FEDERAL COURT OF AUSTRALIA

Orrcon Operations Pty Ltd v Capital Steel & Pipe Pty Ltd (No 2)

[2008] FCA 24

PROCEDURE – COSTS – where application for interlocutory relief dismissed – where applicant failed to establish serious question to be tried – where balance of convenience favoured refusal of relief – where applicant succeeded on one allegation – whether applicant should pay first and second respondent's costs of application for interlocutory relief – whether costs order should reflect applicant's success on one allegation pursuant to s 43(2) *Federal Court of Australia Act 1976* (Cth)

Held: applicant should pay first and second respondent's costs of application for interlocutory relief – not appropriate to reflect applicant's success on one allegation in costs order because allegation only one element of issue

PROCEDURE – COSTS – where dismissal of application for interlocutory relief determined discrete issue – where conduct of unsuccessful applicant not unreasonable – where first and second respondents may lack financial resources to meet any final judgment against it – whether costs should be taxed and paid forthwith pursuant to O 62 r 3 *Federal Court Rules*

Held: Not appropriate to order that costs be taxed and paid forthwith

PROCEDURE – COSTS – where applicant alleged knowledge of defective goods against second respondent – where applicant failed to establish serious question to be tried that respondents engaged in unconscionable conduct – whether applicant made unsuccessful allegation of fraud – whether applicant persisted with hopeless case – whether costs should be taxed on indemnity basis

Held: Allegation of knowledge an element of plea of unconscionable conduct and not an allegation of fraud – application not a hopeless case – costs to be taxed on usual party and party basis

PROCEDURE – COSTS – where fourth respondent made submissions at hearing – where orders sought by applicant reformulated as hearing proceeded – whether submissions of fourth respondent were or could have been made by first and second respondents – whether fourth respondent should have its costs of application for interlocutory relief

Held: Fourth respondent entitled to protect its interests at hearing – applicant should pay fourth respondent's costs

Federal Court of Australia Act 1976 (Cth) s 43(2)
Federal Court Rules O 62 r 29, O 6 r 8
Supreme Court Rules 1970 (NSW) Pt 52A, r 9

Australian Agricultural Co Ltd v AMP Life Ltd [2003] FCA 1134 referred to
Bailey v Beagle Management Pty Ltd (2001) 105 FCR 136 referred to
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225 referred to
Cretazzo v Lombardi (1975) 13 SASR 4 referred to
Fiduciary Limited v Morning Star Research Pty Ltd (2002) 55 NSWLR 1 referred to
His Eminence Metropolitan Petar Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2) [2007] NSWCA 142 referred to
Inn Leisure Industries Pty Ltd (Provisional Liquidator Appointed) v DF McCloy Pty Ltd (No 2) (1991) 28 FCR 172 referred to
News Limited v Australian Rugby Football League Limited (1996) 64 FCR 410 referred to
NMFM Property Pty Ltd v Citibank Ltd (No 11) (2001) 109 FCR 77 referred to
Orrcon Operations Pty Ltd v Capital Steel & Pipe Pty Ltd [2007] FCA 1319 referred to
Trade Practices Commission v Nicholas Enterprises Pty Ltd (1979) 28 ALR 201 referred to
Wilcox, Re; Ex parte Venture Industries Pty Ltd (No 2) (1996) 72 FCR 151 referred to

ORRCON OPERATIONS PTY LTD v CAPITAL STEEL & PIPE PTY LTD, EDWARD STUDDY, WESTPAC BANKING CORPORATION AND COMMONWEALTH BANK OF AUSTRALIA

NSD1346 OF 2007

BESANKO J
24 JANUARY 2008
ADELAIDE (HEARD IN SYDNEY)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD1346 OF 2007**

BETWEEN: **ORRCON OPERATIONS PTY LTD**
Applicant

AND: **CAPITAL STEEL & PIPE PTY LTD**
First Respondent

EDWARD STUDDY
Second Respondent

WESTPAC BANKING CORPORATION
Third Respondent

COMMONWEALTH BANK OF AUSTRALIA
Fourth Respondent

JUDGE: **BESANKO J**

DATE OF ORDER: **24 JANUARY 2008**

WHERE MADE: **ADELAIDE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The applicant pay the first and second respondents' costs of its application for interlocutory relief dated 13 July 2007 to be taxed on a party and party basis in default of agreement.

2. The applicant pay the Commonwealth Bank of Australia's costs of its application for interlocutory relief dated 13 July 2007 to be taxed on a party and party basis in default of agreement.

