FEDERAL COURT OF AUSTRALIA

Australian Broadcasting Corporation v Kane [2020] FCA 443

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| Prospective appeal from: | *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 |
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| File number: |  |
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| Judge: | **GRIFFITHS J** |
|  |  |
| Date of judgment: | 6 April 2020 |
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| Catchwords: | **COSTS –**  determination of costs in respect of Urgent Application Before Start of a Proceeding – indemnity costs sought by prospective applicant – prospective applicant unable to demonstrate prospective respondents acted unreasonably or that their conduct was sufficiently grave to warrant an order for indemnity costs – no order as to costs |
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| Legislation: | *Crimes Act 1914* (Cth), s 3E *Legal Services Directions 2017* (Cth), Appendix B |
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| Cases cited: | *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133*Australian Law Company Pty Ltd v Initiative Holdings Pty Ltd* [2019] FCA 1561*Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin* [1997] HCA 6; 186 CLR 622  |
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| Date of hearing: | 24 February 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 26 |
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| Solicitor for the Prospective Applicant: | Australian Broadcasting Corporation, Legal Department |
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| Solicitor for the Prospective Respondents: | Australian Government Solicitor |

ORDERS

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|  | NSD 173 of 2020 |
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| BETWEEN: | AUSTRALIAN BROADCASTING CORPORATIONProspective Applicant |
| AND: | MARTIN KANEProspective First RespondentCOMMISSIONER OF THE AUSTRALIAN FEDERAL POLICEProspective Second RespondentAGENT IAN BRUMBY OF THE AUSTRALIAN FEDERAL POLICEProspective Third Respondent |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 6 APRIL 2020 |

THE COURT ORDERS THAT:

1. There be no order as to costs in respect of the Urgent Application Before Start of a Proceeding filed on 20 February 2020.

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

REASONS FOR JUDGMENT

GRIFFITHS J:

## Introduction

1. The Australian Broadcasting Corporation (**ABC**) seeks indemnity costs in respect of its Urgent Application Before Start of a Proceeding, which it filed on 20 February 2020. It seeks those costs against the prospective second and third respondents, who are the Commissioner of the Australian Federal Police (**AFP**) and Australian Federal Police Agent Mr Ian Brumby (who applied for and executed a search warrant at the ABC’s premises) respectively. I shall refer to the second and third prospective respondents as the **AFP parties**. The prospective first respondent is Mr Martin Kane, who is a Registrar of the Local Court of New South Wales and who issued the relevant search warrant.
2. For the following reasons, I consider that there should be no order as to costs.

