FEDERAL COURT OF AUSTRALIA

Hill v Zhang (No 2) [2019] FCA 1649

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| File number: |  |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 8 October 2019 |
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| Catchwords: | **COSTS** – application for costs of an interlocutory hearing be paid partly on an indemnity basis, and be taxed and payable immediately – costs ordered partly on an indemnity basis, and to be taxed and payable immediately |
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| Legislation: | *Federal Court Rules 2011* (Cth) rr 16.21, 40.13 |
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| Cases cited: | *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 13)* [1995] FCA 1459  *Australian Flight Test Services v Minister for Industry, Science and Technology* [1996] FCA 1425  *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International**B.V. (No 5)* [2018] FCA 19  *Hill v Zhang* [2019] FCA 1562 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 3 October 2019 |
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| Registry: | Australian Capital Territory |
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| Division: | General 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: | 12 |
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| Counsel for the Applicants: | The applicants did not file submissions |
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| Solicitor for the Applicants: | Nelson & Hill Lawyers |
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| Counsel for the Respondents: | K Pattenden |
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| Solicitor for the Respondents: | Aulich Civil Law |

ORDERS

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|  | | ACD 50 of 2019 |
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| BETWEEN: | ALAN HILL  First Applicant  INITIATIVE HOLDINGS PTY LTD  Second Applicant | |
| AND: | KAI ZHANG  First Respondent  THE AUSTRALIAN LAW COMPANY PTY LTD  Second Respondent | |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 8 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The first and second applicant, jointly and severally, pay the respondents’ costs of and incidental to the interlocutory application on a party and party basis to 11 September 2019 and thereafter on an indemnity basis, including the costs thrown away arising from the striking out of the applicants’ pleading.
2. Such costs to be taxed and payable immediately.

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

REASONS FOR JUDGMENT

GRIFFITHS J:

1. On 25 September 2019, I made orders granting the respondents’ application for security for costs and struck out the applicants’ originating application and statement of claim under r 16.21 of the *Federal Court Rules 2011* (Cth) (***2011 FCRs***): *Hill v Zhang* [2019] FCA 1562. The final order made on that day provided that the parties were to seek to agree the terms of an order for costs in respect of the respondents’ successful interlocutory application within a week. Failing agreement, the parties were to file and serve submissions setting out the orders sought and supporting reasons for making those orders.
2. On 2 October 2019, the respondents filed an affidavit affirmed by their instructing solicitor, Ms Erin Taylor. Annexed to the affidavit was correspondence between the parties’ solicitors outlining their respective positions on costs. On 3 October 2019, the respondents filed submissions on costs and an amended version of the 2 October 2019 affidavit. The respondents seek orders that the applicants jointly and severally pay the respondents’ costs of and incidental to the interlocutory application on a party/party basis up to 11 September 2019 and thereafter on an indemnity basis. They also seek their costs thrown away as a consequence of the applicants’ statement of claim being struck out. Further, the respondents’ seek that these costs be taxed and payable immediately.
3. No submissions were received from the applicants on costs, nor did they indicate to the Court the orders they considered to be appropriate.

## The respondents’ submissions and evidence summarised

1. There are two aspects of the costs orders sought by the respondents that depart from the usual order. The first is that they seek part of their costs on an indemnity basis, and the second is that they seek that their costs be taxed and payable immediately.
2. On the first issue, the respondents acknowledged that some special feature of the case is necessary to justify an order for indemnity costs. In this case, the relevant special feature was said to be that on 11 September 2019, the respondents provided a detailed explanation of the defects in the applicants’ statement of claim and offered the opportunity to replead without the need for paying the respondents’ costs thrown away. As the usual consequence of repleading is payment of the other party’s costs thrown away, rejection of this offer was imprudent and warrants an order for indemnity costs.
3. On the second issue, the respondents acknowledged that although ordinarily a party with the benefit of an interlocutory order will not have their costs until the proceedings are finalised (r 40.13 of the *2011 FCRs*), the Court may order that those costs be taxed and payable immediately. The respondents accepted that it was their burden to justify departure from the usual course. They said that such an order was justified for three reasons additional to those supporting the order for indemnity costs (referring to *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International**B.V. (No 5)* [2018] FCA 19 at [5]-[9] per Perram J):
   1. the need for the applicants to replead will result in essentially new proceedings;
   2. the issue of security for costs was a discrete issue; and
   3. the respondents have been required to incur significant costs over and above that which would have been incurred had the applicants’ conducted the proceedings properly.

## Consideration

1. I accept the respondents’ submissions that it is appropriate to award indemnity costs from 11 September 2019. As the respondents submitted, the usual consequence of a party needing to replead is that they will bear the other party’s costs thrown away occasioned by the need to replead. In circumstances where the respondents offered the applicants an opportunity to replead without having to pay their costs thrown away, there was no good reason to dismiss that opportunity.
2. Similarly, the respondents raised their concerns about security for costs with the applicants on 25 July 2019. They explained the basis for these concerns in some detail, as well as the steps that could be taken to alleviate those concerns. That was two weeks before the respondents’ interlocutory application was filed. No attempt was made to engage with these concerns until the applicants’ filed an affidavit on 27 August 2019. That affidavit made little attempt seriously to engage with the specific concerns raised by the respondents. Having regard to the applicants’ conduct, I am satisfied that an order that costs from 11 September 2019 be paid on an indemnity basis is appropriate.
3. I also accept that this is a case where it is appropriate under r 40.13 of the *2011 FCRs* to order that the costs be taxed and payable immediately. I have reached that view for two reasons.
4. First, I agree with the respondents’ submissions that the question of security for costs was a discrete issue capable of resolution separate from the substantive proceedings (*Australian Flight Test Services v Minister for Industry, Science and Technology* [1996] FCA 1425 at [7] per O’Loughlin J)).
5. Secondly, and more importantly, it may be some time before these proceedings are finalised. As matters presently stand, the proceedings are stayed pending payment of security which means there is no timeline in place for this matter to proceed to hearing. Furthermore, the fact the applicants must replead their case after security has been paid means the proceeding must, in effect, begin again. Bearing in mind the uncertainty of the timing of the finalisation of these proceedings, it is inappropriate to deny the successful respondents the fruits of their order for costs for what is currently an indefinite, and potentially significant, period of time (*Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 13)* [1995] FCA 1459 at [5] per Lockhart, Lindgren and Tamberlin JJ).
6. For these reasons, I shall make orders substantially in the form sought by the respondents.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 8 October 2019