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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Nos.29 and 30 of 1995

BETWEEN:

CATHY YUK CHU LIN
Plaintiff

AND:

KATAMON PTY LTD
First Defendant

AND:

FRANK HUNG CHI LAM
Second Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 31 May 1995)

The defendants' application

I rule today on the defendants' application of 19 May 1995 for the costs of various hearings of the plaintiff's summonses of 1 March 1995 filed in proceedings 29 and 30 of 1995, and for those costs to be paid on the indemnity basis set out in r63.27 (p4).

In her summonses of 1 March the plaintiff sought two forms of relief. First, to extend the time for which her caveat should remain on the title of the first defendant's Lot 2666. That caveat would expire on 9 March. Secondly, an injunction restraining the defendants from selling or otherwise dealing with

the subject land, or carrying out any works on it. The second defendant is a director of the first defendant.

At pp5-6 of reasons for decision of 11 April I recounted what happened when the two summonses first came on for hearing before me on 2 March. Mr Alderman of counsel for the plaintiff was clearly then seeking an interim order for extension of time, the "usual limited extension" referred to in *Wahallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198. However, the vigorous opposition by Mr McDonald of counsel for the defendants to the use of supporting affidavits based on "information and belief" under r43.03(2) apparently persuaded Mr Alderman to seek an adjournment until 7 March when the plaintiff would have returned from overseas and could swear an affidavit containing "facts which [she was] able to state of [her] own knowledge" in accordance with r43.03(1).

In opposing the adjournment application Mr McDonald sought (transcript pp29-31) that the summonses be dismissed with costs on an indemnity basis, because of -

> "- - - the conduct of these proceedings by the plaintiff in relation to the defendants. There are numerous decisions in the Federal Court; Woodward J's decision in [*Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397] is one, but most recently Sheppard J in *Colgate-Palmolive Co. v Cussons Pty Limited* [(1933) 46 FCR 225] where the principles are spelled out [as to] indemnity costs - [that] if there has been [something] unusual in the course of the litigation the court is entitled to go beyond ordering party/party costs.
>
> In this case the costs [of the hearing on 2 March] will be entirely thrown away, and it is not appropriate to simply order 'costs in the cause' [as Mr Alderman had submitted], otherwise the court will have no sanction for applications that are precipitous, ill-conceived or defective in content, in protecting its own processes."

I indicated that Mr Alderman's application for an adjournment would be granted, on the basis that in any event the plaintiff must pay the costs "thrown away" by the defendants as a result. The parties consulted as to the length of the adjournment; in the result, on 3 March by consent an adjournment was granted to 27 March, for a 2-day hearing, with the caveat being extended to 4pm on 29 March. Mr Stuart the solicitor for the defendants observed (transcript p36):-

> "[The plaintiff's solicitor] and I are - - - united in wishing Your Honour to continue to hear the matter. We prefer the time spent already not to be wasted - - -."

At the adjourned hearing the application was clearly to be for the "further extension" referred to in *Wahallin* (supra) at p204.

General observations

The appropriate basis for the award of costs herein is to be decided against the background of the following Supreme Court Rules:-

> "63.18 INTERLOCUTORY APPLICATION
>
> Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court orders otherwise.
>
> 63.25 BASES OF TAXATION
>
> Subject to this Part, costs in a proceeding which are to be taxed shall be taxed on -
>
> (a) the standard basis; or
>
> (b) the indemnity basis.
>
> 63.26 STANDARD BASIS
>
> On a taxation of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and any doubts which the

Taxing Master has as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

63.27 INDEMNITY BASIS

On a taxation of costs on the indemnity basis, all costs shall be allowed except to the extent that they are of an unreasonable amount or have been unreasonably incurred, and any doubts which the Taxing Master has as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

63.28 GENERAL BASIS

(1) Except as provided by these Rules or an order of the Court, costs shall be taxed on the standard basis.

(2) Where the Court makes an order for costs -

(a) without indicating the basis of taxation; or

(b) to be taxed on a basis other than the standard basis or the indemnity basis;

the costs shall be taxed on the standard basis.

63.29 WHERE INDEMNITY BASIS APPLICABLE

(1) Subject to this Order, the Court may order that costs be taxed on the indemnity basis.

- - -"

As to r63.18 Martin J (as he then was) in *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143 observed at 144-5:-

"Under the current rules a successful party on an interlocutory application must bear his own costs unless the Court otherwise orders, and even when such an order is made may not proceed to taxation and recovery until the conclusion of the proceedings, unless it appears to the Court that the costs ought to be taxed at an earlier stage, and so orders.

