Federal Court of Australia

Burston v Hanson (No 2) [2023] FCA 113

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| File number: |  |
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| Judgment of: | **BROMWICH J** |
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| Date of judgment: | 22 February 2023 |
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| Catchwords: | **COSTS –** where question of costs arises from a dispute following verdict and judgment in favour of the applicant on one out of three publications sued upon – where respondent seeks no orders as to costs asserting equal level of success and that the applicant engaged in disentitling conduct in the proceeding – Held: no sufficient basis for departing from the ordinary rule; respondent to pay the applicant his costs on a party/party basis as agreed or assessed, including by way of a lump sum assessment.  |
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| Cases cited: | *Burston v Hanson* [2022] FCA 1235*Mawhinney v Australian Securities and Investments Commission (No 2)* [2022] FCAFC 205*Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 73 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Other Federal Jurisdiction |
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| Number of paragraphs: | 17 |
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| Date of hearing: | 15 February 2023 |
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| Counsel for the Applicant: | Mr N Olson  |
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| Solicitor for the Applicant: | Mark O’Brien Legal  |
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| Counsel for the Respondent: | Ms S Chrysanthou SC and Mr T Smartt  |
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| Solicitor for the Respondent: | Danny Eid Lawyers  |

ORDERS

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|  | NSD 652 of 2020 |
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| BETWEEN: | BRIAN BURSTON Applicant |
| AND: | PAULINE LEE HANSON Respondent |

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| order made by: | BROMWICH J |
| DATE OF ORDER: | 22 February 2023 |

THE COURT ORDERS THAT:

1. The respondent pay to the applicant:
	1. the filing fee paid to the Supreme Court of Queensland;
	2. the costs and disbursements incurred from 17 March 2022 up to and including the costs of and incidental to the costs determination on a party/party basis.
2. If not agreed, costs to be assessed by a registrar, including, at the registrar’s discretion, by way of a lump sum assessment.

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

REASONS FOR JUDGMENT

BROMWICH J:

