Lobux Pty Ltd v Willshaun Pty Ltd (No 2) [2022] FCA 395

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| File number(s): | QUD 64 of 2020 |
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| Judgment of: | **DOWNES J** |
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| Date of judgment: | 14 April 2022 |
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| Catchwords: | **COSTS** – whether costs should be reduced pursuant to r 40.08(b) *Federal Court Rules 2011* (Cth)– whether successful party should be paid a proportion of its costs pursuant to s 43(3)(c) *Federal Court of Australia Act 1976* (Cth)  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2 s 24*Federal Court of Australia Act 1976* (Cth) ss 37N, 43(3)(c)*Federal Court Rules 2011* (Cth) r 40.08(b) |
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| Cases cited: | *Dutton v Bazzi (No 2)* [2021] FCA 1560*Lobux Pty Ltd v Willshaun Pty Ltd* [2022] FCA 204*Umoona Tjutagku Health Service Aboriginal Corporation v Walsh* (2019) 268 FCR 401; [2019] FCAFC 32 |
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| Division: |  |
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| Registry: |  |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 29 |
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| Date of last submissions: | 18 March 2022 |
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| Date of hearing: | Determined on the papers  |
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| Counsel for the Applicant: | Ms SK Long |
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| Solicitor for the Applicant: | Celtic Legal |
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| Solicitor for the Respondent: | Cooper Grace Ward |

ORDERS

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|  | QUD 64 of 2020 |
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| BETWEEN: | LOBUX PTY LTD ACN 008 032 488Applicant |
| AND: | WILLSHAUN PTY LTD ACN 077 535 507Respondent |

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| order made by: | DOWNES J |
| DATE OF ORDER: | 14 april 2022 |

THE COURT ORDERS THAT:

1. The respondent pay the applicant’s costs of and incidental to the proceedings, including the cross-claim and any reserved costs.

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

REASONS FOR JUDGMENT

DOWNES J:

1. On 11 March 2022, the Court delivered judgment in this matter in *Lobux Pty Ltd v Willshaun Pty Ltd* [2022] FCA 204.
2. The applicant (**Lobux**) was successful in obtaining the primary relief sought by it, namely the recovery of possession of a custom-made “Hooklift Backdoor Vacuum Tank” which it had manufactured pursuant to a contract with the respondent (**Willshaun**).
3. Willshaun had limited success in relation to its cross-claim in that it obtained certain declarations concerning unfair contract terms within the meaning of s 24 of the *Australian Consumer Law* (being Schedule 2 to the *Competition and Consumer Act 2010* (Cth)). However, these declarations were of no utility because they did not assist it in defending Lobux’s claim for the return of the vacuum tank.
4. An order was made on 11 March 2022 requiring Willshaun to file and serve any submissions by 16 March 2022 as to the necessity for any further relief in relation to the terms found to be unfair and the form of that relief. Willshaun did not serve any submissions. This served to amplify the lack of utility in claiming that these clauses were unfair.
5. An order was also made on 11 March 2022 for the parties to file and serve any submissions as to costs by 18 March 2022. On 18 March 2022, submissions were received from both parties.
6. Lobux seeks an order that Willshaun pay its costs of the proceeding on a party and party basis. It submits that it was wholly successful and that costs should follow the event. It also submits that Willshaun’s success in relation to aspects of its cross-claim had no real effect on the substantive relief sought in the claim and cross-claim, and that Willshaun was unsuccessful in obtaining almost all of the relief sought in the cross-claim.
7. Willshaun seeks an order that it pay two thirds of Lobux’s costs of the proceeding (save for the 25 October 2021 application for the adjournment of the trial) on a scale appropriate to an action brought in the Federal Circuit and Family Court of Australia (**FCFCOA**) for a general federal law proceeding. It also seeks an order that Willshaun pay only those disbursements which Lobux would have had to pay had the proceeding been brought and pursued in the FCFCOA. Finally, it seeks an order that Lobux pay its costs of the application on 25 October 2021 for the adjournment of the trial.
8. For the reasons below, the appropriate order is that Willshaun pay Lobux’s costs of and incidental to the proceeding, including the cross-claim and any reserved costs.