3. There be no order as to the costs of the applicant's application for interlocutory relief dated 13 July 2007 as between the applicant and the Westpac Banking Corporation.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD1346 OF 2007**

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Applicant

AND: **CAPITAL STEEL & PIPE PTY LTD**
First Respondent

EDWARD STUDDY
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WESTPAC BANKING CORPORATION
Third Respondent

COMMONWEALTH BANK OF AUSTRALIA
Fourth Respondent

JUDGE: **BESANKO J**

DATE: **24 JANUARY 2008**

PLACE: **ADELAIDE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 Orrcon Operations Pty Ltd ("Orrcon") issued a proceeding in this Court on 13 July 2007. In its application Orrcon sought both interlocutory relief and final relief. The claim for interlocutory relief came on for hearing before me on 14, 15 and 16 August 2007. On 22 August 2007, I made an order that the application for interlocutory relief be dismissed. I delivered reasons: *Orrcon Operations Pty Ltd v Capital Steel & Pipe Pty Ltd* [2007] FCA 1319. I reserved the question of costs and these reasons deal with the question of costs.

2 Capital Steel & Pipe Pty Ltd ("Capital Steel") seeks the following orders:

1. That Orrcon pay its costs of the interlocutory application;
2. That such costs be taxed and paid forthwith before the principal proceeding is concluded; and
3. That such costs be taxed on an indemnity basis.

3 In support of its application, Capital Steel tendered an affidavit of Paul Joseph Dillon sworn on 30 August 2007. Mr Dillon is a solicitor acting on behalf of Capital Steel.

4 Orrcon opposes the making of such orders. It submits that its costs and those of Capital Steel should be reserved, or, in the alternative, that the costs of the interlocutory application should be Capital Steel's costs of the cause.

5 The Commonwealth Bank of Australia ("Commonwealth Bank") is the fourth respondent to the proceeding. It opposed Orrcon's application for interlocutory relief and it seeks an order that Orrcon pay its costs of and incidental to the application for interlocutory relief. Orrcon opposes that order and submits that there should be no order as to the costs of the Commonwealth Bank.

6 Solicitors for the Westpac Banking Corporation appeared at the hearing to submit to any order of the Court, save as to costs. The Westpac Banking Corporation and the applicant have agreed that the appropriate order as between them would be that there be no order as to costs.

The costs of Capital Steel

7 Orrcon referred to O 62 r 29 of the *Federal Court Rules* ("the Rules") which is as follows:

> Subject to this Order, the costs of any application or other step in any proceedings shall, unless the Court otherwise orders, be deemed to be part of the costs of the cause of the party in whose favour the application or other step is determined and shall be paid and otherwise dealt with in accordance with the provisions of this Order.

8 Orrcon submits that if its costs and those of Capital Steel are not reserved, then the appropriate order is that the costs be Capital Steel's costs of the cause. The effect of such an order would be that if Capital Steel is successful, it will receive the costs of the interlocutory application. If Capital Steel is unsuccessful, it will not have to pay Orrcon's costs of the interlocutory application.

9 Orrcon referred to *His Eminence Metropolitan Petar Diocesan Bishop of the*

Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2) [2007] NSWCA 142 in support of its submission. However, the discussion in that case (at [16]-[32]) focused on the question of whether there was a general rule in circumstances where an applicant for an interlocutory injunction succeeds, and not where he or she fails.

10 In *Australian Agricultural Co Ltd v AMP Life Ltd* [2003] FCA 1134 Sackville J considered it appropriate to award costs against an unsuccessful applicant for an interlocutory injunction where the applicant had failed, not only on the balance of convenience ground, but also on the serious question to be tried ground.

11 Orrcon submits that it succeeded on a substantial matter involved in its interlocutory application in that it succeeded in establishing that there was a serious question to be tried in relation to the allegation that the pipe was defective. (See [42]-[49] of my previous reasons.) However, the fact is that in terms of the interlocutory relief it sought, Orrcon failed to establish a serious question to be tried and, in any event, the balance of convenience favoured the refusal of relief. In addition, my decision means that Orrcon's claim for final relief in relation to the Westpac letter of credit is otiose. In those circumstances, I think it is appropriate to order that Orrcon pay Capital Steel's costs of the application for interlocutory relief.

