he sought and that, on the amended cross-claim, he consented to the grant of the alternative relief sought by the amendment as soon as the amendment was effected.

4 The notion that costs should follow the "event" -- embraced by the plaintiff in the first of these contentions -- is, in the circumstances, too simplistic. There has been no "event", in the sense of a decision by the court between competing contentions of the parties. There has been no hearing on the merits, with the result that regard must be had to approaches most recently discussed by the Court of Appeal in **Foukkare v Angreb Pty Ltd** [2006] NSWCA 335 (28 November 2006), **Fordyce v Fordham** [2006] NSWCA 274 (27 October 2006) and **Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission of NSW** [2006] NSWCA 129 (30 May 2006). I quote paragraphs [66] to [68] of the judgment of Beazley JA in the **Foukkare** case:

66 In *Australian Securities Commission v Aust-Home Investments Limited* (1993) [44 FCR 194](#) Hill J summarised the principles that have emerged from the case law as to how the Court should approach the exercise of discretion in respect of costs when there has been no hearing on the merits. He said (at 201):

(1) Where neither party desires to proceed with litigation the Court should be ready to facilitate the conclusion of the proceedings by making a cost order ...

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a Court determining how the costs of the proceeding should be borne to endeavour to determine for itself the case on the merits or, as it might be put, to determine the outcome of a hypothetical trial ... This will particularly be the case where a trial on the merits would involve complex factual matters where credit could be an issue.

(3) In determining the question of costs it would be appropriate, however, for the Court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them ...

(4) In a particular case it might be appropriate for the Court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation ...

(5) Where the proceedings terminate after interlocutory relief has been granted, the Court may take into account the fact that interlocutory relief has been granted ...'

67 The same question was considered in *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin* (1997) [186 CLR 622](#). McHugh J said at 624 --625:

'In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence a litigation. Thus, for example, in *R v Gold Coast City*

Council; Ex parte Raysun Pty Ltd [1971] QWN 13, the Full Court of the Supreme Court of Queensland gave a prosecutor seeking mandamus the costs of the proceedings up to the date when the respondent Council notified the prosecutor that it would give the prosecutor the relief that it sought. The Full Court said that the prosecutor had reasonable ground for complaint in respect of the attitude taken by the respondent in failing to consider the application by the prosecutor for approval of road and drainage plans.' (Footnotes omitted)

68 The principles discussed in these cases apply where a court is asked to make an order under *UCPR* 42.19. This was recognised in *Fordyce v Fordham*, where McColl JA (Beazley and Santow JJA agreeing) said, after pointing out the default orders provided for under the rules governing discontinuance (see *UCPR* 42.19):

'84 [*UCPR* 42.19 is] a relevant, but not determinative, consideration. Other relevant considerations were, as the primary judge concluded, usefully gathered in *Lai Qin* and *Australian Security Commission v Aust-Home Investments Ltd & Ors* (1993) [44 FCR 194](#), notwithstanding, as the discussion below reveals, that they were decided in a different statutory context.

...

87 Once it is recognised, however, that the costs discretion conferred by *UCPR* 42.19 ... is unconfined, the matters referred to in the *Lai Qin* line of authority are plainly pertinent, although, again, not necessarily determinative."

5 The general principle is well summarised in the judgment of Davies AJA in a somewhat earlier decision of the Court of Appeal, **Edwards Madigan Torzillo Briggs Pty Ltd v Stack** [2003] NSWCA 302:

"When proceedings are brought to an end without a determination after a trial, the judge may find it difficult, even impossible, to make an award of costs. If the judge does make an award, it will generally be because the judge is satisfied that one party has had a substantial victory and the other a substantial loss, or that there has been a marked difference in the reasonableness of the actions taken by the parties, so that one party should be rewarded for its reasonable actions and the other party should suffer a detriment in costs."

6 Davies AJA also said:

"In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs."

3. UNFAIR CONTRACT – INDUSTRIAL LAW – TERMINATION OF EMPLOYMENT

Powerlan Ltd v Squires, [2006] NSWIRComm 390

Industrial Relations Commission of NSW

13 December 2006

Wright P, Walton Vice President, Schmidt J

CATCHWORDS: Appeal - Unfair contract - Leave to appeal - Timing and manner of employee's termination of employment - Treatment of redundancy pay and long service leave entitlements - Notice and mitigation - Amounts to be paid by way of Notice - Misconduct and breach of contract - Appeal upheld (by majority) in part - Parties to have leave to file submissions as to costs at first instance and on appeal.

