FEDERAL COURT OF AUSTRALIA

Clarence City Council v Commonwealth of Australia [2019] FCA 1721

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| File numbers: | TAD 25 of 2018  TAD 27 of 2018 |
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| Judge: | **O’CALLAGHAN J** |
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| Date of judgment: | 18 October 2019 |
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| Catchwords: | **COSTS** – no reason to depart from usual order – no separate events |
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| Cases cited: | *Clarence City Council v Commonwealth of Australia* [2019] FCA 1568  *Davies v Lazer Safe Pty Ltd (No 2)* [2019] FCAFC 118  *GlaxoSmithKline Consumer Healthcare Investments (Ireland) (No 2) Limited v Generic Partners Pty Limited (No 2)* [2018] FCAFC 100 |
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| Date of hearing: | On the papers |
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| Date of last submissions: | 3 October 2019 |
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| Registry: | Tasmania |
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| Division: | General Division |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 16 |
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| Solicitor for the Applicants in both proceedings: | Shaun McElwaine & Associates |
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| Counsel for the Second Respondent/Cross-Claimant in both proceedings: | Dr K Stern SC with L Coleman |
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| Solicitor for the Second Respondent/Cross-Claimant in TAD 25 of 2018: | Corrs Chambers Westgarth |
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| Solicitor for the Second Respondent/Cross-Claimant in TAD 27 of 2018: | Tierney Law |

ORDERS

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|  | | TAD 25 of 2018 |
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| BETWEEN: | CLARENCE CITY COUNCIL  Applicant | |
| AND: | COMMONWEALTH OF AUSTRALIA  First Respondent  HOBART INTERNATIONAL AIRPORT PTY LTD  Second Respondent | |
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| AND BETWEEN: | HOBART INTERNATIONAL AIRPORT PTY LTD  Cross-Claimant | |
| AND: | COMMONWEALTH OF AUSTRALIA  Cross-Respondent | |
|  | TAD 27 of 2018 | |
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| BETWEEN: | NORTHERN MIDLANDS COUNCIL  Applicant | |
| AND: | COMMONWEALTH OF AUSTRALIA  First Respondent  AUSTRALIAN PACIFIC AIRPORTS (LAUNCESTON) PTY LTD  Second Respondent | |
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| AND BETWEEN: | AUSTRALIAN PACIFIC AIRPORTS (LAUNCESTON) PTY LTD  Cross-Claimant | |
| AND: | COMMONWEALTH OF AUSTRALIA  Cross-Respondent | |

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| JUDGE: | O’CALLAGHAN J |
| DATE OF ORDER: | 18 October 2019 |

THE COURT ORDERS THAT:

1. In each proceeding, the applicant pay the second respondent’s costs of the proceeding, including the costs of the second respondent’s cross-claim against the first respondent.

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

REASONS FOR JUDGMENT

O’CALLAGHAN J:

