FEDERAL COURT OF AUSTRALIA

Rosegum Corporation Pty Ltd v Young, in the matter of Rosegum Corporation Pty Ltd (No 2) [2017] FCA 36

File number:	WAD 76 of 2015
Judge:	**MCKERRACHER J**
Date of judgment:	31 January 2017
Catchwords:	**COSTS** - defendants seek costs of interlocutory hearings to be payable forthwith – substantial delays by plaintiffs in articulating case - substantial and unnecessary costs to defendants - appropriate that costs orders be payable forthwith
Legislation:	*Federal Court Rules 2011* (Cth) r 40.13
Cases cited:	*Harris v Cigna Insurance Australia Ltd & Dickie* (1995) ATPR 41-445 *Life Airbag Company of Australia Pty Ltd v Life Airbag Company (New Zealand) Ltd* [1998] FCA 545 *Lynx Engineering Consultants Pty Ltd v The ANI Corporation Ltd (t/as ANI Bradken Rail Transportation Group) (No 3)* [2010] FCA 32 *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639 *Orrcon Operations Pty Ltd v Capital Steel & Pipe Pty Ltd (No 2)* [2008] FCA 24 *Rafferty v Time 2000 West Pty Ltd (No 3)* (2009) 257 ALR 503 *Rosegum Corporation Pty Ltd v Young, in the matter of Rosegum Corporation Pty Ltd* [2016] FCA 604
Date of hearing:	Determined on the papers
Date of last submissions:	22 December 2016
Registry:	Western Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency

Category:	Catchwords
Number of paragraphs:	24
Counsel for the Plaintiffs:	Ms Fei Fei Xue
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Counsel for the First and Second Defendants:	Mr JP Cook
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Counsel for the Third Defendant:	Mr DP Butler
Solicitor for the Third Defendant:	Lavan Legal

ORDERS

WAD 76 of 2015

IN THE MATTER OF ROSEGUM CORPORATION PTY LTD (IN LIQUIDATION) ACN 079 390 113

BETWEEN:	**ROSEGUM CORPORATION PTY LTD (IN LIQUIDATION) ACN 079 390 113** First Plaintiff
	GLEN DOUGLAS TRINICK IN HIS CAPACITY AS LIQUIDATOR OF ROSEGUM CORPORATION PTY LTD (IN LIQUIDATION) ACN 079 390 113 Second Plaintiff
AND:	**PAULA MARGARET YOUNG** First Defendant
	NORMAN WAYNE YOUNG Second Defendant
	EUGENIE PAULA FAULKNER AS TRUSTEE FOR THE EDGE INVESTMENT UNIT TRUST Third Defendant

JUDGE: **MCKERRACHER J**

DATE OF ORDER: **31 JANUARY 2017**

THE COURT ORDERS THAT:

1. The plaintiffs pay forthwith the defendants' costs of the plaintiffs' interlocutory applications dated 5 May 2016 and 20 June 2016, to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

BACKGROUND TO SPECIAL COSTS APPLICATION

1 On 4 June 2015, the plaintiffs filed a statement of claim to which the first and second defendants filed a defence on 3 July 2015. Between June and September 2015 parties, other than the first and second defendants, conferred on various procedural matters. On 2 October 2015, the third defendant filed a defence to the statement of claim.

2 On 22 October 2015, by consent, the parties agreed to orders for discovery by categories and for inspection and mediation. Mediation took place on 2 December 2015 and was adjourned to 8 February 2016. On 1 February 2016, the plaintiffs wrote to the defendants foreshadowing an application to amend the statement of claim in terms of a 49 page draft amended pleading. That draft removed allegations of insolvent trading, which had been made in the original claim, and introduced detailed allegations of 'breach of duties' claims. Notably, the draft was not marked up to conveniently identify the proposed amendments.

3 Such a marked-up version was provided in early February 2016, but took the form only of striking out the entire original statement of claim and replacing it with a new statement of claim. On 5 February 2016, the plaintiffs provided a two page written summary of the nature of the proposed amended claim, in particular, relying upon claims for 'equitable compensation' and 'a claim under s 197 of the *Corporations Act*' and the breaches of duties case. There were numerous exchanges between the parties over a period of 10 months in relation to this proposed amendment and, ultimately, the defendants persuaded the plaintiffs to completely remove from the claim any equitable claims, claims for breaches of duties or breaches of trustee's duties and claims under s 197 of the ***Corporations Act*** *2001* (Cth).