## Background matters summarised

1. On 17 February 2020, Abraham J made orders and delivered reasons for judgment in *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133. Her Honour dismissed the ABC’s challenge to the search warrant which was issued by Mr Kane on 3 June 2019 under s 3E(1) of the *Crimes Act 1914* (Cth). The warrant was executed at the ABC’s premises on 5 June 2019.
2. The search warrant related to suspected offences by two men, including Mr David McBride. Mr McBride has been committed to stand trial in the Supreme Court of the Australian Capital Territory. In December 2019, a substantive pre-trial issue and the trial of Mr McBride were listed for hearing for 10 days commencing on 2 March 2020. These dates were subsequently vacated in February 2020 and the matter was listed for mention in the ACT Supreme Court on 24 February 2020 for the purpose of setting new dates. As at February 2020, it was understood that any trial would likely be listed in November or December 2020.
3. Throughout the substantive proceeding before Abraham J, the AFP parties had given an undertaking which had the effect of restraining them from accessing or dealing with materials seized during the execution of the warrant. At the hearing before Abraham J, senior counsel for the AFP parties extended the existing undertaking until seven days after judgment was published. At the delivery of the primary judgment on Monday, 17 February 2020, the AFP parties further extended the undertaking until 4:30 pm on Monday, 24 February 2020. This was done in response to information that neither senior nor junior counsel for the ABC was available for an interlocutory hearing in the week commencing 17 February 2020.
4. By letter dated 19 February 2020, the ABC was informed by the solicitors for the AFP parties (**AGS**) that no further extension would be given and that it was planned to access the seized material when the current undertaking expired unless restrained from doing so. The AGS stated that the only circumstance that may potentially alter the position of the AFP parties concerning the undertaking was if the Court was able to list any appeal for an expedited appeal hearing.
5. By a reply letter dated 19 February 2020, the ABC informed the AGS that the ABC intended to appeal the whole of the judgment. The AFP parties were asked whether they would extend the undertaking until such time as the parties could make a joint approach to the Court with a view to ascertaining the likely timeframe for the hearing of an expedited appeal. The ABC stated that if the AFP parties did not agree to make that joint approach, the ABC would urgently apply for an injunction. It might be noted that, at this point, the ABC had not identified any prospective grounds of appeal, nor did it indicate when a notice of appeal would be filed.
6. On 20 February 2020, the AFP parties declined to further extend the undertaking. They emphasised that any proposed grounds of appeal were as yet unknown. They added that they might agree to extend the undertaking to accommodate an early final hearing of the appeal, but this would depend upon the terms of the notice of appeal and the time within which the appeal could be heard. They added that, given the history of the matter, a special leave application might also be filed and that there was a strong public interest in the seized material being available to AFP investigators, and to the accused and his representatives, well in advance of any trial. This presumably was a reference to the AFP’s disclosure obligations under the Commonwealth Director of Public Prosecutions’ Statement on Disclosure (March 2017) (**CDPP’s Statement on Disclosure**).
7. Shortly thereafter, on that same day, the ABC filed its Urgent Application Before Start of a Proceeding. The ABC sought an injunction restraining the AFP parties from viewing, accessing, copying or disseminating or causing to be viewed, accessed, copied or disseminated any materials seized when the warrant was executed on 5 June 2019. The ABC gave an undertaking to the Court in its application that it would start a proceeding in relation to the subject matter of the application within 14 days after the Urgent Application Before Start of a Proceeding had been determined. Notwithstanding that statement, in his affidavit dated 20 February 2020 Mr Grant McAvaney (who is the Head of Disputes and Litigation in the Legal Department of the ABC) deposed that the ABC’s intention to appeal was subject to receiving advice on grounds of appeal as well as the ultimate decision of ABC management.
8. On 21 February 2020, the ABC wrote to the AFP parties proposing certain matters with a view to encouraging the AFP to extend the undertaking. The letter noted that the ABC’s then present intention, subject to receiving advice as to the grounds of appeal and final instructions, was to file a notice of appeal within the 28 day period provided under the *Federal Court Rules* *2011* (Cth). The ABC added that this step could be taken more urgently if the AFP parties were “prepared to take a sensible approach to resolving the procedural steps moving forward”. The ABC proposed that the parties agree that the undertaking be continued, subject to the ABC filing any notice of appeal on or before 9 March 2020 and the AFP parties thereafter giving not less than two days’ notice of any intention to access or deal with the seized documents. The ABC’s letter stated that if this proposal was accepted, the ABC would prepare short minutes of order to be provided to the Court when its Urgent Application Before Start of a Proceeding was listed for hearing on 24 February 2020.
9. When the matter was called for hearing on 24 February 2020, the Court indicated that if the ABC filed and served a notice of appeal by no later than 5:00 pm on 28 February 2020, the appeal would be listed for hearing before a Full Court on 15 April 2020. After being given an opportunity to consider that information, the parties gave their consent to orders which gave effect to the Court’s proposals, together with other steps to have the matter ready for hearing on 15 April 2020. Accordingly, the hearing listed for 24 February 2020 did not proceed substantively.
10. To cover the contingency that no notice of appeal was filed by 28 February 2020, orders were also made by consent for the parties to file and serve submissions on costs in relation to the Urgent Application Before Start of a Proceeding, with a view to that matter being heard on the papers.
11. In accordance with those orders, and in circumstances where no notice of appeal was filed, the Court has the benefit of helpful written submissions from the parties on costs, including reply submissions by the ABC.