12 Orrcon submits that if, contrary to its primary submission, I award costs in favour of Capital Steel, then I should reflect in any such order the fact that it succeeded in establishing a serious question to be tried in relation to the allegation that the pipe was defective. Three experts who gave evidence in support of that allegation were cross-examined by counsel for Capital Steel and the issue occupied some time. I could reflect Orrcon's success on that particular matter by making different costs orders with respect to different issues, or I could reduce the costs otherwise payable to Capital Steel by Orrcon.

13 There is no doubt that I have the power to proceed in one or other of the ways I have identified. The power is contained in s 43(2) of the *Federal Court of Australia Act 1976* (Cth): *Inn Leisure Industries Pty Ltd (Provisional Liquidator Appointed) v DF McCloy Pty Ltd (No 2)* (1991) 28 FCR 172. Some caution is to be exercised before splitting costs in accordance with the success of the parties on various disputed questions of fact and law:

Cretazzo v Lombardi (1975) 13 SASR 4 at 12 per Jacobs J; *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 28 ALR 201 at 208 per Fisher J.

14 I do not think that this is a case calling for the making of different costs orders in relation to different issues, or for reducing Capital Steel's costs by reason of Orrcon's success on the particular matter. In my opinion, to do so would be to define or identify an issue too narrowly. At the very least, the issue is whether Orrcon had established a serious question to be tried that Capital Steel had engaged in unconscionable conduct, and the allegation that the pipe was defective was simply one element of that issue. Orrcon failed on the issue.

15 Before leaving this topic, it should be noted that the fact that Orrcon established a serious question to be tried in relation to the allegation that the pipe was defective is a matter I have taken into account in rejecting Capital Steel's submission that Orrcon should be ordered to pay costs on an indemnity basis.

16 I turn to consider whether an order should be made that the costs I have awarded in favour of Capital Steel be taxed and paid forthwith.

17 Order 62 r 3 is as follows:

> (1) The Court may in any proceeding exercise its powers and discretions as to costs at any stage of the proceeding or after the conclusion of the proceeding.
>
> (2) Where the Court makes an order in any proceeding for the payment of costs the Court may require that the costs be paid forthwith notwithstanding that the proceeding is not concluded.
>
> (3) An order for costs of an interlocutory proceeding shall not, unless the Court otherwise orders, entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded or further order.

18 The authorities suggest that there are a number of reasons for the general rule embodied in O 62 r 3(3) and they include avoiding multiple taxations, avoiding interlocutory applications being used as a means to exhaust the funds of an opposing party and avoiding unfairness in a case where, for example, a party who is ultimately successful is unable to set off his or her judgment against an earlier liability to pay costs. The authorities suggest that a

common example of a case in which a court will otherwise order is where there are multiple attempts to plead a case causing delay in the progress of the case to hearing and final orders.

19 Capital Steel submits that this is an appropriate case for an order that costs be taxed and paid forthwith. It submits that it has succeeded on a discrete issue, namely the question of whether any orders should be made in relation to the Westpac letter of credit, and that in those circumstances it should receive its costs forthwith. It also submits that Orrcon's conduct was unreasonable.

20 Capital Steel referred to the decision of Barrett J in *Fiduciary Limited v Morning Star Research Pty Ltd* (2002) 55 NSWLR 1. In that case, Barrett J identified three categories of case in which the court might order that costs be paid forthwith under Pt 52A, r 9 of the *Supreme Court Rules 1970* (NSW) namely,

1. where the decision on the application determines a separately identifiable matter or the completion of a discrete aspect;
2. where there has been unreasonable conduct on the part of the unsuccessful party; or
3. where there is likely to be a considerable lapse of time between the application and the final determination of the proceeding.

21 In *Australian Agricultural Co Ltd v AMP Life Ltd* [2003] FCA 1134, Sackville J held that the case before him came within the first and third categories. His Honour said (at [14]-[16]):

> In the present case, I think the application for an interlocutory injunction can fairly be regarded as a self-contained part of the proceedings. The failure of the application for an injunction effectively means that the claim for this form of relief has been finally disposed of. While it is open to AACo to pursue other relief against AMP, such as its claim for damages, the overwhelming likelihood is that the Stanbroke Shares have now been transferred to Nebo as the purchaser. Moreover, there is nothing in the proceedings to indicate that AACo intends to seek relief against Nebo in these proceedings.
>
> In addition, if AACo does pursue claims against AMP, it would seem that the litigation will take a considerable period of time to resolve. Unless an order is made for the payment of costs forthwith, AMP is unlikely, in the ordinary course of events, to recover its costs in respect of the interlocutory proceedings for a lengthy period.

