FEDERAL COURT OF AUSTRALIA

Zaghloul v Woodside Energy Limited (No 9) [2019] FCA 1718

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| File number: | ACD 62 of 2012 |
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| Judge: | **COLVIN J** |
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| Date of judgment: | 18 October 2019 |
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| Catchwords: | **COSTS** - application by respondent for costs consequent on applicant's amendment to the statement of claim - application for costs to be taxed and paid forthwith - where applicant is self-represented - where amendment made in the interests of effective case management - where no reason to depart from ordinary rule - orders made for applicant to pay respondent's costs thrown away - other orders not made |
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| Legislation: | *Federal Court Rules 2011* (Cth) r 40.13 |
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| Cases cited: | *Airservices Australia v Jeppesen Sanderson Inc* [2006] FCA 906*Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281; (2006) 33 WAR 82*Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112*Courtney v Medtel Pty Limited (No 3)* [2004] FCA 347*Fiduciary Ltd v Morningstar Research Pty Ltd* [2002] NSWSC 432; (2002) 55 NSWLR 1*Hamod v State of New South Wales* [2011] NSWCA 375*Kazar (Liquidator) v Kargarian; In the matter of Frontier Architects Pty Ltd (In Liq)* [2011] FCAFC 136; (2011) 197 FCR 113*Nobarani v Mariconte* [2018] HCA 36*Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72*Platcher v Joseph* [2004] FCAFC 68*QS Holdings Sarl v Paul's Retail Pty Ltd (No 2)* [2011] FCA 1038*SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; (2013) 216 FCR 445*SZVCP v Minister for Immigration and Border Protection* [2016] FCAFC 24; (2016) 238 FCR 15*Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15*Zaghloul v Woodside Energy Limited (No 7)* [2019] FCA 818 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 28 August 2019 (Applicant)14 August 2019 (Respondent) |
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| Registry: | Western Australia |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 23 |
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| Counsel for the Applicant: | In person |
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| Counsel for the Respondent: | Mr JB Blackburn SC |
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| Solicitor for the Respondent: | Ashurst |

ORDERS

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|  | ACD 62 of 2012 |
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| BETWEEN: | DR HASSAN ZAGHLOULApplicant |
| AND: | WOODSIDE ENERGY LIMITED (ACN 005 428 986)Respondent |

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| JUDGE: | COLVIN J |
| DATE OF ORDER: | 18 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The applicant shall bear any costs thrown away by the respondent by reason of the amendment to the statement of claim allowed on 18 October 2018 in any event.

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

REASONS FOR JUDGMENT

COLVIN J:

1. In proceedings that have been on foot since 2012, Dr Zaghloul brings claims for damages arising from the circumstances of his employment by Woodside Energy Limited (**Woodside**). Dr Zaghloul acts on his own behalf. In the course of the proceedings, Dr Zaghloul has brought a number of unsuccessful interlocutory applications.
2. Woodside was successful in having certain of the claims summarily dismissed in 2014. At about that time, Woodside also obtained orders for determination of a separate question as to whether the Court was prevented from awarding Dr Zaghloul damages in tort or contract for personal injury. The question was decided adversely to Woodside. It brought an appeal which was dismissed in 2015.
3. By 2018, Dr Zaghloul had informed the Court that he was preparing a new pleading. Proposed pleadings of some considerable length had been provided by Dr Zaghloul. In July 2018, I sought to bring Dr Zaghloul's ongoing efforts to a head by directing that Dr Zaghloul file and serve a proposed statement of claim or concise statement of claim by a date which was extended by consent to 10 September 2018. I encouraged Dr Zaghloul, in preparing that document, to adopt a concise form that set out a chronological narrative of the facts relied upon by him without legal characterisation followed by a statement of each of the claims made by him based on those facts. Dr Zaghloul filed a proposed concise statement of claim (**PCSC**) broadly of that character. It was a document of some seven pages (and 66 paragraphs). As directed, he also filed an affidavit in support of his application to amend.
4. A major part of the claims made by Dr Zaghloul in these proceedings is that Woodside has liability for conduct that allegedly affected his mental health. In Dr Zaghloul's affidavit in support of his application to amend, amongst other things, he explained aspects of his mental health during the course of these proceedings and displayed insight into the fact that various applications that had been brought by him at times when he was not well were 'entirely misconceived' and applications that 'should not have been brought'. He recognised that earlier pleadings included submissions and evidence that should not have been pleaded.
5. Woodside responded to the PCSC by filing objections that ran to over 30 pages. It objected to the whole of the proposed new pleading. It complained about costs that it had incurred in considering past proposed pleadings that were long.
6. On 31 October 2018, I made orders that the application proceed on the basis of the claims made in the PCSC noting that the factual claims advanced by Dr Zaghloul were those stated in paras 1 to 42 and the matters stated in paras 43 to 66 were the legal contentions arising from those factual claims. I also directed Woodside to file by 14 November 2018 an outline of submissions stating any cost orders that it sought consequent upon that order and the basis upon which it sought those orders and for Dr Zaghloul to respond by 28 November 2018. I also made provision for Woodside to file any application to strike out the PCSC or for summary dismissal by 28 November 2018.
7. Woodside did not file submissions as to costs. But on 28 November 2018, Woodside filed an application seeking judgment in relation to the claims at paras 48 to 62 and for the factual claims in paras 30, 32, 33, 38, 39 and 42 to be struck out. Woodside's application was heard by McKerracher J and was successful: *Zaghloul v Woodside Energy Limited (No 7)* [2019] FCA 818. Orders were made accordingly on 20 June 2019. Orders were made for Dr Zaghloul to pay Woodside's costs of the interlocutory application.
8. On 31 July 2019 I made orders requiring an amended version of the PCSC to be filed reflecting the orders made by McKerracher J. As no submissions had been filed in respect of the costs claimed by Woodside consequent upon allowing Dr Zaghloul to amend in terms of the PCSC and Woodside wished to press for costs orders, I made further orders for those submissions and affidavits to be filed and for the issue to be determined on the papers.
9. On 14 August 2019, Woodside filed submissions seeking an order that Dr Zaghloul pay its costs consequent upon the order made on 31 October 2018 granting leave to the applicant to amend his statement of claim in terms of the PCSC. It sought a further order that Dr Zaghloul pay Woodside's costs thrown away and the costs of the application for costs. It also sought an order for costs to be taxed and paid forthwith.
10. Woodside's application is supported by an affidavit of Ms Young, a senior associate at the firm of solicitors acting for Woodside. Ms Young deposes to work undertaken in 2012 in preparing the defence to the original statement of claim. She says that she is aware of work now being done in responding to the PCSC. Ms Young says that she considers it likely that costs were incurred in preparation of the defence that will have been wasted as a result of Dr Zaghloul's new statement of claim.
11. Ms Young also refers to an application for leave to amend that was brought in July 2017 at which time no proposed new pleading was provided. The application was adjourned and a proposed 102 page amended statement of claim was provided. Ms Young says that it sought to plead numerous additional facts and causes of action. Ms Young deposes to costs being incurred 'having to consider, take instructions and formulate a response to that document'. A further proposed statement of claim was served on 12 September 2017 which was said to be 'substantially reformatted and revised' and Ms Young says that as a result 'work which the respondent had performed in considering the previous iteration was wasted'.
12. Ms Young's affidavit also deals with Dr Zaghloul's financial capacity to meet any costs order and says that he has obtained a worker's compensation payment and that in 2016 a cheque was sent to Dr Zaghloul for $63,176. Reference is also made to a claim against Woodside's superannuation fund. Finally, it is said that a further amount of compensation of $44,341 was paid to Dr Zaghloul on 15 March 2019.
13. Dr Zaghloul has filed an affidavit opposing the cost orders sought by Woodside. He says that since July 2013, a Centrelink Disability payment has been his only regular income. He says that an order for costs to be paid forthwith will accelerate his financial hardship. He says that he has been relying upon payments received from claims for workers compensation and total and permanent disability to meet the shortfall in his living costs. He confirms that he has received payments for workers compensation of the order of those deposed to by Ms Young. He says he has used some of those monies to meet a past cost order in these proceedings and a certificate of costs in the Supreme Court of Western Australia. The total amount paid is just over $23,000.
14. He says that he prepared the amended pleadings because of denials of certain matters by Woodside in its defence. He said changes were made to plead the claims by causes of action rather than chronologically. He refers to attempts by Woodside to obtain orders for a split trial and his attempt to plead the case in a way that would facilitate a split up of issues. Dr Zaghloul then expresses a concern that Woodside would claim excessive costs in any taxation.
15. As is recognised by the submissions for Woodside, the amendment to Dr Zaghloul's pleading in terms of the PCSC was made in the interests of effective case management to separate the factual issues from their legal characterisation and to understand the chronological narrative of events upon which Dr Zaghloul relies in bringing his claim. The pleading filed by Dr Zaghloul conformed to those requirements. I accept that it followed attempts by Dr Zaghloul to formulate an amended pleading to deal with matters he considered were raised by Woodside's defence and there were costs incurred by Woodside in considering those pleadings.
