FEDERAL COURT OF AUSTRALIA

W Hoy Pty Ltd v W.T.H. Pty Ltd (No 2) [2018] FCA 506

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| File number: | WAD 67 of 2018 |
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| Judge: | **BARKER J** |
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| Date of judgment: | 13 April 2018 |
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| Catchwords: | **COSTS –** whether costs should be paid forthwith – where urgent application of prospective applicant for interlocutory injunctions dismissed – where urgent application was a standalone application – where substantive application yet to be filed – where prospective applicant gave an undertaking as to damages – prospective applicant to pay costs forthwith |
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| Legislation: | *Federal Court Rules 2011* (Cth) R 40.04, R 40.13 |
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| Cases cited: | *Generate Group Pty Ltd v Sea-Tech Automation Pty Ltd* [2018] FCA 482  *Lamond (No 2)* [2017] FCA 548  *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639  *O’Donoghue v Attorney‑General for the Commonwealth of Australia* [2013] FCA 319  *Rafferty v Time 2000 West Pty Limited (No 3)* [2009] FCA 727  *Singtel Optus Pty Limited v Vodafone Pty Limited (No 2)* [2011] FCA 260  *W Hoy Pty Ltd v W.T.H. Pty Ltd* [2018] FCA 310 |
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| Date of hearing: | Determined on the papers |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Number of paragraphs: | 22 |
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| Counsel for the Prospective Applicant: | Mr GMG McIntyre SC |
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| Solicitor for the Prospective Applicant: | Hammond Legal |
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| Counsel for the Prospective Respondent: | Mr MJ Feutrill |
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| Solicitor for the Prospective Respondent: | K&L Gates |
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ORDERS

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|  | | WAD 67 of 2018 |
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| BETWEEN: | W HOY PTY LTD ACN 076 430 254  Prospective Applicant | |
| AND: | W.T.H. PTY LTD ACN 000 165 855  Prospective Respondent | |

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| JUDGE: | BARKER J |
| DATE OF ORDER: | 13 APRIL 2018 |

THE COURT ORDERS THAT:

1. The costs of the prospective respondent on the urgent application be paid by the prospective applicant forthwith.
2. If the parties cannot agree the costs within 30 days, the Court will hear the parties on the terms of a lump sum costs order.
3. Liberty be granted to apply for programming orders for the lump sum costs hearing, if necessary.

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

REASONS FOR JUDGMENT

BARKER J:

1. On 13 March 2018, I dismissed the application of the prospective applicant for interlocutory injunctions against the prospective respondent and reserved the question of costs. See *W Hoy Pty Ltd v W.T.H. Pty Ltd* [2018] FCA 310.
2. The prospective respondent submits that in the circumstances of this case costs should follow the event and the prospective applicant should pay the prospective respondent’s costs of the application forthwith, to be assessed if not agreed.
3. The substantive question now raised is not whether the prospective applicant should pay costs, but whether they should be paid forthwith.
4. It is recognised that the Court has a discretion to order that a party pay costs forthwith, where the interests of justice in the particular case require it. See R 40.13 of the *Federal Court* ***Rules*** *2011* (Cth); *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639 at [38].
5. In support of submissions that the Court should order that costs be payable forthwith, the prospective respondent identifies the following circumstances of the case as relevant to the exercise of the costs discretion:
6. there is likely to be a considerable lapse of time between this application and the final determination of the proceeding, given that there is currently no principal proceeding on foot;
7. the application, although not strong, required the prospective respondent to incur significant legal costs to successfully defend it;
8. the bringing of the application by the prospective applicant on an urgent basis was a matter outside the prospective respondent's control, despite efforts by the prospective respondent to avoid it;
9. the determination of the application, although necessarily involving a consideration of the merits of a prospective proceeding, resolved discrete issues which are separate from what will be determined in any principal proceeding, namely:
   1. whether there was a serious question to be tried;
   2. whether damages were an adequate remedy; and
   3. whether the balance of convenience favoured the granting of an interlocutory injunction;
10. the quantum of the prospective respondent's costs, as a result of the discrete nature of the application, are readily ascertainable;
11. the prospective applicant has proffered an undertaking as to damages and, while it cannot be relied upon by the prospective respondent to enforce an order as to costs, it is apparent that the prospective applicant is able to meet such an order; and
12. the prospective respondent was wholly successful in defending the application.
13. In resisting an order for the payment of costs forthwith, the prospective applicant refers to authorities of this Court in which judges have declined to make an order that costs be payable forthwith, namely, ***Rafferty*** *v Time 2000 West Pty Limited (No 3)* [2009] FCA 727 (Besanko J); ***Singtel Optus*** *Pty Limited v Vodafone Pty Limited (No 2)* [2011] FCA 260 (Nicholas J); ***Lamond*** *(No 2)* [2017] FCA 548 (Besanko J); and ***O’Donoghue*** *v Attorney‑General for the Commonwealth of Australia* [2013] FCA 319 (McKerracher J). The implied submission is that this case is sufficiently similar to those to result in no order that the costs be payable forthwith.
14. The prospective applicant also refers to its undertaking to commence the substantive proceeding as a reason why it is unnecessary for costs to be paid forthwith.
15. In *Rafferty* an application for an adjournment of a trial date by a respondent was successful and the trial date was vacated with an order that the costs thrown away be paid by the respondent. Besanko J refused to make an order that the costs be payable forthwith. His Honour indicated that he might have made such an order if he had been satisfied that the adjournment application was a delaying tactic or as the result of some form of reprehensible conduct on the part of the respondent and the delay between the first trial date and a new trial date was substantial. His Honour also considered that the general rule, whereby costs are not taxed until a principal proceeding is concluded or until further order, has the advantage of avoiding multiple taxations in a proceeding, as well as avoiding an apparent unfairness which may arise at an early stage of a proceeding, where a party who is ultimately successful is required to pay costs to a party who is ultimately unsuccessful. His Honour also observed that refusing to make a forthwith costs order prevents interlocutory proceedings being used as a weapon to exhaust the financial resources of one of the parties.
16. In *Singtel Optus*, an interlocutory application for injunction failed. By reference to the rule that is now R 40.04 of theRules, Nicholas J ordered that the respondent’s costs of the interlocutory application be the respondent’s costs in the proceeding. In other words, that they not be taxed forthwith.
17. In *Lamond*, following an unsuccessful application for an interlocutory injunction by the prospective applicant, Besanko J ruled that costs should not be paid forthwith. His Honour observed, at [18], that he did not think that the costs “would be that substantial, but more importantly, I think they could be more accurately assessed after the determination of the proposed substantive proceeding”.
18. In *O’Donoghue*, McKerracher J, having found that the applicant had not established an arguable case on his application for interlocutory injunction in respect of an alleged breach of the *International Covenant on Civil and Political Rights,* simply ordered that the applicant pay the costs to be taxed if not agreed, without making any order for payment forthwith.
19. The prospective respondent submits that:

* *Rafferty*, having regard to the facts, supports its position that costs be payable forthwith;
* in *Singtel Optus*, Nicholas J was not prepared to characterise an order that costs follow the event as the “usual” result, but merely establishing a default position for determining costs in the event the Court does not otherwise order. *Singtel Optus* is distinguishable in any event, due to the fact that the prospective respondent in this proceeding has been wholly successful; and
* *Lamond* is distinguishable for three reasons: the applications for injunctive relief were withdrawn prior to hearing before the parties had incurred the costs; were made in the context of a broader application for winding up which was already on foot; and Besanko J found that the costs would not be that substantial and could be more accurately assessed after the determination of the substantive proceeding.