# Costs of application for adjournment

1. On 14 October 2021, which was less than two weeks before the commencement of the trial on 26 October 2021, Willshaun served the second report of its expert (Mr Fry) which, according to the unchallenged affidavit evidence of Mr Brendan Long, Lobux’s solicitor, made assertions which had not been raised previously. Mr Long made immediate attempts to obtain the assistance of an expert to review and consider the report and to provide a response but those attempts were not successful in the period prior to the adjournment application.
2. The second expert report of Mr Fry was served by Willshaun notwithstanding that the parties had consented to an order being made on 22 September 2021 that any affidavit material of the evidence in chief of the witnesses to be called by the parties would be filed and served by 1 October 2021. No direction had been sought or made for the service of any further expert reports.
3. An adjournment was not consented to by Willshaun (according to an affidavit prepared by its solicitor, Mr Benjamin Williams) which meant that the adjournment application was necessary.
4. On 25 October 2021, after an urgent hearing of the adjournment application brought by Lobux, an order was made whereby the trial was split between the lay evidence (to be heard on 26 October 2021) and expert evidence (9 November 2021). Costs of the application were reserved.
5. On 9 November 2021, Lobux did not adduce any expert evidence of its own. However, it does not follow from this fact that Lobux should pay the costs of the adjournment application. As is apparent from [189] to [195] of the reasons for judgment delivered on 11 March 2022, the first report of Mr Fry had serious deficiencies and it was apparent from the oral submissions made by Lobux at the hearing of the adjournment application that it regarded that report as defective. Lobux was entitled to proceed to trial without calling expert evidence of its own to respond to a defective expert report.
6. The second report of Mr Fry was not requested by Willshaun until 24 September 2021, which was just over a month before commencement of the trial. The evidence of Mr Williams did not contain any explanation as to why the second report of Mr Fry was not requested prior to 24 September 2021. This late request had the inevitable consequence that the second report was served on a date which was close to the commencement of the trial. Because of this, Lobux was unable to obtain the assistance of an expert in time to enable it to make an informed decision as to whether to adduce expert evidence in response to it. Once it had that further time, it was able to make that decision.
7. In truth, the adjournment application was the direct consequence of the late decision taken by Willshaun to obtain a second report of Mr Fry and the consequent late service of that report. In circumstances where the proceeding was commenced in March 2020, and the trial dates allocated at a case management hearing on 31 August 2021, Willshaun’s delay in briefing its expert for a second report was not consistent with the overarching purpose as required by s 37N *Federal Court of Australia Act 1976* (Cth). The late service of the second report of Mr Fry was unfair to Lobux, which had no option but to apply for an adjournment and otherwise bring the issue to the Court’s attention.
8. For these reasons, I decline to order that Lobux pay Willshaun’s costs of the adjournment application.

# Application of rule 40.08 federal court rules

1. Rule 40.08(b) *Federal Court Rules 2011* (Cth) relevantly provides that a party may apply to the Court for an order that any costs and disbursements payable to another party in the proceeding be reduced by an amount to be specified by the Court if the proceeding (including a cross-claim) could more suitably have been brought in another court or tribunal.
2. Willshaun submits that the proceedings could more suitably have been brought in the FCFCOA. Willshaun also submits that it sought the transfer of the proceeding to the Federal Circuit Court (as it was then called) in Sydney in April 2020 (including by submissions filed on 7 May 2020). However, this does not assist because it appears that either Willshaun abandoned that application or the proposed transfer was rejected by Greenwood J, who instead made orders by consent on 8 May 2020, including for the matter to be mediated.
3. Willshaun submits that the issues that arose for determination by the Court were not complex, and were all capable of being resolved through the application of existing judicial authority.
4. To assess this submission requires an evaluation of the factual and legal issues which arose in this case.
5. As a result of Willshaun’s defence, Lobux was put to proof on factual issues on which Willshaun’s witness, Mr Walsh, was not believed and in relation to which Willshaun was unsuccessful. This is a factor which tells against making the orders sought by Willshaun: see *Umoona Tjutagku Health Service Aboriginal Corporation v Walsh* (2019) 268 FCR 401; [2019] FCAFC 32 (White, Perry and Banks-Smith JJ) at [58].
6. By its pleadings, Willshaun also made allegations of breach of contract by Lobux which required the terms of the agreement to be construed, factual findings to be made about events spanning May 2018 to March 2019 (which involved credit findings and the tender of numerous documents) as well as the evaluation of expert evidence. Issues were also raised by Willshaun as to whether any established breach amounted to repudiation by Lobux, whether Willshaun terminated the agreement validly, whether Willshaun established loss and damage by reason of any breach, whether it was entitled to claim damages, including loss of profits and the quantum of any such damages. The resolution of these issues added to the overall complexity of the case. This is a factor which tells against making the orders sought by Willshaun: see *Dutton v Bazzi (No 2)* [2021] FCA 1560 at [41].
7. By its cross-claim, Willshaun alleged that 18 separate clauses of the standard terms and conditions of trade which are used by Lobux in its business constituted unfair terms within the meaning of s 24(1) *Australian Consumer Law*. Many of the impugned clauses had no bearing on the real dispute between the parties but their inclusion added to the legal complexity of the case. In particular, some of the impugned clauses had no direct precedent in terms of deciding whether it was an unfair term. The law in this regard was therefore undeveloped and unclear.This is a factor which tells against making the orders sought by Willshaun: see *Dutton v Bazzi (No 2)* at [41].
8. In the circumstances and taking into account these matters, I do not accept that the proceeding could more suitably have been brought in the FCFCOA and I decline to reduce the disbursements payable by Willshaun to Lobux or to order that the costs be payable on the scale appropriate to an action brought in the FCFCOA.