- - -

- - - there must be something exceptional about the circumstances of the interlocutory application under consideration to lead the Court, in the exercise of its discretion, to make an order as to costs, taxation and payment.

> Given the tenor of the rules, it would not be just to make interlocutory orders for costs, or, if made, to order that they may be taxed earlier than completion of the proceedings, with a view to punishing the unsuccessful party. To do so may engender a reluctance in parties to properly ventilate their problems during the pre-trial process. What is required is an approach which seeks to have a successful party reimbursed the expense of interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably or which are unnecessarily burdensome or which are made at a time, such as here, when that party has been deprived of the value of the work done in preparation of his case for trial. In such instances, and the list is not intended to be definitive or complete, it may well be within the Court's discretion to exercise the power to override the principles established by the rules.
>
> Costs in interlocutory matters no longer follow success. No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the application or resistance, as the case may be, are reasonable. However, if such application or resistance is without real merit, as if often the case, the successful party should not have to bear his costs.
>
> As to taxation, and payment of interlocutory costs ordered to be paid by one party to another, a just approach to take is to consider whether the successful party ought to have reasonably anticipated interlocutory proceedings of the kind in question. If so, then he should have anticipated bearing the expense, at least to the conclusion of the proceedings, and not reckoned on having it paid for by the other party. If, however, the kind of interlocutory application or the number of them could not have been so anticipated, then there may be a better case for ordering that the successful party's costs be taxed and paid earlier."

See also on r63.18 *Guernier v Patterson* (1992) 110 FLR 178 at 186-7.

It can be seen from r63.28 that usually costs are to be taxed on the "standard basis" in r63.26, which contemplates a strict "no frills" approach to the conduct of litigation, though the basis is reasonableness; see *Smith v Buller* (1875) 19 Eq. 473. The Rules do not indicate when the more generous "indemnity

basis" in r63.27 is to be used, but the Court has an unfettered discretion in that regard. Subject to the express wording in r63.27 this latter basis is akin to what was formerly called costs on a "solicitor and own client" basis; see *Re National Safety Council of Australia Victoria Division (In Liq) (No.2)* [1992] 1 VR 485 at 499-502 and 510-514. I note that r63.59 provides that a solicitor's bill to his client is to be taxed on an indemnity basis.

I also note examples of cases in the past where the Court exercised its costs discretion on a basis more generous than 'party and party'; see *E.M.I. Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch. 59. This involved orders that a contemnor pay costs on an indemnity basis. Sir Robert Megarry V.C. observed at p64 that "for many years the Courts have been making such orders, particularly against contemnors", and noted that often they had been "more or less equated with orders for costs as between solicitor and own client."

In *Colgate-Palmolive Co v Cussons Pty Ltd* (supra) Sheppard J considered the history, sources and breadth of the Federal Court's power to award costs on an indemnity basis, and the circumstances in which the Court could depart from the standard (or 'party and party') basis. His Honour observed at p227:-

> "These applications [for costs to be awarded on a basis other than party and party] are based on the particular circumstances of particular cases."

To ascertain the circumstances in which a departure from the standard basis was warranted, his Honour examined various

authorities at pp230-2 from which he "distilled", inter alia, the following 2 principles at pp233-4:-

> "(4) - - - The circumstances of the case must be such as to warrant the Court in departing from the usual [standard basis]. - - - The tests have been variously put. The Court of Appeal in *Andrews v Barnes* (1887) 39 Ch D 133 at 141 said the Court had a general and discretionary power to award costs as between solicitor and client "as and when the justice of the case might so require". Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 appears to have adopted what was said by Brandon LJ (as he was) in *Preston v Preston* [1981] 3 WLR 619 at 637; namely, there should be some special or unusual feature in the case to justify the Court in departing from the ordinary practice. Most judges dealing with the problem have resolved the particular case before them by dealing with the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule. But as French J said (at p8) in *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* (unreported, Federal Court, 3 May 1991), "The categories in which the discretion may be exercised are not closed." Davies J expressed (at p6) similar views in *Ragata Developments Pty Ltd v Westpac Banking Corporation* (unreported, Federal Court, 5 March 1993).
>
> (5) Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* (supra) and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No.2)* (1993) 46 IR 301; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson* (1987) 10 NSWLR 525; *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724 (Court of Appeal); *Crisp v Keng* (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) and an award of costs on an indemnity

> basis against a contemnor (eg Megarry V-C in *EMI Records* (supra)). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis."