1. On 24 September 2019, I made orders dismissing both proceedings on the ground that the councils had no standing to seek the declaratory relief the subject of their application. See *Clarence City Council v Commonwealth of Australia* [2019] FCA 1568.
2. The issue of costs now arises. The parties agreed that the issue may be decided on the papers.
3. The Commonwealth seeks no order for costs.
4. The councils agree that they must pay the costs of the lessees in each proceeding, but say that the following costs should be carved out, namely the costs:
5. thrown away by reason of the amended defences of the lessees pursuant to the leave granted on 2 April 2019;
6. of the accord and satisfaction and estoppel defences of the lessees; and
7. of each cross-claim.
8. In their written submissions, counsel for the lessees in both proceedings submit that there should be no such carve out.
9. In April 2019, I granted the lessees leave to file further amended defences and to file and serve cross-claims against the Commonwealth. The cross-claims and amendments raised issues of accord and satisfaction, and estoppel (in TAD 27 of 2018), between the Commonwealth and the lessees. The pleas were said to be relevant to the exercise of the court’s discretion to grant the relief sought by the councils.
10. The lessees submit that there is no basis for departing from the usual order as to costs. They contend that the court’s decision that the councils did not have standing to seek declaratory relief with respect to the proper construction of the leases, and the order that the proceedings be dismissed, means that the relevant events for costs purposes are properly to be characterised as their success in defeating the claims brought against them by the councils.
11. The lessees say that they were entirely successful in these proceedings, and succeeded on a basis which they raised at the forefront of their contentions and submissions (that is, standing).
12. The lessees say that the councils’ claims against them and the lessees’ cross-claims against the Commonwealth ought not be treated as separate events, for three reasons.
13. First, they contend that the lessees’ cross-claims against the Commonwealth replicate the accord and satisfaction claims pleaded by the lessees in their defences to the councils’ claims. They contend that the respective issues of fact and law are not discrete, but identical, citing *GlaxoSmithKline Consumer Healthcare Investments (Ireland) (No 2) Limited v Generic Partners Pty Limited (No 2)* [2018] FCAFC 100 at [8] (there is no separate event for costs purposes if the relevant issues on a cross-claim concern a common substratum of fact or may have been wrapped up with other issues or could not be readily disentangled).
14. The lessees say that the evidence relevant to their cross-claims cannot readily be “disentangled” from the evidence relevant to their defences to the councils’ claims. For the same reason, they say that it cannot be said that the costs occasioned by the lessees’ cross-claims are additional to, or separate from, the costs incurred by the lessees in their defence of the proceedings brought by the councils.
15. Next, the lessees contend that the cross-claims against the Commonwealth “was at all times advanced solely to buttress [their] defence to the [councils’] claim[s], and to rebut the Commonwealth’s contentions as to justiciability and standing. In particular, [the lessees] expressly relied upon [each of their] cross-claim[s] as a matter that militated against there being any justiciable controversy before the Court and/or against the discretionary relief sought by the Council”. They contend that “[w]hile the final orders made by the Court have the effect of disposing of [the lessees’] cross-claim[s] against the Commonwealth, [those] cross-claim[s] [were] plainly defensive in character and had no work to do in circumstances where [the lessees] succeeded on the anterior question of the Council’s standing”, citing *Davies v Lazer Safe Pty Ltd (No 2)* [2019] FCAFC 118 at [9].
16. The councils do not take issue with those submissions. They say that the carve out of the costs described above should be made for two other reasons:

The first matter is that it should be concluded that the second respondent in each proceeding acted unreasonably in giving very late notice of its intention to rely upon the amended defences. That late notice necessarily resulted in the adjournment of the trial in March 2019. And, thereafter, the parties suffered a very significant increased costs burden by reason of the additional evidence and documentation that was required to be included in each supplementary court book. That material became relevant because of the amendments and the cross-claims.

The second matter is that the applicants ought not suffer the costs of the amended defences and the cross-claims (to which they were not parties) that raised issues that did not, largely, concern the relief that they sought in each proceeding.

1. In their reply submissions, the lessees say the following:

Contrary to the Council’s contention, all of the amendments contained in [the lessees’] Further Amended Defence[s] (and each of the issues raised by way of cross-claim against the Commonwealth) ultimately went to the twin questions of the [councils’] standing to bring these proceedings, and the existence and exercise of the Court’s jurisdiction to grant the relief sought by the [councils]. Those matters were critical to the [councils’] claim[s], and were put in issue by [the lessees] in the first defence[s] filed in the proceedings.

The [councils] consented to leave being granted for [the lessees] to amend [their] defence[s], and to file [] cross-claim[s] against the Commonwealth, and did so without qualification as regards the costs of that course. [The lessees] cannot be said to have acted unreasonably by seeking to amend [their] Defence[s] prior to the hearing of the [councils’] claim[s] … and no prejudice was occasioned to the [councils] as a result of those amendments. In those circumstances, there is no proper basis for the costs order proposed by the [councils].

1. In my view, there is no sufficient basis for making orders of the type contended for by the councils, in circumstances where they do not seek to contradict the lessees’ principal submissions (at [7]-[12] above), and where the lessees’ reply submissions must be accepted.
2. Accordingly, I will order in each proceeding that the council pay the lessee’s costs of the proceeding, including the costs of the lessee’s cross-claim against the Commonwealth.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O’Callaghan. |

Associate:

Dated: 18 October 2019