LEGISLATION CITED: Industrial Relations Act 1996 s 102 s 103 s 106 s 191 Long Service Leave Act 1955

CASES CITED: Ace Business Brokers Pty Ltd v Phillips-Treby (2000) [100 IR 420](#) Austin v NF Importers Pty Ltd & Anor (2005) [146 IR 113](#) Blyth Chemicals v Bushnell (1933) [49 CLR 66](#) Box Valley Pty Ltd v Price (2000) [97 IR 484](#) Caltex Petroleum Pty Ltd v Harmer (1999) [92 IR 264](#) Centiad (NSW) Pty Ltd v Neil Chambers (Unreported, Spender AJ, 29 March 1995) David Jones v Cukeric at (1997) [78 IR 430](#) De Simone Consulting Pty Ltd v Ison (2000) [97 IR 478](#) English v Aradlay Insurance Brokers Pty Ltd (2005) [145 IR 129](#) Gala v State Bank of NSW Ltd (No 2) (1998) [84 IR 216](#) Hivac Ltd v Park Royal Scientific Instrument Ltd and ors [1946] Ch 169 Knowles v Anglican Church Property Trust (No 2) (1999) [95 IR 380](#) Murray Irrigation Ltd v Balsdon [2006] NSWCA 253 Newton v Goodman Fielder Mill Ltd (1997) [81 IR 227](#) Perrott v XcelleNet Australia Ltd (1998) [84 IR 255](#) Squires v Powerlan Ltd and Anor [2005] NSWIRComm 354 Stevenson v Barham (1977) [136 CLR 190](#) Strathfield Group Ltd v Hall (2002) [121 IR 158](#) Westfield Holdings v Adams (2001) [114 IR 241](#)

LBC Ref No 465093

Notice and mitigation

99 *Haylen J* varied the contract to require Powerlan to give Mr Squires six months' notice, taking the view that the three months' notice of termination which the parties had agreed when Powerlan purchased Centrelink and Phase Shift and employed Mr Squires, was unfair when the employment later came to an end in circumstances of redundancy. Mr Squires had agreed to work for Powerlan for three years, unless it earlier exercised the right to terminate his contract by giving him three months notice, or the contract being terminated summarily for misconduct or breach, amongst other matters. His Honour concluded that the contract was unfair in so providing, even though on Friday 2 August, when he was given that notice, Mr Squires the same day approached Cardlink and obtained a full-time position with it, as a contractor, on the same rate he was being paid by Powerlan. He commenced that work the following Monday. The result was that until the employment came to an end in September, Mr Squires doubled his income.

100 His Honour's conclusion that fair notice was six months in the circumstances of this contract, rested on a number of considerations:

36 Having regard to the position held by the applicant in the Centrelink business, the transfer of his employment to the Powerlan business, the requirement for him to remain in employment with Powerlan for three years, the near autonomous operation of the Centrelink business within the Powerlan group by Mr Squires and Mr Phillips, the status of the position held by Mr Squires at termination and the payment arrangements (being substantially by share allotment) which tied the value of the sale

of the business to the continued profitability and share market price of the respondents and the continued input of Mr Squires to achieve profitable results, and Mr Squires' age and the fact that there was still seven months of the three year period to run when he was terminated, I consider that the claim for six months' notice on being made redundant is not unreasonable. Such a period is in reality, a fairly modest claim which is justified by consideration of concepts of fairness and reasonableness and by reference to the expectations of the ordinary person: the contract was unfair in its terms by not providing six months' notice in circumstances of redundancy.

101 The respondent complained that in so concluding, his Honour failed to have proper regard to the terms of the acquisition which the parties had agreed; particularly given that Mr Squires was legally advised about the agreements which he then entered, including the terms of the employment contract; that proper account had not been taken of the employment obtained with Cardlink even before the Powerlan employment had come to an end and that his Honour's consideration of redundancy as a factor relevant to fixing fair notice, had the result that there was a double counting, because his Honour also varied the contract to require the respondents to pay Mr Squires redundancy pay on termination.

102 In my view there is some force in these submissions. As the High Court observed in *Stevenson v Barham* (1977) [136 CLR 190](#) at 192:

The legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited.

103 The discretion vested in the Court by s 106 may only be exercised in circumstances where a contract is found to be unfair. It may not be exercised to make an agreement more generous to one party, in the absence of a proper basis for the finding of unfairness.

On any view of the evidence, Mr Squires did not, in fact, require longer notice than he received. Mr Squires was given notice on Friday, 2 August and commenced work at Cardlink on Monday, 5 August. His employment was due to come to an end in November and he was being paid by Powerlan during the notice period, but was not required to attend work. He had for some time been seeking early termination of his contract by Powerlan, not himself having the right to resign during the three-year term of the contract. Powerlan was willing to entertain an early termination, but did not wish to pay out the contractual notice in those circumstances and so it invited him to resign. Mr Squires declined to do so. On the same day that he was finally given three months' notice by Powerlan, he took up another full-time position at Cardlink and persisted with his efforts to have his Powerlan employment brought to an end early. Even then, Mr Squires did not offer to resign. Clearly what he was seeking to ensure by not being frank with Powerlan was that he would be both paid out the notice and that he would earn income from his Cardlink position.

