IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION & PLANNING LIST

Not Restricted

S CI 2016 00839

WARWICK ALEXANDER MANDERSON — Plaintiff

v

VICKI LOUISE WRIGHT — Defendant

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 April 2018
DATE OF JUDGMENT:	17 April 2018
CASE MAY BE CITED AS:	Manderson v Wright (Costs)
MEDIUM NEUTRAL CITATION:	[2018] VSC 177

COSTS – Costs of proceeding following trial – Defendants successful on discrete issue – Discretionary considerations – Defendant to pay 50% of plaintiff's costs – *Chen v Chan* [2009] VSCA 233 applied.

COSTS – Application for gross sum costs order – Gross sum costs order not warranted – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.07.

COSTS – Application by plaintiff for costs on indemnity basis – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff		Mr C Raven, Raven & Associates
For the Defendant	Ms L Hicks	Best Hooper

HIS HONOUR:

1 The plaintiff applied for the costs of the proceeding. In doing so, the plaintiff contended that he was entitled to all his costs notwithstanding that he did not succeed on all aspects of his claim. Further, he contended that his costs should be taxed on an indemnity basis and that it was fair and just in the circumstances that I make a lump sum assessment of his costs in the sum of $460,000.

2 The defendant did not resist the proposition that the plaintiff was entitled to costs. However, she contended that a significant part of the proceeding concerned the plaintiff's claim that the restrictive covenant protected the coastal Moonah woodland (CMW) and that he was entitled to orders for its reinstatement. As that part of the plaintiff's claim failed, the plaintiff should be denied his costs and pay the defendant's costs in respect of that issue.

3 I acknowledge that the general rule is that costs should follow the event and that, absent disqualifying conduct, the successful party should recover its costs even where it has not succeeded on all heads of claim.[1] That said, the court has an absolute and unfettered discretion in relation to costs,[2] and may, in appropriate circumstances, examine the realities of the litigation and attempt to achieve on the matter of costs substantial justice as between the parties.[3]

4 The principles that govern whether there should be any apportionment of costs in a proceeding were set out by the Court of Appeal in *Chen v Chan*.[4] Where there is a multiplicity of issues and mixed success has been enjoyed by the parties, a court may take a pragmatic approach in framing the order for costs, taking into consideration the success of the parties on an issues basis.[5] Generally, if such an order is made, it is

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1 *Ritter v Godfrey* [1920] 2 KB 47; *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97-8 (McHugh J); 124 (Kirby J).

2 *Supreme Court Act 1986* (Vic), s 24(1).

3 *Spotless Group Limited v Premier Building and Consulting Pty Ltd and Northern Suburban Properties Pty Ltd* [2008] VSCA 115 [14] ('*Spotless*').

4 [2009] VSCA 233 [10], which I applied in *Dual Homes Victoria Pty Ltd v Moores Legal Pty Ltd (Costs ruling)* [2016] VSC 113.

5 *McFadzean v Construction Mining and Energy Union* (2007) 20 VR 250, 291-292 [157]–[158] ('*McFadzean*').

reflected in the successful party being awarded a proportion of its costs but not the full amount.[6] Further, such an order is framed primarily as 'a matter of impression and evaluation,' rather than with arithmetical precision, the court having considered the importance of the matters upon which the parties have been successful or unsuccessful, the time occupied and the ambit of the submissions made, as well as any other relevant matter.[7]

5 The plaintiff was only successful on one of two distinct issues. It was clear from at least Emerton J's preliminary determination that notwithstanding what may have been the original intention of the restrictive covenant, it did not operate to protect the vegetation.[8] In the principal judgment, I concluded that breach of the covenant cannot provide a basis for the plaintiff's claim for the value of the removed vegetation or, alternatively, for its reinstatement and that the plaintiff was not entitled to orders directing reinstatement of the CMW, or directing in what way reinstatement should be achieved.[9]

6 I am satisfied that the issue of removal/reinstatement of the CMW has been a significant issue throughout the proceeding, not just at trial where it occupied a substantial proportion of the hearing time. Further, properly understood, the issues of whether the plaintiff should be confined to *Lord Cairns Act* damages and removal/reinstatement of the CMW were distinct. Substantial justice as between the parties on matters of costs would not be achieved if the costs order did not properly acknowledge that the plaintiff lost on this core issue.