> I think that each of these factors justifies making an order in terms of FCR, O 62 r 3(3). In my opinion, the demands of justice require that there be a departure from the general practice that an order for costs of an interlocutory proceeding should not entitle a party to have a bill of costs taxed until the principal proceedings have been concluded. Accordingly, I propose to order that AACo pay AMP's costs of the interlocutory proceedings forthwith and that AMP be entitled to have its bill of costs taxed forthwith.

22 Capital Steel's success on the application for interlocutory relief means that Orrcon's claim for final relief in relation to the Westpac letter of credit is otiose. That is a significant factor in favour of the order sought by Capital Steel. Capital Steel submits that Orrcon's conduct was unreasonable in the following ways:

1. The refusal, or at least failure, by Orrcon to particularise its plea of unconscionable conduct;
2. Orrcon's failure to establish a serious question to be tried;
3. The fact that the orders sought by Orrcon would have involved a substantial interference in the commercial relationship between Capital Steel and the Commonwealth Bank (see [108] of my previous reasons);
4. The fact (so it is said by Capital Steel) that Orrcon has not quantified its claim against it (see [105] of my previous reasons); and
5. The fact (so it is said by Capital Steel) that Orrcon has unlawfully refused to make payment of a separate amount due by it to Capital Steel (see [105] of my previous reasons).

23 I do not think that any of these matters constitute unreasonable conduct in the relevant sense.

24 Orrcon submits that should I make an order that the costs be taxed and paid forthwith, it may be deprived of a set-off if its claim ultimately succeeds. That result may occur (so Orrcon submits) in circumstances in which I found that Capital Steel would not have the financial resources to pay a substantial amount to Orrcon (see [101] of my earlier reasons).

25 Capital Steel submits that there is no case in which an order that costs be paid forthwith has been refused on the ground that the unsuccessful party may thereby lose a right of set off. Whether that be so or not, there is no doubt that the effect on a possible right of set off is a relevant matter, the precise weight to be placed on it is to be determined having

regard to the circumstances of the case. In *Bailey v Beagle Management Pty Ltd* (2001) 105 FCR 136 the Full Court of this Court said (at 145 [37]):

> The applicants must pay the respondents' costs. We also think this an appropriate case for an order under O 62, r 3(2) that these costs be paid forthwith. The policy behind O 62, r 3 is that, in the ordinary course of litigation, costs awarded in interlocutory proceedings need not be paid until the conclusion of the proceedings when set-offs can be made in the light of the ultimate orders for costs. There is an access to justice aspect in this. Impecunious litigants who have a meritorious claim or defence should not be forced out of court because of inability to meet interlocutory costs orders. However, applications for leave to appeal in interlocutory matters of practice and procedure stand on a different footing. There is a strong public policy against the proliferation of such applications, for the reasons given by Jordan CJ and endorsed by the High Court in [*Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170]. The applicants in the present case having failed in this application, the respondents should not have to wait for a year or more before being paid.

26 In my opinion, weighing up the relevant considerations, I do not think an order that the costs be taxed and paid forthwith should be made.

27 I turn now to consider Capital Steel's application that there be an order that the costs be taxed on an indemnity basis.

28 The principles by which a court proceeds in determining whether costs should be awarded on a basis other than a party and party basis are well known and I will not repeat them: *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 232-234 per Sheppard J; *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151; *NMFM Property Pty Ltd v Citibank Ltd (No 11)* (2001) 109 FCR 77 ("*NMFM*"). Various circumstances have been identified in the cases as warranting a special order. It is trite to say that the discretion is a broad one, no two cases are alike, and the categories or circumstances in which a court will make a special order are not closed.

29 Capital Steel sought to support its application for a special order by reference to two of the well known categories or circumstances, namely, unsuccessful allegations of fraud and persistence in a hopeless case.

30 Capital Steel submits that the allegation of knowledge made against Mr Studdy is akin to an allegation of fraud and that it was unsuccessful. I accept that the allegation of knowledge was unsuccessful and that it was a relatively serious one, but I do not accept that it is akin to an allegation of fraud. To my mind, it was simply part of the plea of unconscionable conduct.

31 Capital Steel submits that Orrcon's case was hopeless and it should have known that. In this context, I am mindful of the following observations of Lindgren J in *NMFM* at [72]-[73].