As to the practical distinction between an award of costs on the standard basis and an award on the indemnity basis, see *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103. The norm is the standard basis. I consider, in general, that indemnity costs should be awarded in cases which are clearly exceptional in nature; for example, where the conduct of the losing party has involved some unmeritorious deliberate or high-handed conduct, an element of deliberate wrongdoing, which warrants an award of costs over and above the normal standard basis, because it is unjust in the circumstances that the successful party should have to bear any part of the legal costs he has reasonably incurred. See also *Degmam Pty Ltd (in liq.) v Wright (No.2)* [1983] 2 NSWLR 354 and *Rouse v Shepherd [No.2]* (1994) 35 NSWLR 277 at 279-281.

The hearing on 2 March; and the defendants' submissions

I return to deal with the basis on which the costs "thrown away" by the defendants in respect of the aborted hearing on 2 March, should be assessed. Costs "thrown away" by an adjournment consist of costs reasonably incurred by the defendants for legal work properly done but wasted by the adjournment: see *The Fashion Warehouse v Pola* [1984] 1 Qd.R. 251. It is convenient

to also deal here with Mr McDonald's general submissions on which the application for costs on an indemnity basis was founded.

I apply the tests mentioned by Sheppard J in *Colgate-Palmolive Co.* (supra) (p8). The fact that costs were "thrown away" is not enough in itself; that is not a "special or unusual feature". The loss of time which resulted from the adjournment was not due to any "particular misconduct". The applications of 1 March were not "commenced or continued for some ulterior motive". I do not consider, in light of the ground on which the plaintiff based its application - the so-called "stand alone" agreement of 29 November 1993 made in Hong Kong - that it can be said that the applications of 1 March were made "in wilful disregard of known facts or clearly established law". There was no question of "the making [by the plaintiff] of allegations which ought never to have been made" or "the undue prolongation of a case by groundless contentions". The fact that ultimately (see reasons for decision of 11 April, p28) I considered that the Hong Kong agreement was obviously not a "stand alone" agreement but embodied the commission agreement as to which it could not be reasonably argued that it was not unenforceable by reason of s121 of the Agents Licensing Act, and that the plaintiff accordingly had "no arguable case", does not mean that costs should be on an indemnity basis. The application of 1 March as eventually argued on 27 and 28 March was for interlocutory relief, whereas on 2 March Mr Alderman had sought only interim relief, and faced a much lower "hurdle"; on such a limited application the plaintiff could have properly relied, in support, on affidavit material based on "information and belief".

In short, there is nothing in the particular facts and circumstances of this case which warrant the making of an order for the payment of the costs of the hearing on 2 March other than on the standard basis. I turn to Mr McDonald's general submissions.

First, he submitted that the plaintiff's applications of 1 March should never have named the second defendant, because he was not a proper party to the application to have the caveat extended. It is correct that the second defendant was not a proper party to the application for that relief. But he was properly named as a party in relation to the injunctive relief which was also sought by the plaintiff in its summonses of 1 March. Accordingly, I reject that submission.

Mr McDonald submitted second that the plaintiff clearly must have known that the sole basis of her claim to be entitled to have Lot 2666 transferred to her was her allegation that it had been agreed that it be so transferred by way of commission - her right to which was rendered unenforceable by virtue of her non-compliance with s121 of the Agents Licensing Act. I note that the submission advanced by Mr Holmes QC of senior counsel for the plaintiff on 27 and 28 March was that the Hong Kong agreement of 29 November 1993 to transfer Lot 2666 was a "stand alone" agreement; that is to say, the submission was that it was not affected by any earlier arrangements between the plaintiff and the second defendant for the transfer of Lot 2666 by way of commission. I found that that agreement could not be so characterized, holding (in reasons of 11 April 1995) at p26 -

> "It is obvious, to my mind, on the evidence, that [the agreement of 29 November 1993] represents in written form the oral agreement made in Darwin and referred to in pars 16 and 220 (sic) - - - and that the expressed consideration of $20,000 was not the real consideration. It was part of the larger transaction between the plaintiff and the second defendant, and in its nature was clearly the implementation of a commission or fee for the work done by the plaintiff in arranging the sale. I accept Mr Abbott's submission that it is clear beyond doubt on the whole of the evidence that to enforce the Hong Kong agreement of 29 November 1993 by specific performance would be to enforce an agreement for a commission caught by s121 of the Act. To my mind the plaintiff's action seeking specific performance of the agreement of 29 November 1993 is properly characterized as an action to recover a fee or commission for acting as an agent for the defendants "in relation to a matter referred to in s5(2)" of the Act. In short, it is an action which s121 of the Act prevents the plaintiff from bringing, in so far as she seeks that relief."

