FEDERAL COURT OF AUSTRALIA

Jadwan Pty Ltd v Rae & Partners (A Firm) (No 2) [2020] FCAFC 95

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| File number: | TAD 28 of 2018 |
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| Judges: | **BROMWICH, O'CALLAGHAN AND WHEELAHAN JJ** |
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| Date of judgment: | 29 May 2020 |
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| Catchwords: | **COSTS** – whether to reduce the costs payable by the appellant to the respondents on account of the appellant’s partial success in the appeal – no reduction applied – whether to make a lump sum costs order – direction for Registrar of the Court to assess the lump sum of costs to be awarded and make orders. |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 35A(1)(h), 43*Federal Court Rules 2011* (Cth) rr 3.01(b), 40.02, item 221 of Schedule 2  |
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| Cases cited: | *Ah Toy v Registrar of Companies* [1985] FCA 291; 10 FCR 280*Driclad Pty Ltd v Federal Commissioner of Taxation* [1968] HCA 91; 121 CLR 45*Idenix Pharmaceuticals LLC v Gilead Sciences Pty Ltd (No 2)* [2018] FCAFC 7*Jadwan Pty Ltd v Rae & Partners (A Firm)* [2020] FCAFC 62*Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42*Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd (costs)* [2020] FCAFC 74*Northern Territory v Sangare* [*2*019] HCA 25; 265 CLR 164*Paciocco v Australia & New Zealand Banking Group (No 2)* [2017] FCAFC 146; 253 FCR 403  |
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| Date of hearing: | Determined on the papers. |
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| Date of last submissions: | 11 May 2020 |
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| Registry: | Tasmania |
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| Division: | General Division |
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| National Practice Area: | Other Federal Jurisdiction |
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| Category: | Catchwords |
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| Number of paragraphs: | 12 |
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| Counsel for the Appellant: | Mr M Pearce SC with Mr D Deller |
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| Solicitor for the Appellant: | Keypoint Law |
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| Counsel for the First, Second and Third Respondents: | Mr P Jackson SC with Ms K Cuthbertson |
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| Solicitor for the First, Second and Third Respondents: | Tremayne Fay Rheinberger Lawyers |
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| Counsel for the Fourth Respondent: | Mr C Gunson SC with Ms B Myers  |
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| Solicitor for the Fourth Respondent: | Lander & Rogers  |
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| Counsel for the Fifth Respondent: | Mr S McElwaine SC |
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| Solicitor for the Fifth Respondent: | Shaun McElwaine & Associates |

ORDERS

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|  | TAD 28 of 2018 |
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| BETWEEN: | JADWAN PTY LTDAppellant |
| AND: | RAE & PARTNERS (A FIRM)First RespondentWILSON DOWD (A FIRM)Second RespondentTOOMEY MANING & CO (A FIRM) (and others named in the Schedule)Third Respondent |

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| JUDGES: | BROMWICH, O'CALLAGHAN AND WHEELAHAN JJ |
| DATE OF ORDER: | 29 may 2020 |

THE COURT ORDERS THAT:

1. The appellant pay the respondents’ costs of the appeal to be assessed in a lump sum pursuant to r 40.02(b) of the *Federal Court Rules 2011* (Cth).
2. It is directed that a Registrar of the Court is to determine the amount of the respondents’ costs in such manner as the Registrar deems fit, and shall then make an order fixing the amount of those costs, which are to be payable within 28 days of such orders.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. On 9 April 2020, we dismissed the appellant’s appeal in this proceeding: *Jadwan Pty Ltd v Rae & Partners (A Firm)* [2020] FCAFC 62. These reasons in relation to costs assume familiarity with those substantive reasons.
2. At that time, we also made orders for the parties to file written submissions as to costs, and for the question of costs to be considered on the papers. All of the parties have now filed submissions as to costs. We note that the first to third respondents, fourth respondent and fifth respondent each filed separate submissions, however as those submissions advanced essentially the same arguments and were supportive of each other, we have addressed them collectively in these reasons.
3. For the following reasons, we have determined to direct a Registrar of this Court to assess the lump sum of costs to be awarded in favour of the respondents. That assessment should not be reduced on account of what was said to be the appellant’s partial success in the appeal. The Registrar is directed to determine the quantum of the respondents’ costs in such a manner as the Registrar deems fit, and at the conclusion of that process, the Registrar is to make orders about the payment of the respondents’ costs in the sums determined.

