35/11; [2011] VSC 524

SUPREME COURT OF VICTORIA

TRA GLOBAL PTY LTD v KEBAKOSKA

Osborn J

19 October 2011

COSTS – APPLICATION FOR SOLICITOR/CLIENT COSTS – WHETHER PROCEEDING COMMENCED IN CIRCUMSTANCES WHERE THE APPLICANT PROPERLY ADVISED SHOULD HAVE KNOWN IT HAD NO CHANCE OF SUCCESS – APPEAL TURNING ON QUESTIONS OF LAW NOT EVIDENCE – CURRENT STATE OF AUTHORITY RENDERING APPEAL HOPELESS – OTHER FACTORS BEARING ON DISCRETION.

In the principal judgment given in *TRA Global Pty Ltd v Kebakoska* [2011] VSC 480; MC34/2011, upon the dismissal of the appeal, the successful plaintiff K. sought costs on a solicitor and client basis.

HELD: Application allowed. Costs awarded to K. on a solicitor and client basis.
1. Although, as a general rule, the Court will order costs to be taxed on a party and party basis, it retains a discretion to order costs on a solicitor and client basis. That discretion is not fettered by specific pre-requisites, but a case must have some 'special' attribute to qualify for the award of costs on a higher basis.

2. In the present case, the appellant/employer fundamentally failed to make out its case with respect to the demise of estoppel by representation as a separate defence to claims for restitution of money paid under mistake.

3. This was not a case in which the facts were in dispute. The Magistrate was either correct or wrong in law. When the current state of authority was considered, the appeal was hopeless. It was submitted on behalf of the appellant that it could not be said that the appeal had no chance of success and that several of the arguments and contentions advanced by the appellant were not foreclosed by authority. That submission is not accepted. The appellant did not properly identify or acknowledge the effect of the authorities conclusively binding upon the Magistrate nor the authority correctly stating the current state of the law in England and Wales.

4. There were three further matters which tended to favour the award of costs on the higher basis:
(a) First, the subsidiary proposition that it was not open to the Magistrate to conclude estoppel by representation was made out on the evidence was not tenable for the reasons explained in the principal judgment.

(b) Secondly, although the appeal was not determined on the 'change of position' arguments, the appellant's arguments in respect of this issue did not acknowledge or confront the New South Wales authorities referred to at [34] following in the principal judgment. Further, the fact that the appellant also failed on this subsidiary aspect of its appeal was of some significance.

(c) Thirdly, the defence of estoppel upheld by the Magistrate was founded on the notion of holding the appellant to its own prior representation and the consequent avoidance of detriment to the respondent. The underlying equity supported the view that the respondent should not suffer consequential detriment by reason of the appellant's unsuccessful appeal.

OSBORN J:

1. In this matter, the successful respondent seeks her costs on a solicitor and client basis.

2. Although, as a general rule, the Court will order costs to be taxed on a party and party basis (r 63.31),[1] it retains a discretion to order costs on a solicitor and client basis (r63.32).

3. That discretion is not fettered by specific pre-requisites, but a case must have some 'special' attribute to qualify for the award of costs on a higher basis.[2]

4. In *Aljade and MKIC v OCBC*,[3] Redlich J stated:

> The Plaintiffs sought to characterise the Defendant's conduct of the litigation as falling within recognised categories. It may be convenient and desirable that frequently occurring circumstances be classified into categories to advance a principle of justice that like cases should be treated alike and that there be some guidance as to the criterion for the judicial exercise of the discretion. In *Colgate*-Palmolive Sheppard J referred to the need to avoid a wilderness of single instances. But facts which render it just that a special costs order be made need not be resolved into a recognised category. It is often stated that the categories are not closed. Ultimately the manner of exercise of the discretion depends upon the peculiar circumstances of each individual case.[4]

5. One category of case in which the Courts have awarded costs on a higher basis is that in which the proceeding has been commenced in circumstances where the applicant, properly advised, should have known it had no chance of success. In *Murdaca v Maisano*,[5] Nettle JA referred to the well-known decision of *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Limited*[6] in the following terms:

> As Woodward, J put it, it is appropriate to consider awarding solicitor/client costs or indemnity costs whenever it appears that a party 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 to clearly established laws.[7]

6. It is not necessary that a collateral purpose or some species of fraud be established.[8]

7. The discretion would not ordinarily fall to be exercised, however, when there was a serious and genuine question of fact to be resolved in the proceeding. In the *OCBC case*, Redlich J stated:[9]

> Where the litigant did not recognise that its case was without merit Courts have sometimes declined to make a special costs order.[10] Where there were serious and genuine questions of fact to be tried, a special costs order will not generally be imposed on the losing litigant.[11] In *Ugly Tribe* Harper J drew attention to the policy consideration that potential litigants should not be unnecessarily discouraged from seeking to litigate a factual dispute, it seldom being possible to predict with any certainty what findings of fact will be made.[12] Disbelief of a party's witnesses does not as a matter of principle provide a sufficient basis for the award of indemnity costs.[13]

8. His Honour further adverted to the danger of viewing the matter through the prism of hindsight.[14]

9. In the present case, the appellant fundamentally failed to make out its case with respect to the demise of estoppel by representation as a separate defence to claims for restitution of money paid under mistake.

