



S ECI 2022 05081

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

IN THE MATTER of an application pursuant to section 84 of the Property Law Act 1958 (Vic) for the modification of a restrictive covenant imposed by Instrument of Transfer 1134165 registered in the Register Book at the Office of Titles and on Certificate of Title Volume 4848 Folio 554 by:

210 HAWTHORN ROAD PTY LTD

Plaintiff

- and -

MEGAN ELLINSON and ORS (according to the attached Schedule)

Defendants

ORDER

JUDGE: The Honourable Associate Justice Ierodionou
DATE MADE: 28 March 2024
ORIGINATING PROCESS: Originating Motion filed on 12 December 2023
HOW OBTAINED: By consent pursuant to Rule 59.07 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* ('Rules')
APPEARANCES: On the papers
OTHER MATTERS:

- A. The Court made orders in this proceeding on 21 March 2024 (the '21 March 2024 orders'), further to the hearing of the proceeding on 20 March 2024. At the hearing, Dr Sharon Shafer pressed her application for costs of two invoices issued by Harold Shafer, from the plaintiff (the 'costs dispute'). I disallowed Dr Shafer's application. The 21 March 2024 orders gave leave to the plaintiff and Dr Shafer to file further affidavit evidence to enable the Court to make further orders fixing costs.
- B. The Court has read the affidavit of Jessica Kaczmarek affirmed on 21 March 2024 (the 'Kaczmarek affidavit') and the affidavit of Harold Shafer dated 25 March 2024 (the 'Shafer affidavit'). The Shafer affidavit states it is filed on behalf of Sharon and David Shafer.

- C. The Kaczmarek affidavit outlines the plaintiff's costs of the costs dispute. Ms Kaczmarek deposes to counsel fees of \$6,000.00 (inclusive of GST) and solicitor fees of \$4,290.00 (inclusive of GST): see paragraphs [5] – [6] of the Kaczmarek affidavit. Ms Kaczmarek annexes the respective invoices to her affidavit: see Exhibits "JLK-45" and "JLK-46" to the Kaczmarek affidavit, 5-8.
- D. I am satisfied that the plaintiff's costs of the costs dispute are largely fair and reasonable. I will however make a reduction in respect of the time of four and a half hours apportioned by the plaintiff's solicitors for the preparation, collation, affirming and filing of the plaintiff's solicitor's affidavit for the costs dispute: see Exhibit "JLK-46" to the Kaczmarek affidavit, 7-8.
- E. The Shafer affidavit contains submissions regarding alleged procedural unfairness, with respect to communications from the Court regarding submissions for the costs dispute hearing and the limited time for which the plaintiff's solicitor gave to Dr Shafer to consider an offer of compromise of the costs dispute. The Shafer affidavit submits that the plaintiff has conflated Mr Shafer's time spent acting as an expert witness and time spent acting as a McKenzie friend to the fourth defendant. Mr Shafer says that he only acted as a McKenzie friend for an hour or two, whereas he was engaged as an expert for a period of over fourteen months. Further, Mr Shafer says that if he is not to be considered an expert witness for the purposes of costs, then he was, a witness of fact pursuant to Appendix B to Chapter 1 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules'), Witnesses' Expenses and Interpreters' Allowance. In turn, up to \$878.80 per day should be allocated to his costs. The Shafer affidavit goes on to submit that the defendant should not be held responsible for any costs.
- F. The Shafer affidavit submissions largely address matters ruled upon in the 21 March 2024 orders save for Mr Shafer's alternative submission that he was a witness of fact. Item 1 of Appendix B allows for the recovery of witness expenses for a person engaged as an expert pursuant to Order 44 or as a professional person for preparing and giving evidence as an expert or as a witness of fact. The amount allowed for the relevant date is \$315 to \$628.80 per hour or part thereof reasonably absent from professional rooms or place of business, but in any event not to exceed \$3,770.50 per one day. Item 2 sets out costs for a witness, other than a professional person, who is engaged in business as a principal on that person's own behalf. Item 3 sets out costs for any other witness, being \$180 per day or if the witness is remunerated in any employment by wages, salary or fees, the amount lost by attendance but in any event not to exceed \$878.80 for one day. Mr Shafer did not have leave to make alternative submissions. However, even if he was given leave, there is no evidence before the Court of the amount lost by attendance at Court to give evidence being \$878.80 per day.
- G. I refer to paragraph T of the 21 March 2024 orders. Leave was given to Dr Shafer to file material regarding reasonable expenses incurred by Mr Shafer as a witness, such as car parking fees. That evidence has not been provided. Therefore, I will not make a costs order regarding witness disbursements.
- H. This Order is authenticated by the Associate Judge pursuant to Rule 60.02(1)(b) of the Rules.



THE COURT ORDERS BY THAT:

1. Within 30 days from the date of this Order, Dr Sharon Shafer must pay the plaintiff's costs of the costs dispute on an indemnity basis fixed in the amount of \$9,290.00 (inclusive of GST).
2. The proceeding is dismissed.

DATE AUTHENTICATED: 28 March 2024



Ierodiaconou

THE HONOURABLE ASSOCIATE JUSTICE IERODIACONOU

SCHEDULE OF PARTIES



S ECI 2022 05081

210 HAWTHORN ROAD PTY LTD

Plaintiff

- v -

MEGAN ELLINSON

First Defendant

KRYSTNA DUSZNIAK

Second Defendant

DAVID SHAFER

Third Defendant

SHARON SHAFER

Fourth Defendant