## No reduction

1. The parties’ submissions on costs focussed on whether the Court should reduce the costs to be awarded in favour of the respondents on account of what was said to be the appellant’s partial success in the appeal. The appellant submitted that such a reduction should be applied, which the respondents opposed.
2. The appellant did not resist an order that it pay the respondents’ costs of the appeal, however it submitted that it should be ordered to pay only two-thirds of the respondents’ costs on account of its partial success in the appeal. The appellant relied on *Idenix Pharmaceuticals LLC v Gilead Sciences Pty Ltd (No 2)* [2018] FCAFC 7 at [3] as authority for the proposition that “the ordinary rule is that costs follow the event, although a successful party may be awarded less than its costs, or costs may be apportioned, based upon success on the issues.” The appellant submitted that it succeeded in relation to three of the nine findings of the primary judge that it challenged, and in particular pointed to the Court’s findings that each of the professionals who had advised it – Mr Wicks, Mr Porter and Mr Hogan – had breached their duties of care. The appellant submitted that the costs ordered in favour of the respondents should be reduced on account of that partial success, despite the Court having found that the appellant did not establish causation, and dismissing the appeal.
3. The respondents submitted that costs should be awarded against the appellant without any reduction. The respondents accepted that the Court may reduce an award of costs on account of an ultimately unsuccessful party’s partial success, so as to achieve justice in the case, but submitted that there was no sufficient reason to displace the general rule that costs should follow the event. The respondents submitted that the central issue in the appeal, on which the appellant failed, was whether the respondents, in breach of duty, caused the appellant to suffer loss. The respondents further submitted that any partial success by the appellant in respect of some grounds of appeal was illusory because, ultimately, none of the primary judge’s orders was disturbed. The respondents also noted that unlike in *Idenix Pharmaceuticals*, which the appellant relied upon,there was no cross-appeal or notice of contention on which the appellant was successful, and which might have in some circumstances justified a reduced costs order.
4. The Court’s power in relation to costs is well established. Section 43 of the *Federal Court of Australia Act 1976* (Cth) gives the Court a wide discretion in awarding costs. That discretion must be exercised judicially, with appropriate regard to guiding principles: *Northern Territory v Sangare* [*2*019] HCA 25; 265 CLR 164 at [25] (the Court). One of the most, if not the most, important guiding principles is that the successful party is generally entitled to costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon it: *Northern Territory v* *Sangare* at [26]. It is basic justice that a successful party should be compensated for expenses that it has incurred because it has been obliged to litigate by the unsuccessful party: *Northern Territory v* *Sangare* at [27]. That principle underpins the ordinary rule that costs follow the event.
5. The issue for consideration is whether there are grounds to justify departure from that ordinary rule in this appeal. We do not consider that there are. The ordinary rule should apply, and the Court should not reduce the costs to be awarded in favour of the respondents on account of what was said to be the appellant’s partial success in the appeal. Reasons for judgment are not of themselves judgments; a judgment is an operative judicial act, being the formal order whereby the Court disposes of the matter before it: *Ah Toy v Registrar of Companies* [1985] FCA 291; 10 FCR 280 at 286 (the Court). And appeals are against the judgment or order, and not the reasons for judgment: *Driclad Pty Ltd v Federal Commissioner of Taxation* [1968] HCA 91; 121 CLR 45 at 64 (Barwick CJ and Kitto J); *Ah Toy* at 286. In the present case, the appellant sought to appeal the orders of the primary judge entered on 29 June 2018, which dismissed its multi-faceted suit in negligence against the respondents. The appellant was required to prove that the respondents, in breach of duty, caused it to suffer loss and failed to do so. We dismissed the appeal and did not disturb any of the primary judge’s orders. In reality and in practical outcome, the appellant failed and the respondents succeeded in resisting the appeal: *Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd (costs)* [2020] FCAFC 74 at [6]-[7] (the Court), and the authorities cited therein. The respondents should be indemnified on the ordinary basis in respect of the costs that they incurred in successfully resisting the appeal. No conduct by the respondents in relation to the litigation justifies a different outcome: *Northern Territory v* *Sangare* at [26].

## Lump sum costs orders

1. The respondents submitted that pursuant to r 40.02(b) of the *Federal Court Rules 2011* (Cth), the Court should make a lump sum costs order.
2. Under the Court’s Costs Practice Note (GPN-Costs), it is stated that the Court’s preference, wherever it is practicable and appropriate to do so, is for the making of a lump sum costs order: see paragraph [4.1]. Further, the making of lump sum costs orders is consistent with the recent practice of this Court in cases of complexity, where a lump sum costs order is made to “save the time, trouble, expense and aggravation of a taxation”: *Paciocco v Australia & New Zealand Banking Group (No 2)* [2017] FCAFC 146; 253 FCR 403 at [20] (the Court). This appeal is such a case. We consider that it is practicable and appropriate to make a lump sum costs order in this appeal, and the appellant did not submit otherwise.

## Registrar to assess the amount of costs

1. Finally, the respondents submitted that the assessment of the quantum of the lump sum costs should be referred to a Registrar of the Court. The appellant did not respond to that submission.
2. The power of the Court to direct a Registrar to make an order about the amount of costs is in s 35A(1)(h) of the *Federal Court Act*,and r 3.01(b) in conjunction with item 221 of Schedule 2 of the *Federal Court Rules*: *Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42 at [19] (the Court), citing *Paciocco* at [39]. We consider that it is appropriate that a Registrar of the Court assess the lump sum of costs to be awarded in favour of the respondents. We shall direct that a Registrar of the Court determine the amount of the respondents’ costs in such manner as the Registrar deems fit, and at the conclusion of that process, the Registrar is to make orders about the payment of the respondents’ costs in the sums assessed.

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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 Justices Bromwich, O'Callaghan and Wheelahan. |

Associate:

Dated: 29 May 2020

SCHEDULE OF PARTIES

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|  | TAD 28 of 2018 |
| Respondents |  |
| Fourth Respondent: | JANET KAY HOGAN AS THE EXECUTRIX OF THE ESTATE OF THE LATE JOHN MICHAEL JOGAN |
| Fifth Respondent: | WORSLEY DARCEY & ASSOCIATES |