# Costs payable based on issues

1. Willshaun submits that only four issues arose for determination by the Court, namely:
2. Which documents formed the agreement between the parties? In particular, was the tank to be manufactured the one referred to in the May 2018 quote or September 2018 quote?
3. Does the agreement contain any unfair terms within the meaning of s 24 *Australian Consumer Law*?
4. Were any terms of the agreement breached by Lobux such that Willshaun was entitled to terminate the agreement?
5. Did Willshaun suffer any loss and damage by reason of any breach of the agreement by Lobux?
6. Willshaun submits that the first issue required “little input by either of the parties” and that the parties had “mixed success” in relation to the second (substantial) issue. While it accepts that it should pay Lobux’s costs, it submits that Lobux should be paid its costs in relation to the two remaining substantial issues and so should be awarded two thirds of its costs. However, the description by Willshaun of the issues is too narrow when one has regard to the multiple factual and legal issues which arose in this case, as is apparent from the reasons for judgment.
7. Section 43(3)(c) *Federal Court of Australia Act* enables the Court to order the parties to bear costs in specified proportions. In *Umoona*, the Full Court observed at [43] that, in determining whether to apply the ordinary rule that the successful party will receive his or her costs, the Court “may have regard not merely to the extent of success vis a vis different causes of action, but also to the extent of success vis a vis different factual and legal issues.” The Court stated at [45] that:

The breadth of the discretion as to costs is reflected among other things in s 43(3)(c) and (e) of the FCA Act which respectively permit the Court to make orders that the parties bear costs in specified proportions and to award costs in favour of or against a party irrespective of whether the party is successful in the proceeding: see also *Oshlack* at [40]. Thus, as the High Court held in *Gray v* *Richards (No 2)* [2014] HCA 47; (2014) 89 ALJR 113:

2. The disposition of costs is within the general discretion of the Court. Ordinarily, that discretion will be exercised so that costs are awarded to the successful party, but other factors may have a significant claim on the discretion of the Court. The disposition which is ultimately to be made in any case where there are competing considerations will reflect a ***broad*** ***evaluative judgment of what justice requires***.

(emphasis original)

1. In this case, Lobux was wholly successful in relation to its claim for the return of the vacuum tank. Such success required it to overcome all of the defences raised by Willshaun and to be successful in resisting the cross-claim, including allegations that the clauses it relied upon for the return of the tank were unfair terms. Of those terms which were found to be unfair terms, none of them had any impact on the claim by Lobux. As those unfair terms were only the subject of brief legal submissions at the conclusion of the trial, the aspect of the cross-claim on which Willshaun was successful did not occupy significant time during the trial.
2. Taking into account these considerations, I consider it to be appropriate that Lobux be awarded all of its costs, without any reduction.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes. |

Associate:

Dated: 14 April 2022