7 The defendant submitted that the plaintiff should not merely be denied his costs as they related to the CMW claim, but the defendant ought to recover her costs in answering that portion of the claim. I am satisfied that throughout the conduct of the proceeding issues concerning the CMW have been intermingled with issues concerning the enforcement of the restrictive covenant. I think it probable that, given

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6 *Spotless* [2008] VSCA 115 [15]; *McFadzean* (2007) 20 VR 250, 289-290 [152].
7 *Major Engineering Pty Ltd v Helios Electroheat Pty Ltd (No 2)* [2006] VSCA 114 [5].
8 *Manderson v Wright* (2016) 222 LGERA 1, 11 [48]-[51].
9 *Manderson v Wright* [2018] VSC 162 [27].

the plaintiff's mixed success, complications would arise on a taxation of costs.

8 Having regard to my conclusion that the evidence of Mr Saunders was inadmissible, I disallow the plaintiff's costs of and incidental to the preparation and tendering of that evidence. As regards the balance of the plaintiff's costs, taking into account all relevant matters of impression and evaluation, I will order that the plaintiff recover 50% of his costs.

9 The plaintiff has contended that his costs ought to be taxed on an indemnity basis. He submitted that the defendant has done everything in her power to ensure that the litigation was long, protracted and costly for the plaintiff, which conduct he characterised as a strategic move against the plaintiff. I reject this characterisation. I did not see that this litigation evidenced any unusual extent of vigorous contest when compared with many other cases with which the court has to deal.

10 The plaintiff submitted that the defendant was in breach of her obligations under ss 17 and 21 of the *Civil Procedure Act 2010* ('the Act'). Earlier, the plaintiff, by summons, alleged breach by the defendant of the Act but that summons was dismissed on 4 May 2017. There is presently no application before the court alleging breach of the overarching obligations under the Act. All that I have before me are references to relief under the Act in the plaintiff's outline of contentions in respect of costs. The issue of applications under the Act was raised on the commencement of the trial when I stated that I would not deal with any such applications prior to judgment. Although the plaintiff contended that the defendant was in breach of the Act and that he had not abandoned a claim in that regard, his submissions were, as I understood them, directed to his claim for taxation of costs on an indemnity basis.

11 None of the findings that I expressed in the principal judgment were made in the context of an application under the Act. The court's powers, if they be relevant, under s 29 of the Act have not been enlivened by findings of breach of an overarching obligation. Although the court may in exercising its discretion in respect of costs take into account any contravention of the overarching obligations, by

reason of s 28(2) of the Act, in this proceeding I have made no such finding. That is not to say that some aspects of the defendant's conduct of the proceeding are not relevant to the discretion to award indemnity costs.

12 For present purposes, I need not recite the principles applying when assessing whether to award costs on an indemnity basis, which were stated by the Court of Appeal in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd.* The plaintiff pointed to some of my findings concerning the defendant's credit and in particular to my finding that, in the context of whether the defendant had demonstrated special circumstances that warranted an award of *Lord Cairns Act* damages, her conduct was high-handed.[10] To prefer the evidence of one party over that of the other party will not normally support the notion of special circumstances or additional considerations that would warrant a departure from the usual rule.

13 Neither the circumstances of the breach of the restrictive covenant nor the defendant's conduct in seeking to establish special circumstances for an award of damages warranted, having regard to all of the circumstances of this proceeding, an award of costs on a special basis. The defendant had not proceeded fraudulently, in pursuit of an ulterior motive or in disregard of known facts or established principle. The law acknowledges that the usual remedy in cases such as this of a mandatory injunction for demolition can be oppressive and the defendant was entitled to attempt to establish special circumstances that warranted limiting the plaintiff to a different remedy. I do not accept that the defendant had little or no chance of succeeding in that endeavour. The defendant did not contest that she had breached the restrictive covenant. The issues for determination were substantially limited to the proper remedy, in respect of which the defendant failed, and the question of removal/reinstatement of the CMW, in respect of which the defendant succeeded.

14 A further issue was that, shortly after the determination of the preliminary issues by Emerton J on 21 December 2016, the plaintiff served a letter described as being

[10] [2013] VSCA 237 [538]ff.