4 A case management hearing was listed for 9 March 2016, but was adjourned to allow ongoing conferral in relation to the proposed amended statement of claim and on security for costs of the action. There was no response from the plaintiffs until a proposed amended pleading was provided in early April 2016, which was again not marked up in any way to identify the amendments. It again took the form only of striking out the entire original claim and replacing it with a new statement of claim. A case management hearing listed on 14 April 2016 was adjourned to 21 April 2016 to allow further conferral in relation to this

proposed amended claim and security for costs. Such conferral occurred again by way of correspondence and telephone exchanges.

5 On 5 May 2016, the plaintiffs pursued a foreshadowed interlocutory application for leave to amend the statement of claim and for separate trials. On 24 May 2016, the hearing of that application proceeded. The first and second defendants engaged senior counsel for the purpose of settling documents for the hearing and for the appearance in court.

6 On 30 May 2016, I delivered judgment on the application and made orders dismissing the application in its entirety, but granting the plaintiffs leave to file a further application for leave to amend the statement of claim: *Rosegum Corporation Pty Ltd v Young, in the matter of Rosegum Corporation Pty Ltd* [2016] FCA 604 (***Rosegum No 1***). Costs were reserved.

7 On 16 June 2016, the plaintiffs circulated a further proposed amended claim of some 54 pages and on 20 June 2016, they filed another interlocutory application to amend the claim in the terms of the draft annexed to an affidavit also filed on that day. On 14 July 2016, in an attempt to avoid the hearing of a further interlocutory application, attempts were made to resolve the pleadings issues by provision of particulars, as had been offered by counsel for the plaintiffs at the previous hearing.

8 The plaintiffs' second application was listed for mention on 21 July 2016, but before that date the second plaintiff died. A short hiatus ensued to allow an opportunity to consider the appropriate response to this event. Communications ensued with further drafts being provided by the plaintiffs, which were rejected by the defendants. The plaintiffs' second application to amend was listed for hearing on 13 October 2016. The defendants had necessarily prepared for that hearing as it was, in substance, a strike out application.

9 By this stage, the plaintiffs had changed solicitors and counsel. They advised of an intent to remove the breaches of duties claims from the current proposed amendments, in consequence of which it was thought that there may be a possibility of settling the pleadings disputes. The interlocutory application was listed again for 1 December 2016 and conferral ensued in relation to the pleadings. Written submissions were filed by both parties, but again, the second interlocutory application was abandoned with the plaintiffs effectively conceding all of the defendants' objections and proffering a further amended pleading. Ultimately, that further pleading was accepted.

10 The defendants seek costs for this very unsatisfactory exercise in refining the plaintiffs' pleadings. The plaintiffs accept that they are liable to pay the defendants' costs of the two interlocutory applications in question. The only issue in dispute is whether those costs should be paid forthwith, as the defendants seek, or at the conclusion of the proceeding.

THE PRINCIPLES

11 The plaintiffs naturally submit that the costs should be paid at the conclusion of the proceedings. The plaintiffs rely on r 40.13 of the *Federal Court Rules 2011* (Cth) (**the Rule**) which provides as follows:

> **40.13 Taxation of costs awarded on an interlocutory application**
>
> If an order for costs is made on an interlocutory application, the party in whose favour the order is made must not tax those costs until the proceeding in which the order is made is finished.
>
> Note: The Court may order that costs of an interlocutory application be taxed immediately.

12 An obvious reason for the existence of this Rule is to avoid a multiplicity of assessments of costs. Additionally, it is not usually appropriate to pay costs immediately because that party may ultimately succeed in the substantive proceedings. From a logical point of view there may be capacity to set off respective liabilities for costs or other awards of the Court at completion of the proceedings in most instances.