> In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, Woodward J stated in an oft-cited passage (at 401):
>
> > "I believe that it is appropriate to consider awarding 'solicitor and client' or 'indemnity' costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion."
>
> The expression "where the applicant, properly advised, should have known that he had no chance of success" should not be allowed to give rise to difficulty. It might be suggested, with the benefit of hindsight, that in every case "proper advice" would be advice in accordance with the reasons for judgment delivered by the Court. Accordingly, it might be suggested in the present case that NM, properly advised, would have been advised in accordance with Reasons for Judgment (No 10). Clearly, this is not what Woodward J had in mind. On the other hand, his Honour's expression "properly advised" was intended to introduce an objective notion: it would "set the bar too high" to insist that the party have actually known that there was no chance of success. Of course, questions will arise in relation to sets of circumstances falling between the two extremes. What assumed knowledge of the facts is the party's litigious conduct to be measured against? What factual inquiries is the party "deemed" to have made? What level of legal advice is the party "assumed" to have had?
>
> I do not attempt to answer these general questions.

32 I would not put Orrcon's application in the category of a hopeless case. The application came on quickly and it was complex, both legally and factually. It has to be said

that views may reasonably differ as to the precise scope of the doctrine of unconscionable conduct. I realise there is an element of impression here, but I would not characterise Orrcon's case as a hopeless one for the purposes of a special order as to costs.

33 I refuse to order that Capital Steel's costs be taxed on an indemnity basis.

The costs of the Commonwealth Bank

34 Order 6 r 8 of the Rules is as follows:

> (1) Where a person who is not a party –
> (a) ought to have been joined as a party; or
> (b) is a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceeding may be effectively and completely determined and adjudicated upon,
> the Court may order that the person be added as a party and make orders for the further conduct of the proceeding.
>
> (2) A person shall not be added as an applicant without the person's consent.

35 A person ought to have been joined under this rule if a judgment of the Court will have a direct affect on the rights and liabilities of that person. This is to be contrasted with a judgment which will have an effect which is no more than indirect or inconsequential: *News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 523-525.

36 I have no doubt that having regard to the reformulated orders and the matters referred to in my previous reasons, the Commonwealth Bank fell within the terms of this rule. I did not understand Orrcon to suggest the contrary. Orrcon's submission was that the Commonwealth Bank was not required to be present at the hearing and that all submissions which were properly made in opposition to its application for interlocutory relief either were or could have been made by Capital Steel. Orrcon submits that the Commonwealth Bank provided no assistance to the Court.

37 I reject this submission. The evidence filed by the Commonwealth Bank was of considerable assistance as my previous reasons indicate, and in my opinion, it would be a counsel of perfection to say that the Commonwealth should have provided this information to Capital Steel who could have presented it on its behalf. Furthermore, the Commonwealth Bank was entitled to be at the hearing to protect its interests, particularly as the orders sought

by Orrcon were reformulated as the hearing proceeded. In my opinion, it cannot be said that it was not appropriate for the Commonwealth Bank to appear and to be heard. In my opinion, it follows that an order should be made that the applicant pay the fourth respondent's costs of and incidental to the application for interlocutory relief. In view of that conclusion, it is not necessary for me to address the rival submissions made by Capital Steel and the Commonwealth Bank regarding Capital Steel's application for a declaration as against the Commonwealth Bank in the event that I did not order that Orrcon pay the costs of the Commonwealth Bank. In that event, Capital Steel sought a declaration that the Commonwealth Bank was not entitled to recover the costs of the application for interlocutory relief under the securities it holds from Capital Steel.

Conclusion

38 Orrcon should pay Capital Steel's costs of and incidental to its application for interlocutory relief to be taxed on a party and party basis in default of agreement. Orrcon should pay the Commonwealth Bank's costs of and incidental to its application for interlocutory relief to be taxed on a party and party basis in default of agreement. There should be no order as to the costs of the third respondent, Westpac Banking Corporation, in relation to Orrcon's application for interlocutory relief.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 24 January 2008

Counsel for the Applicant: Mr F M Douglas QC and Mr R J Cheney

Solicitor for the Applicant: Fisher Jeffries

Counsel for the First and Second Respondents:	Mr A G Bell SC with Mr A J McInerney and Mr D Barnett
Solicitor for the First and Second Respondents:	Foulsham & Geddes
Solicitor for the Third Respondent	Minter Ellison
Counsel for the Fourth Respondent	Mr R G Forster SC with Mr P J Dowdy
Solicitor for the Fourth Respondent	John O'Sullivan
Date of Hearing:	14, 15 and 16 August 2007
Date of Judgment:	24 January 2008