1. I would also note the discussion of Gleeson J in *Generate Group Pty Ltd v Sea-Tech Automation Pty Ltd* [2018] FCA 482, concerning the payment of costs forthwith and lump sum costs orders.
2. Needless to say, determining whether costs should be payable forthwith at an interlocutory stage of a proceeding sometimes presents difficulties. One is always concerned that such an application is simply a strategy designed to frustrate the continuance of the principal proceeding through the imposition of an immediate, significant financial burden on an unsuccessful applicant. A court will always be mindful of avoiding the imposition of hurdles, including financial ones, that may deny a party access to justice where they appear to have some prospect of finally succeeding in their claim. In many circumstances, the costs incurred in what are truly interlocutory proceedings should be assessed at the conclusion of a proceeding for reasons of efficiency. Nonetheless, the circumstances of each case need to be carefully considered before determining if a forthwith costs payment is appropriate.
3. While it may not, strictly speaking, be appropriate to say that the prospective respondent in this case was wholly successful in putting its case in opposition to the application for interlocutory injunctions, as the prospective respondent submits, it is correct to observe that the Court considered that the issues that the prospective applicant wishes to try, while not hopeless, were not strong. The Court additionally found that damages could constitute an adequate remedy; and that the balance of convenience lay in one direction, being that of the prospective respondent. This generally weighs against the deferral of the payment of the costs of the urgent application.
4. While the making of the application for an interlocutory injunction by urgent application in this case may be considered not surprising, in circumstances where the agreements the prospective applicant had with the prospective respondent were terminated on 30 days’ notice without apparent reason or explanation, the simple fact is that the application for interlocutory injunctions was very much a standalone application. It was an urgent application under the Rules, commenced before an originating application and considered pleadings were filed in a proceeding. The urgent application failed and the substantive application is yet to be commenced. It is very likely, unless the foreshadowed proceeding is put on a fast track, that given the matters in issue some time will pass before there is a trial. That weighs against waiting for a final disposition before requiring payment of the costs of the urgent application.
5. This is not a case where the interlocutory application made is simply one step of many interlocutory steps leading to final resolution of a proceeding after a trial. The urgent application was an important strategic step taken prior to the commencement of substantive proceedings. In my view, it should be seen as a separate substantive proceeding; not just another interlocutory step in a substantive proceeding. This too is a factor which weighs against deferral of payment of the costs.
6. In all of these circumstances, whilst I accept it is a question of judgement, I consider the prospective applicant should pay the costs of the prospective respondent forthwith.
7. I do not view this as a case where the prospective respondent is simply attempting to take some tactical advantage of the other party. I note that prior to the prospective applicant commencing the urgent application, the parties had been in without prejudice negotiations for some three months. I do not consider the urgent application, in this case, to be but another step in a proceeding in relation to which the costs should be assessed at the conclusion of the proceeding which is yet to be commenced.
8. I should add that the fact that, on the face of it, the prospective respondent is a large and financially well-resourced entity and the prospective applicant appears to have far fewer financial resources available to it should not be the criterion as to whether or not the forthwith costs order should be made. Each of the parties is entitled to the most appropriate order in the particular circumstances of the case. The prospective applicant gave an undertaking as to damages on the urgent application and may be presumed to have capacity to meet the costs order.
9. I should finally add that the assessment of costs payable will necessarily not be the same as the actual legal costs that the prospective respondent has so far paid to its lawyers in its dealings over the prospective applicant’s claims. As noted above, the parties spent some months in pre-action negotiations and no doubt took legal advice as to their positions for that purpose. I would expect the parties to come to an agreement on the costs apportionable to the urgent application vis à vis those negotiations. If they cannot do so within 30 days, I will hear from the parties as to the terms of a lump sum costs order. I do not consider the question of costs should be drawn out by a potentially complicated costs assessment process before a Registrar.
10. I would, therefore, order that:
11. The costs of the prospective respondent on the urgent application be paid by the prospective applicant forthwith.
12. If the parties cannot agree the costs within 30 days, the Court will hear the parties on the terms of a lump sum costs order.
13. Liberty be granted to apply for programming orders for the lump sum costs hearing, if necessary.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: 13 April 2018