13 Nevertheless, in circumstances where the interests of justice require there should be departure from the Rule. It would be rare to make an order of this nature unless there was some unreasonableness in the conduct of the unsuccessful party and/or a likelihood of a long delay between the interlocutory proceeding and the conclusion of the principal proceeding: *Rafferty v Time 2000 West Pty Ltd (No 3)* (2009) 257 ALR 503 per Besanko J. A further factor relevant to whether or not there should be a departure from the normal rule is the existence of an award for security for costs. Thus I noted in *Lynx Engineering Consultants Pty Ltd v The ANI Corporation Ltd (t/as ANI Bradken Rail Transportation Group) (No 3)* [2010] FCA 32 (at [37]):

> An additional matter for consideration in the exercise of discretion is the fact that a significant order for security for costs in favour of Bradken will be made and while Bradken will, if it ultimately succeeds, not have the benefit of the costs awarded on the strike out application for a considerable period of time, the security for costs application should go some considerable way in ensuring that it will be protected on the existing costs order regardless of the outcome.

14 In that case I declined to depart from the normal rule, despite arguments from the respondents in relation to long delays, the instigation of what was, in effect, a new proceeding, ample opportunity to rectify the pleading in response to numerous requests, and the fact that the pleading failed to identify a critical part of the applicant's case.

15 In *Lynx*, however, a main consideration in the exercise of discretion was that a significant order for security for costs was made.

CONSIDERATION

16 In this case, the plaintiffs argue that costs should be payable at the conclusion of the proceedings for the following reasons:

(a) the plaintiffs have substantial claims against the defendants, which the plaintiffs may be successful at the conclusion of the proceedings. It would be unfair to insist the plaintiffs pay costs immediately when those costs may be set-off at the conclusion of the proceeding; and

(b) the plaintiffs have already provided security for costs in relation to the interlocutory applications in the form of a bank guarantee - $25,000 for the first and second defendants and $20,000 for the third defendant. The parties are conferring regarding provision of further security in respect of the remainder of the proceeding. Irrespective of the ultimate success of the proceeding, the defendants costs in relation the interlocutory applications would be protected by the security already given.

17 Reference is also made to the fact that at the conclusion of the first interlocutory application, which I dismissed, I reserved the question of costs to be determined at any further application by the plaintiffs for leave to amend the statement of claim. The point is made that I did not indicate that such costs needed to be paid forthwith. I would observe that equally, I would not have been anticipating the extraordinary further delays in the plaintiffs being able to articulate an acceptable case, which has clearly and inappropriately put the defendants to substantial and unnecessary cost.

18 As noted by Besanko J in *Orrcon Operations Pty Ltd v Capital Steel & Pipe Pty Ltd (No 2)* [2008] FCA 24 (at [18]), repeated failure to properly plead the case is a recognised exception to the general rule that costs of an interlocutory application should be held over until the end of the action itself. Such an order may be justified where there has been a 'long delay in

close of pleadings by the pursuit of an ill-considered and perhaps unnecessary claim': *Harris v Cigna Insurance Australia Ltd & Dickie* (1995) ATPR 41-445 per Kiefel J. I note the discussion in *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639 per Weinberg J (at [13]-[20]):

> 13 Order 62 r 3 of the Federal Court Rules provides:
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> "3. (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.
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> *(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.*"
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> 14 The principles which govern the exercise of the discretion under O 62 r 3 are identified in a helpful manner in a recent decision of Branson J in *Life Airbag Company of Australia Pty Ltd v Life Airbag Company (New Zealand) Ltd* (unreported, 22 May 1998).
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> 15 Her Honour said:
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> "Order 62 rule 3 does not give any indication of the matters to which the Court is to have regard in determining whether to order that certain costs be paid forthwith notwithstanding that the proceeding is not concluded. Olney J in Thunderdome Racetiming and Scoring Pty Ltd v Dorian Industries Pty Ltd (1992) 36 FCR 297 at 312 expressed the view that –
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> > "the discretion should be exercised in favour of a party who establishes that the demands of justice require that there be a departure from what appears to be the general practice envisaged by the rule, namely, that an order for costs of an interlocutory proceeding shall not entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded."
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> In *Allstate Life Insurance Co v Australia & New Zealand Banking Group Limited (No 14)* (Lindgren J, 18 August 1995, unreported) his Honour expressed the view that the provision of the Federal Court Rules allowing orders that costs be paid forthwith is "possibly under utilised". His Honour indicated that where the final determination of a proceeding was "far away", it might be appropriate for use to be made of O 62 r 3. In *Allstate Life Insurance Co v Australia & New Zealand Banking Group Limited (No 13)* (Full Federal Court, 17 August 1995, unreported) the Court, in considering the costs of an interlocutory appeal, said:
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> > "The litigation is complex. It is unlikely that final judgment will be given until late 1996 or even later. The successful parties to the appeals before this Court will therefore, in the ordinary course of events, not recover their costs for a long time.