16. However, it is no longer the case that it is appropriate for lawyers to approach any pleading by parsing and scrutinising each aspect for objection. The proper approach to objections to pleadings must be informed by the modern approach to case management. The question is whether the pleading adequately discloses an arguable case and does so in a manner that discloses the issues and informs the other party of the case to be met. If it does so, then objections should not be raised: *Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281; (2006) 33 WAR 82 at [6]‑[8] applied in *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13] (Greenwood, McKerracher and Reeves JJ). In other words, objections must be directed towards facilitating the efficient and effective management of the case to a hearing directed towards considering the real issues in the case. It appears from the lengthy objections filed to the PCSC that Woodside approached the pleadings in this matter by reviewing them for the purpose of making what may be described as comprehensive objections. I do not accept that it is appropriate to make cost orders on the basis that costs of that kind may have been incurred. Otherwise, the affidavit and submissions for Woodside lack any particularity concerning any issues that had to be considered that are no longer in issue or otherwise mean that considerable wasted costs have been incurred.
17. The Court has a duty to ensure that its processes are fair and that requires that a person does not suffer a disadvantage from exercising the recognised right of a litigant to be self‑represented. It is a duty that extends to ensuring that the litigant has sufficient information about the practice and procedure of the court to ensure a fair hearing: *Hamod v State of New South Wales* [2011] NSWCA 375 at [309]‑[311], quoted with approval in *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; (2013) 216 FCR 445 at [37]; and *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112 at [103]. See also *SZVCP v Minister for Immigration and Border Protection* [2016] FCAFC 24; (2016) 238 FCR 15 at [36]‑[38]. When Dr Zaghloul was informed by the Court as to what the process of pleading entailed he then conformed to that requirement by producing a concise statement of the kind required. Woodside could have facilitated that process by raising the issue at a case management hearing before undertaking any detailed consideration of proposed amended pleadings.
18. Of course, the absence of legal representation on one side does not deprive the other party of its entitlement to the proceedings being conducted in conformance with the rules of procedure, but the Court may be lenient in the standard of compliance which it exacts from a litigant in person so long as it does not go so far as conferring an advantage on the person who acts on their own behalf: *Nobarani v Mariconte* [2018] HCA 36 at [47] approving, amongst other decisions, the reasoning in *Platcher v Joseph* [2004] FCAFC 68 at [104]‑[105] (Tamberlin and Emmett JJ).
19. Dr Zaghloul acts on his own behalf and has provided explanations as to why he prepared the proposed amended pleadings. Allowing for those aspects, it has not been demonstrated that the present instance is in the category of case where pleadings have been ill-considered and the opposing party has been burdened with considering a claim that has not been thought through. In such instances, it may be appropriate to order that costs thrown away be paid forthwith: *Airservices Australia v Jeppesen Sanderson Inc* [2006] FCA 906 at [31]‑[33].
20. The Court has a general discretion to award costs. The discretion to award costs is unconfined, but must be exercised judicially, that is according to relevant considerations and taking account of the contextual features and facts of the litigation: *Kazar (Liquidator) v Kargarian; In the matter of Frontier Architects Pty Ltd (In Liq)* [2011] FCAFC 136; (2011) 197 FCR 113 at [4]. Settled principle guides the exercise of the discretion: see *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at [38]. In the ordinary course of litigation, costs awarded in interlocutory proceedings need not be paid until the conclusion of the proceedings. This enables all costs to be assessed and set‑offs made having regard to all orders for costs: see r 40.13 of the *Federal Court Rules 2011* (Cth). However, the Court may make orders for interlocutory costs to be paid forthwith where the particular circumstances justify the making of such orders in the interests of justice: see, for example, *Courtney v Medtel Pty Limited (No 3)* [2004] FCA 347 at [20]‑[22] (Sackville J); *QS Holdings Sarl v Paul's Retail Pty Ltd (No 2)* [2011] FCA 1038 at [37] (Kenny J); and *Fiduciary Ltd v Morningstar Research Pty Ltd* [2002] NSWSC 432; (2002) 55 NSWLR 1 at [11]‑[13] (Barrett J).
21. I accept that Dr Zaghloul has some financial capacity to meet a costs order at this time. Therefore, this is not a case where the Court might decline to make an order for costs to be paid forthwith out of a concern that the order itself might itself jeopardise his ability to advance the claims. In any event, apart from the conduct of the appeal on the case stated where Dr Zaghloul received some legal assistance, it appears that he has acted on his own behalf throughout. It is not a case where the making of a costs order might deprive a party of ongoing legal assistance.
22. However, in my view, it has not been demonstrated that there should be a departure from the usual approach which is to recognise that interlocutory costs should be assessed and brought to account when the ultimate outcome is known. Woodside did not act promptly in bringing the present application which concerns costs consequent upon orders made in October last year. There is nothing to suggest that there will be considerable further delay from this point in the matter being heard and determined. Orders have been made for parties to file the evidence upon which they will rely at the hearing. Further, given the advantages for the efficient conduct of these proceedings of the adoption of the concise from of pleading in the form of the PCSC and the absence of any suggestion that particular claims have been abandoned by Dr Zaghloul as well as the views I have expressed concerning the proposed amendments, I am of the view that the only order that should be made is that any costs thrown away by Woodside by reason of the amendment of the statement of claim allowed on 18 October 2018 be paid by Dr Zaghloul. An order to that effect should be made because Dr Zaghloul initiated the course of amending his pleadings well after the proceedings were commenced so as to recast his claims with the consequence that Woodside would have to prepare a new defence. To the extent the pleadings raised new claims that did not have merit those costs have been dealt with by McKerracher J. Otherwise, all costs should simply be treated as costs of the proceedings to be dealt with when the proceedings are determined or otherwise resolved.
23. As the respondent has been substantially unsuccessful on the application for costs and Dr Zaghloul acts on his own behalf there should be no order as to the costs of the application.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin. |

Associate:

Dated: 18 October 2019