112 On the evidence, I take the view that this was not a case where it could seriously be thought that the contract was unfair in providing for the giving of three months' notice by Powerlan when it was made.

4. SECURITY FOR COSTS – NATURAL PERSON

FEDERAL COURT OF AUSTRALIA

Lamb v Hog's Breath Company Pty Ltd (No 1) [2007] FCA 49

PRACTICE AND PROCEDURE -- security -- natural person applicant outside jurisdiction - no assets in jurisdiction -- limited evidence as to financial position - - uncontested estimate as to respondents' costs -- security ordered to point of trial -- transfer of proceedings -- proceedings commenced in Perth Registry -- respondents in Queensland but remote from Brisbane -- applicant represented by Perth solicitors -- respondents represented by Queensland solicitors -- balance of convenience -- no benefit in transferring proceeding at interlocutory stage -- motion to transfer dismissed

JOHN CHARLES LAMB v HOG'S BREATH COMPANY PTY LTD ACN 011 054 970, HOG'S BREATH CAFE (AUSTRALIA) PTY LTD ACN 071 132 655, HB INVESTMENTS PTY LIMITED ACN 060 678 328, HOG'S BREATH CLOTHING CO PTY LTD ACN 060 678 355 AND DONALD RICHARD ALGIE

WAD300 OF 2006

FRENCH J

30 JANUARY 2007

PERTH

Security for costs

1 The general principles governing the provision of security for costs are well known and I need not recite them here. There is, as I have said on previous occasions, no precise formula in determining what is an appropriate level of security, nor the identification of the stages of the litigation in respect of which security should be provided, if it is to be provided on a staged basis at all.

2 In this case there is a need to have regard to the legitimate interests of both the applicant in seeking to pursue what he asserts are his rights, in this case a claimed copyright and remedies for infringement, and those of the respondents who are faced with a litigant residing out of the jurisdiction apparently with no assets in the jurisdiction. The respondents, if successful, could find themselves with a costs order in their favour which they are unable to enforce.

3 The provision of security is rarely, if ever, a complete indemnity against the risk faced by respondents and needs to be pitched at some level which involves a reasonable recognition of the competing interests. In this case the respondents have provided evidence, which is not contested, of costs estimates on a party-party basis

with two different figures dependent upon whether the proceedings are to go ahead in Perth or in the Brisbane registry of the Court. In each case there is a division between pre-trial costs and trial costs. The pre-trial costs, if the proceedings were to go ahead in Perth, are estimated at \$131,089.50. If they were to go ahead in Brisbane, they are estimated at \$124,096.50.

4 The applicant has not been particularly forthcoming about the impact of a security order on his ability to conduct these proceedings. I have an affidavit sworn by his solicitor, Mr Mallon, in which he says that in relation to the suggested figure of \$100,000 sought by the respondents, the applicant would need either to sell some of his available assets or borrow or obtain a bank guarantee against the security of those assets. It is not suggested that an order for security for costs would, even at the level of \$100,000, have the effect of stifling the litigation in the sense that the applicant would be unable to proceed. The highest it seems to be put in his solicitor's affidavit is that the provision of the security would impose significant additional costs upon the applicant and place significant restrictions upon his personal financial freedom and planning. One can accept, of course, that exposure to an order for the provision of a not insignificant sum of money does have some impact upon a person's financial flexibility, but the quantum of that impact is difficult to judge without a more fulsome account of that person's financial position than has been offered in this case.

5 This is a case in which it is possible that when interlocutory processes have been completed, or in the course of interlocutory processes, there may be a negotiated resolution. I don't think it is appropriate yet to make an order for security to cover the whole of the litigation. I propose to do it on a staged basis covering security for costs up to the point of trial. I will allow liberty to apply if circumstances change to such an extent that a justification can be shown for varying the order that I propose to make.

6 I do not propose to order the full sum of \$100,000 which was sought, albeit in respect of the proceedings by the respondents. I will make no distinction between Perth and Brisbane for this purpose as that suggests a false level of precision. It seems to me, having regard to the uncontested estimates of costs, that an appropriate figure is \$60,000 up to the point of, but not including, the first day of trial. I propose that the security should be provided, by 26 February 2007, either by way of payment into Court or by way of bank guarantee in a form acceptable to the Registrar. I don't see much point in staying proceedings until then, but would stay proceedings from that date if the security has not been provided, and will give liberty to apply. I will hear the parties on the question of costs of the motion so far as it relates to security.