Mr McDonald's point was that on the known facts and in the light of those reasons for decision the plaintiff must have known, or should be inferred to have known, that her applications of 1 March "had no possibility of success". I consider that the proposition that the agreement of 29 November 1993 "stood alone", which was the basis of the plaintiff's applications, was a proper and legitimate proposition, even though after hearing the evidence on 27 and 28 March I considered it was "clear beyond doubt" that it must fail. It cannot be said that the plaintiff must have known that her case on the "stand alone" point could not succeed; that is to apply the wisdom of hindsight. To argue that because there was a finding on 4 April that there was no serious question to be tried on the matters in issue between the parties, costs should be awarded on the indemnity basis is, with respect, to proceed upon an untenable premise. I reject Mr McDonald's second submission.

His third submission turned on the adverse assessment I made of the plaintiff at p21 of the reasons of 11 April, viz:-

> "Although she testified through a Cantonese/English language interpreter, I consider that in fact she understood English quite well, and could speak it to some degree; she said that she understood about 90% of it, but her English in 1992 was a "bit poor". - - - I consider that the plaintiff has a particularly acute mind, and is clearly very experienced in real estate negotiations. Occasionally, she displayed some heat in the witness box, but was usually cool, calm and collected. I consider that where she could, she tailored her evidence to suit what she perceived to be her advantage. Occasionally she became evasive - "I forget" - when pressed. Overall, I do not consider her to be a trustworthy and reliable witness."

Mr McDonald also placed weight on Angel J's views on a later affidavit of the plaintiff of 13 April 1995 at a hearing before his Honour of the plaintiff's application of 13 April for a further injunction for a limited time to enable her to consider the reasons for decision of 11 April, to decide whether she had grounds for appeal against the decision of 4 April. Mr McDonald's submission was that the adverse view of the plaintiff expressed by me on 11 April and by Angel J on 13 April was also a factor which took her case "out of the ordinary", and warranted an order for costs on the indemnity basis. I do not consider that there is any substance in this submission.

Mr McDonald relied on all of these submissions to support his general submission that costs of the hearings of 2 March, 27 and 28 March and 5 April, which the defendants must clearly recover, should be paid on an indemnity basis.
Mr Alderman frankly admitted that the application for relief made on 5 April should have been made on 4 April, immediately after judgment had been delivered. The application of 5 April was

clearly unnecessary, and the plaintiff must be sanctioned in costs in relation thereto.

Applying the various tests mentioned by Sheppard J in *Colgate-Palmolive Co.* (supra) (p8) I see no reason why the costs "thrown away" by the defendants as a result of the adjournment on 2 (and 3) March should be allowed on an indemnity basis. I do not consider that a case has been made out by the defendants for a special sanction in the form that the plaintiff pay indemnity costs in respect of any of the hearings relating to the applications of 1 March. I should say that I have also carefully considered and assessed the contents of Mr Stuart's affidavit of 23 May, particularly pars 14, 21 (as amended on 24 May) and 22, in coming to these conclusions.

As to Mr McDonald's submission that I should certify for the attendance of 2 counsel at the hearing on 27 and 28 March I adopt the well-known test in *Kroehn v Kroehn* (1912) 15 CLR 137 at 141 per Griffith CJ, and the considerations his Honour refers to. I consider that the approach in *Smith v Madden* (1946) 73 CLR 129 relates to a trial, and now must be read in light of modern practice, particularly the abolition of the 2-counsel rule - see, for example, Professional Conduct Rule No.15. Similarly, as to reading what was said in *Bush v Condon and Barrett Pty Ltd* [1975] 1 NSWLR 260 and *Stanley v Phillips* (1966) 115 CLR 470. Adopting that approach, I decline to certify for 2 counsel because I do not consider that the proper conduct of the case on 27 and 28 March required the assistance of junior counsel.

Accordingly, I dismiss the defendants' summons of 19 May insofar as it seeks that the plaintiff be ordered to pay costs on

an indemnity basis. In the result I make the following orders as to costs:-

(1) The defendants to have their costs thrown away in respect of the hearing of 2 March; I certify for the attendance of counsel on that day, pursuant to r63.72(9)(a).

(2) The costs of the hearing on 3 March to be costs in the cause.

(3) The defendants to have the costs of the hearing on 27 and 28 March; I certify for counsel under r63.72(9), to the extent of one counsel only, being senior counsel.

(4) The defendants to have the costs of the hearing of 4 and 5 April.

(5) I direct under r63.04 that the costs payable in (1)-(4) above, if not agreed, may be taxed prior to the conclusion of proceedings no.29 of 1995.

(6) The plaintiff to have the costs of the defendants' summons of 19 May 1995; I certify for counsel in that regard, under r63.72(9)(a).