10. The case put on behalf of the appellant proceeded by reference to views expressed by some members of the High Court in *Commonwealth v Verwayen*[15]. For the reasons I have indicated in my principal judgment, I do not accept that it was open for the Magistrate to take the view put forward on behalf of the appellant. Further, having regard to the judgment in *Giumelli v Giumelli*[16] (to which no reference was made in submission), I do not accept that any appellant properly advised could have taken the view there was any realistic chance of success with respect to the arguments put on the basis of *Verwayen*. The decision of the New South Wales Court of Appeal in *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd*[17] (again to which no reference was made in submission) underlines the current state of the law in Australia.

11. Likewise, the appellant sought to rely on *obiter* observations of Jonathan Parker J in *Philip Collins v Davis*,[18] but did not acknowledge the subsequent decision of the Court of Appeal of England and Wales in *National Westminster Bank v Somer International Limited*,[19] to which I refer at [55] following of my principal judgment.

12. This is not a case in which the facts were in dispute. The Magistrate was either correct or wrong in law. When the current state of authority is considered, the appeal was hopeless. It is submitted on behalf of the appellant that it cannot be said that the appeal had no chance of success and that several of the arguments and contentions advanced by the appellant were not foreclosed by authority. I do not accept this submission. In my view, the appellant did not properly identify or acknowledge the effect of the authorities conclusively binding upon the Magistrate nor the authority correctly stating the current state of the law in England and Wales.

13. There are three further matters which tend to favour the award of costs on the higher basis.

14. First, the subsidiary proposition that it was not open to the Magistrate to conclude estoppel by representation was made out on the evidence was not tenable for the reasons I have explained in my principal judgment.

15. Secondly, although the appeal was not determined on the 'change of position' arguments, the appellant's arguments in respect of this issue did not acknowledge or confront the New South Wales authorities to which I refer at [34] following of my principal judgment. Further, the fact that the appellant also failed on this subsidiary aspect of its appeal is of some significance.

16. Thirdly, the defence of estoppel upheld by the Magistrate is founded on the notion of holding the appellant to its own prior representation and the consequent avoidance of detriment to the respondent. The underlying equity supports the view that the respondent should not suffer consequential detriment by reason of the appellant's unsuccessful appeal.

17. In all the circumstances, I propose to award costs to the respondent on a solicitor and client basis.

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[1] *Supreme Court (General Civil Procedure) Rules* 2005.
[2] *Bass Coast Shire Council v King* (1997) 2 VR 5, 29; (1996) 92 LGERA 129, per Winneke P.
[3] [2004] VSC 351 ('the *OCBC* case').
[4] The *OCBC* case, [35].
[5] [2004] VSCA 123 ('*Murdaca*').
[6] (1988) FCA 202; (1988) 81 ALR 397.
[7] *Murdaca* at [40], cited in the *OCBC* case, [30].
[8] *Re; J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers Western Australia & Anor* Unreported FCA per French J 9 February 1993.
[9] The *OCBC* case, [32].
[10] *Hurstville Municipal Council v Connor* (1991) 24 NSWLR 724; *Monitronix Ltd v Michael* (1992) 7 WAR 195; *Ugly Tribe Co Pty Ltd v Sikola*, *supra* Footnote 7 per Harper J at [18]; *Clarke v Deputy Commissioner of Taxation* [2002] FCA 75; (2002) 50 ATR 173; all cited in the *OCBC* case, [32].
[11] *Wenzel v Australian Stock Exchange Ltd* [2002] FCA 353; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189; both cited in the *OCBC* case, [32].
[12] *Ugly Tribe Co. Pty. Ltd v Sikola* [2001] VSC 189 cited in the *OCBC* case, [32].
[13] *McHattan v Saramoa Charters Pty Ltd*, Unreported FCA 17 September 1996; *Expectation Pty Ltd v PRD Realty Pty Ltd* [2003] FCA 1086; both cited in the *OCBC* case, [32].
[14] The *OCBC* case, [36]-[37].
[15] [1990] HCA 39; (1990) 170 CLR 394 ('*Verwayen*').
[16] [1999] HCA 10; (1999) 196 CLR 101; (1999) 161 ALR 473; (1999) 73 ALJR 547; [2000] Aust Contract Reports 90-106; (1999) 6 Leg Rep 23.
[17] [2005] NSWCA 39.
[18] (2000) All ER 808, 826.
[19] [2001] EWCA Civ 970; (2002) QB 1286, 1303; [2002] 1 All ER 198; [2002] 3 WLR 64; [2001] All ER (D) 235; [2001] Lloyds Rep Bank 263.

APPEARANCES: For the appellant TRA Global Pty Ltd: Mr M Follett, counsel. Harmers Workplace Lawyers. For the respondent Kebakoska: Mr M McKenney, counsel. Madgwicks, solicitors.