'without prejudice save as to costs', which made an 11 point proposal to resolve the dispute between the parties. The plaintiff undertook to keep that offer available for acceptance until 20 January 2017, but the defendant elected to proceed to trial. The plaintiff now contends that, had the defendant accepted that offer, she would have obtained a better result than that obtained by taking the judgment. In those circumstances, the defendant acted unreasonably in not accepting the offer.

15 The relevant principles were stated by the Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*,[11] but I need not recite those principles. I will determine the claim by reference to them. Three matters are of significance in assessing this letter. The first is that it did not state, as letters pursuant to the *Calderbank* principles usually do, that in the event that the offer contained in the letter is not accepted and the plaintiff achieves a better result at trial, the plaintiff will produce the letter to the court in support of an application that the defendant pay the costs taxed on an indemnity basis.

16 The absence of that statement from the letter meant that it did not carry the explicit statement that the defendant faces an application for indemnity costs if the offer is bettered at trial. The plaintiff submitted that the words, 'without prejudice, save as to costs', were sufficient to communicate to the defendant's solicitors that those consequences would follow, but I do not accept that submission. The effect of those words is to provide that the letter was privileged under s 131 of the *Evidence Act 2008* (Vic) until any argument as to costs, when the plaintiff could produce the letter to the court and rely on it.

17 In my view, that reservation of rights falls short of making it clear that the letter would support an application for indemnity costs.

18 Secondly, of greater significance, is the question of whether the letter clearly and specifically identified the obligations that the defendant would assume if she accepted the offer. The acceptance of the offer required that the defendant undertake

[11] (2005) 13 VR 435.

a revegetation program to be completed to the reasonable satisfaction of the plaintiff's nominated ecologist.

19 While there was evidence at trial of what the plaintiff's ecologist, Mr Mark Trengove, regarded as the proper and reasonable revegetation, there is no basis for me to assume that Mr Trengove's plan was communicated to the defendant in December 2016 or could be understood to be the standard that was to be met by the defendant in undertaking revegetation if she accepted this offer. Given the uncertainty in the precise scope of the offer that was being made, it cannot be said the defendant was acting unreasonably in rejecting it.

20 Thirdly, the offer cannot be realistically compared with the plaintiff's judgment. As is clear from my reasons, the plaintiff's primary application was for both a mandatory injunction, a revegetation order, and damages. The alternative claim was for *Lord Cairns Act* and other damages if the court was not minded to grant an injunction. The offer of December 2016 does not correlate precisely with those claims. It posed, firstly, a different and lesser obligation to demolish that would have enabled the defendant to retain the western pavilion. It contained other obligations: entitlements to retain various improvements, obligations to remove cameras and, also, the revegetation option that I have already referred to.

21 In my view, it was not reasonably open to make a simple comparison of this offer with the judgment to be entered so as to say that the ultimate result is a worse result for the defendant than if she had accepted this offer.

22 I have not sought to address every factor that is relevant to the issue of indemnity costs in these brief reasons, but taking all relevant considerations into account I am not persuaded that it is appropriate to order that costs be taxed on that basis.

23 Finally, the plaintiff sought an order for a gross sum assessment of his costs. I considered a similar application last week in *Wilson v Bauer Media Pty Ltd*,[12] when I

[12] [2018] VSC 161.

set out the applicable principles. I see no need to repeat those principles on this occasion. As I then said, an award of a gross sum is a 'rare event'. It is an exception to the usual process that gives an unsuccessful party the opportunity to participate in the taxation process. Taking what is a less precise approach must clearly be justified in the circumstances. I must be confident that a proper gross sum can be assessed on the material available by a logical and reasonable approach that is fair and not arbitrary.

24 There is no evidence before the court concerning costs. The plaintiff's application is based upon a summary statement made in an outline of submission.

25 I will order that the defendant pay 50% of the plaintiff's costs of and incidental to the proceeding, including reserved costs.

26 Accordingly, the judgment of the court is:

1. By no later than 12 July 2018, the defendant shall demolish the structures, highlighted in yellow to the south of the red line on the plan annexed to this order, on the land known as Lot 6 Warrenbeen Court, Barwon Heads, more particularly described in Certificate of Title Volume 10546 Folio 031.

2. Upon completion of the demolition, the plaintiff must remove the caveat registered on Certificate of Title Volume 10546 Folio 031.

3. The defendant pay 50% of the plaintiff's costs of and incidental to the proceeding, including reserved costs.

4. Liberty to apply is reserved.