> It would be wrong if the successful parties do not enjoy the fruits of their order for costs for such a long time. The parties entitled to the benefit of the order for costs which this Court has made in appeals from interlocutory orders should not be deprived of that benefit until the case has been finally disposed of."

> The statement of claim in this matter suggests that the litigation will be complex. Certainly the matter to date has proceeded slowly. A hearing date can not realistically be expected for many months. I therefore take into account in the exercise of my discretion the fact that, unless an order is made pursuant to O 62 r 3, the respondents will not receive the benefit of the orders for costs made in their favour for a considerable time. "

16 In *Harris v Cigna Insurance Australia Ltd* (1995) ATPR 41-445 Kiefel J accepted that an order that certain costs be taxed and paid forthwith was justified in circumstances where there had been "long delay in close of pleadings by the pursuit of an ill-considered and perhaps unnecessary claim" (see 41,011).

17 Branson J in *Life Airbag* referred specifically to the judgment of Kiefel J in *Harris v Cigna Insurance Australia Ltd*, and continued:

> "Her Honour's approach appears to reflect a view, with which I am in agreement, that the demands of justice may well require a departure from the ordinary rule that costs are to be paid after the completion of proceedings, where a party has been required to incur significant costs over and above those which it would have incurred had the opposing party acted in the handling of the proceeding with competence and diligence. In this case the applicants filed and served five different versions of a statement of claim over a period of nine months. The applicants' own counsel ultimately conceded that the first four versions were unsatisfactory and required to be redrawn, but not before the respondents incurred the costs of instructing counsel to attend at Court on strike out applications. Costs incurred in such circumstances are not costs which, in the ordinary course, a party should be expected to bear until a proceeding is concluded. They are costs in reality thrown away and in respect of which, in my view, the demands of justice may require a departure from the general practice envisaged by O 62 r 3."

18 *Mitanis v Pioneer Concrete (Vic) Pty Ltd & Ors* (1998) ATPR 41,623 is a decision of this Court, also referred to by Branson J in *Life Airbag*, in which Goldberg J ordered costs to be taxed and paid forthwith where the effect of the interlocutory application before his Honour had been to remove "both factually and legally, one of the three causes of action … from the area of dispute between the parties".

19 Branson J also referred to the decision of Lehane J in *Vasyli v AOL International Pty Ltd & Anor* (unreported, 2 September 1996) in which his Honour ordered that the respondents' costs of a successful strike out motion against the applicant's statement of claim be taxed and paid forthwith. In *Vasyli*, the applicant failed to amend his statement of claim despite clear warnings having been given by the respondents as to its deficiencies. His Honour found that upon the filing of an amended statement of claim following the strike out, the matter before the court would be, to a large extent, a new proceeding. Lehane J noted the justification for the general rule, and the inconvenience and oppression that could result from a series of taxations of costs of a series of interlocutory applications. However, he decided that the case before him was "one of those rare cases where it is appropriate to make an order for taxation and payment forthwith."