1. This is an adjudication on costs in this defamation proceeding, following a verdict and judgment in favour of the applicant, Mr Brian Burston, on one out of three publications sued upon, each being a separate cause of action, and an award of damages of $250,000: see *Burston v Hanson* [2022] FCA 1235 (**Liability Judgment** or **LJ**). These reasons assume general familiarity with the Liability Judgment, and in particular the conclusions reached about the pleaded imputations, and adopt the use of the same definitions.
2. An imputation of either sexual harassment or sexual abuse towards Mr Burston’s staff was relied upon as having been conveyed for all three publications, with a common substratum of evidence relied upon to prove that these imputations were not true, or that they were substantially true. The most serious of those imputations, sexual abuse, was found to have been conveyed in the *Today Show* television interview with the respondent, Ms Pauline Hanson, and not found to be justified as being substantially true or upon any other basis. The defence of the other imputation found to have been conveyed in the same television interview, of physical assault without provocation, also failed.
3. At the outset, it is necessary to record that the common ground position is that only the costs incurred by Mr Burston from 17 March 2022 and the filing fee paid to commence the proceedings in the Queensland Supreme Court engage the indemnity principle so as to make them amenable to a costs order. The reason for that limitation is that up until that date, Mr Clive Palmer paid Mr Burston’s costs (but not the filing fee), without any asserted liability on the part of Mr Burston to reimburse Mr Palmer.
4. The ordinary rule is that a successful litigant will obtain the benefit of a compensating costs order, unless there is demonstrated misconduct relating to the litigation or the circumstances leading up to the litigation sufficient to displace that rule in favour of a different outcome: see *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 73 per McHugh J at [67]-[70].
5. Ms Hanson submits that there should be no order as to costs, due to what is said to be equal success by the parties to the proceeding and an assertion that Mr Burston engaged in disentitling misconduct in bringing aspects of the case and in giving evidence.
6. Mr Burston submits that the ordinary rule that costs follow the event properly applies, being his success in achieving a substantial verdict in his favour, notwithstanding that two causes of action failed, and disputes the reasons advanced for departing from that rule or that he engaged in any conduct of the kind that would disentitle him to a costs order.
7. Ms Hanson characterises the main factual issue in the case as being that Mr Burston had sexually harassed two of his staff, Ms Vairy and Ms Leach, which she had proved to be substantially true. She relies upon the finding at LJ[81], to be read in the context of LJ[78]-[80], that in Mr Burston’s desperation to have his perception and recollection of events accepted, he went beyond giving evidence of merely a different recollection of events and gave an account at key points that he must have known was “*not correct*”. That phrase was carefully and deliberately chosen and largely related to his allegation that Ms Leach had sexually propositioned him, which I rejected.
8. Ms Hanson significantly overstates the effect of the adverse findings made about Mr Burston’s evidence. In this regard it is important to repeat the observation at LJ[79] that Mr Burston probably genuinely saw nothing wrong with his behaviour towards Ms Vairy and Ms Leach, however objectively wrong and inappropriate it was. That observation is of some importance in addressing the state of mind I am now asked to attribute to Mr Burston when he gave evidence about that conduct.
9. I was urged by Ms Hanson to make a further finding to the effect that Mr Burston had deliberately lied on oath or had given dishonest evidence in numerous respects. As I am not satisfied either of these characterisations of his evidence is properly available, I do not consider it appropriate to repeat what was said to be such evidence. Suffice it to say that I have considered each example that is given and reject the reference in Ms Hanson’s written submissions to each constituting an “*extraordinary extent … of dishonest evidence*” which “*demands*” that there be no order as to costs. That is not to say that Mr Burston did not give evidence which was in places objectively either incorrect or unable to be accepted as reliable or credible. In relation to the allegations of sexual harassment, I found him to be an unsatisfactory witness whose evidence I was unable to accept on the topic of sexual harassment: LJ[67]. In the same paragraph I said that I did not accept, as submitted by Ms Hanson, that virtually none of his evidence could be accepted as either truthful or reliable. Yet the arguments advanced by her on costs at least partially cavil with that conclusion.
10. Evidence that is found objectively to be incorrect, wrong, untrue or even false does not necessarily constitute any sufficient basis for finding it was given dishonestly or was a lie. That is especially so for evidence that is merely exaggerated, overblown or mistaken, or peripheral and not of any great importance in the case viewed holistically. Reaching such an objective assessment of the character or status of evidence in terms of what it does or does not establish, does not of itself necessarily establish an adverse state of mind corresponding to its objective falsity or lack of accuracy, such as intention, knowledge, awareness, or deliberateness, even though a limited finding was made as to some degree of knowledge about aspects of Mr Burston’s account not being correct. Lesser states of mind may be a better or more appropriate explanation, such as mistake, memory failure, self-delusion, emotion, confusion and the like, or it may not be readily able to be explained at all, including by reason of the passage of time and the age and acuity of a witness. I still go no further, except to the limited extent at LJ[81], than to accept the evidence of Ms Vairy and Ms Leach and to prefer it to that of Mr Burston; and to accept and prefer the evidence of Mr Burston to that of Mr Ashby.
11. Further, contrary to Ms Hanson’s submission, I would characterise one of the main factual issues in the case as being whether Mr Burston had engaged in sexual misconduct towards Ms Vairy and Ms Leach, and if so, how far it had gone, both of which were not just relevant but indispensable to the defence of substantial truth arising out of this aspect of the imputations conveyed by the *Today Show* television interview, as well as the Facebook Post and the Text to Mrs Burston. That evidence (including that of Mr Burston, Ms Vairy and Ms Leach) was of greater importance to the *Today Show* television interview and the most serious imputation of sexual abuse that was alleged to have been conveyed than it was to either the Facebook Post or the Text to Mrs Burston.
12. The key defence successfully advanced about the Facebook Post, a relatively limited publication, was that it was not shown to be about Mr Burston. The Text to Mrs Burston was of very limited compass, published only to Mrs Burston, and therefore of less importance. I do not find that the additional time that was spent on the issue of who the Facebook Post was about, nor the additional time spent on the imputations alleged to have been conveyed by the Text to Mrs Burston, was such as to displace the ordinary rule that costs follow the event, in the sense of the overall success in the litigation achieved by Mr Burston on the most serious and most important imputations and the most significant of the three publications. No such conclusion is mandated by authority: see *Mawhinney v Australian Securities and Investments Commission (No 2)* [2022] FCAFC 205 at [66].
13. Ms Hanson also advances somewhat contradictory submissions about the other main factual issue in the case, being whether Mr Burston had physically assaulted Mr Ashby in Parliament House without provocation. She submits in writing on the topic of apportioning trial time that this was a confined issue and was not a major part of the case, asserting that Mr Burston had obscured the resolution of this issue by giving false evidence referring to the issue of blood on her door. I do not accept that Mr Burston knowingly gave false evidence on that topic. However, on the topic of misconduct to which I next turn, in her oral submissions Ms Hanson refers to Mr Burston’s allegation that, in the latter part of the altercation, Mr Ashby had taken “*a swing*” at him, seeming to advance the proposition that this was misconduct because of prolonging the hearing sufficiently to contribute to warranting a departure from the usual rule of costs following the event.
14. I was urged to descend into the details of the evidence and make adverse findings as to Mr Burston’s evidence being false in relation to this altercation. I decline to do so, because I generally accepted the evidence of Mr Burston in relation to those events, and preferred it to the evidence of Mr Ashby. I am unable to accept that spending what would have been a considerable amount of time on such an exercise would have been productive of anything useful. At most, I might have found that Mr Burston was mistaken about this relatively peripheral aspect of Mr Ashby’s provocative conduct, which, if it occurred, took place well after the altercation was underway and also well after the material provocation by Mr Ashby had already taken place. I might well have made a finding that I was not satisfied he was mistaken at all, noting that only a small subset of the altercation was recorded on a mobile phone and that only limited photographs that were taken, albeit that Mr Burston thought they supported his recollection. Either way, this could not have affected in any material way the conclusion I reach about costs.
15. In any event, I am not satisfied that the relatively isolated aspects of the evidence of Mr Burston that Ms Hanson asserts was false, dishonest and or were a lie, materially contributed to the duration of the trial, let alone did so to the extent that it could on any reasonable view constitute disentitling conduct precluding the application of the usual rule that costs abide by the overall success of the litigation in reaching a conclusion that Mr Burston was seriously defamed by the most serious imputations he relied upon.
16. I am not satisfied that Ms Hanson has advanced any sufficient basis for departing from the usual rule that costs follow the event. To the contrary, I am satisfied that it is appropriate and in the interests of justice that the usual rule apply. It follows that Ms Hanson must pay to Mr Burston:
17. the filing fee paid to the Supreme Court of Queensland, where this proceeding was originally commenced;
18. the costs and disbursements incurred from 17 March 2022, up to and including the costs of and incidental to this costs determination on a party/party basis.
19. The costs so ordered, if the quantum cannot be agreed, are to be assessed by a registrar, which may include a lump sum assessment at the discretion of the registrar.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 22 February 2023