> 20 On 12 November 1999, Kiefel J handed down an interlocutory judgment in *Batten v CTMS Ltd* [1999] FCA 1576. The proceedings in that case, like the case before me, arose out of the recruitment and training of a non union workforce by and on behalf of the "Patrick companies" and others. Kiefel J ordered that certain costs of the respondents' successful strike out application be taxed and paid forthwith. Her Honour made that order on grounds "principally connected with the omission of … pleas of loss and damage", and stated: "[t]he matter cannot proceed until these facts are pleaded". Her Honour (at par 63) compared the case before her to *Life Airbag* and to *Vasyli*:
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> > "Lehane J made such an order where an unsatisfactory statement of claim required substantial amendment such that the proceedings could be viewed as having been commenced afresh. In this case, whilst the statement of claim was not wholly deficient, it has taken almost a year and three attempts to constitute the action, and when loss and damage are pleaded that will be the first time when the pleading could be regarded as complete. I will make the orders requiring payment of costs following taxation."

19 It is quite clear, in my view, that the plaintiffs have, in substance and effect, lost both interlocutory applications after a very substantial delay. I accept the first and second defendants' submissions that insofar as the first interlocutory application sought a separate trial, it was misconceived and premature. The orders make clear that the entire application was dismissed, even if the issue of separate trials was not finally decided by reason of its prematurity.

20 As to the second interlocutory application, it was listed twice for special appointments for which the defendants twice fully prepared only to have the plaintiffs capitulate on relevant points at the eleventh hour and only after the Court pressed them for submissions.

21 In my view, the conduct of those parts of the proceeding by the plaintiffs has been unsatisfactory and unreasonable. I accept the submission for the defendants that:

(a) the defendants have tried their best to take the plaintiffs out of the 'breach of duties case' from the earliest moment after mediation failed to resolve the matter;

(b) the defendants articulated to the plaintiffs detailed reasons as to why the 'breach of duties' case must fail, only for the plaintiffs to refuse to accept those contentions;

(c) the defendants have had to fully prepare on three occasions for special appointments, succeeding on the first and the plaintiffs fully capitulating on the last two;

(d) security for costs has been given and while I take this into account, it is obvious that security for costs would have been ordered in any event in the circumstances and the amount is not particularly substantial; and

(e) the plaintiffs have changed solicitors and used three different counsel to attempt to settle the pleadings without success.

22 It is the case that the defendants, through consultation and negotiation, have eliminated several causes of action in their entirety. The original claim alleged breaches of 15 different sections of the *Corporations Act*, unspecified breaches of fiduciary duties, insolvent trading and more.

CONCLUSION

23 In my view, this case is similar to *Life Airbag*, referred to at length above (at [18]) by Weinberg J, where multiple different versions of a statement of claim were proffered and four redrawn not before the respondents had incurred significant costs associated with poor attendances. In that case, Branson J said (at 12-13):

> It may be noted that Lehane J in *Vasyli v AOL International Pty Limited* (Lehane J, 2 September 1996, unreported) ordered that costs incurred by a party in obtaining an order that a totally unsatisfactory statement of claim be struck out should be paid forthwith notwithstanding that the proceeding was not concluded. His Honour made such an order on the ground that the proceeding, if it were to continue, would do so on the basis of an amended statement of claim and, to a large extent, would be a new proceeding. See also the decision of Goldberg J in *Mitanis v Pioneer Concrete (Vic) Pty Ltd* (Goldberg J, 25 February 1998, unreported), where his Honour made an order that costs be taxed and paid forthwith where an interlocutory application had resulted in one of three causes of action being removed from "*the arena of dispute between the parties*".
>
> I conclude that in the circumstances of this case, the interests of justice require that there be a departure from the ordinary rule that an order for costs of interlocutory proceedings does not entitle a party to have a bill of costs taxed, and the costs paid, until the principal proceeding is concluded. In so concluding I do not overlook the suggestion put forward on behalf of the applicants that such a departure from the ordinary rule may have the effect of stifling the proceedings. I am not satisfied that it would necessarily have such an effect. However, even if I were, my conclusion would not alter.

24 All defendants have incurred costs with the plaintiffs struggling to articulate an arguable cause of action. The substantial delays and the plaintiffs inadequately articulating the case against the defendants, in particular, by removal of numerous causes of action, which removal suggests they were unarguable, puts this case in an exceptional position. The defendants have been put to substantial expense by this approach and should not have to wait

until completion of the proceeding before being compensated. The exceptional costs orders will be made for costs to be paid forthwith.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 31 January 2017