## Consideration and determination

1. In brief, the ABC contends that this is an appropriate case for indemnity costs having regard to the following matters.
2. The alleged uncooperative conduct of the AFP parties leading up to the filing of the ABC’s Urgent Application Before Start of a Proceeding, including refusing to extend the undertaking and their insistence that the matter come before the Court in any event. This was said to be contrary to their obligations as model litigants.
3. The AFP parties persisted in “an unjustified rejection of the ABC’s attempts to reach sensible agreement”. The ABC submitted that the stated concern of the AFP parties relating to the timing of Mr McBride’s trial was “illusory”.
4. The fact that it proved unnecessary to hear and determine the Urgent Application Before Start of a Proceeding, despite the position taken by the AFP parties in the correspondence referred to above.
5. The “surprising attitude” of the AFP parties that forcing the ABC to apply for an urgent injunction and forcing the Court to hear and determine the matter would not entail “a significant expenditure of time and public funds”, in circumstances where the ABC incurred considerable expenses in having to make the application, including paying a filing fee of $7,180.00, briefing counsel and preparing evidence and written submissions. The ABC submitted that the ultimate outcome suggested by the Court and adopted by the parties “reflected the very proposal the ABC put to the [AFP parties] in that correspondence”.
6. The parties did not dispute the relevant principles, which are set out at some length in their respective outlines of written submissions and which are reflected in my reasons for concluding that there should be no order as to costs. Those principles relate to the exercise of the Court’s discretion to award costs, whether on the normal basis or by way of indemnity costs.
7. The general principle which applies where it has proved unnecessary for the Court to determine the merits of an application were summarised by me in *Australian Law Company Pty Ltd v Initiative Holdings Pty Ltd* [2019] FCA 1561 at [16] to [18]. The starting point is that in such a case costs normally are assessed having regard to the approach of McHugh J in *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin* [1997] HCA 6; 186 CLR 622, i.e. where it appears that both parties have acted reasonably in commencing and defending the proceeding and that conduct continues to be reasonable until the litigation is settled or otherwise does not require a final hearing, the proper exercise of the Court’s costs discretion usually means that there is no order as to costs.
8. There is considerable force in the contention of the AFP parties that the ABC is not entitled to any costs, even on the normal basis, in circumstances where it failed to file any notice of appeal or indicate at any time possible grounds of appeal. Accordingly, the legal position as declared in the primary judgment prevails.
9. In any event, it has not been demonstrated by the ABC that the AFP parties have acted unreasonably so as to warrant an order for costs in its favour on the normal basis, nor engaged in conduct which is sufficiently grave to warrant an order for indemnity costs. My reasons for coming to those conclusions are as follows.
10. I accept the AFP parties’ submission that, in considering whether to extend the undertaking, they had to weigh several factors, against which the reasonableness of their conduct should be gauged. Prior to the 24 February 2020 hearing, the position was as follows:
11. From the commencement of the substantive proceeding, the ABC had disputed the AFP parties’ contention that the matter required expedition.
12. The AFP was subject to the disclosure obligations described at [8] above.
13. The primary judgment confirmed the rights of the AFP parties with respect to the seized material.
14. It was not known to the AFP parties if the Court would be able to accommodate any expedited appeal, especially if the filing of the appeal was delayed.
15. The ABC had made no proper proposal for how the parties could usefully approach the Court to seek an expedited listing for an appeal that did not exist, on grounds that had not been formulated, and whose merits could not be assessed. As the AFP pointed out, the ABC failed to indicate on what basis the Court’s jurisdiction could be enlivened in the absence of an application or appeal or other federal matter.
16. The AFP parties had taken several steps to facilitate a 24 February 2020 hearing as the simplest and most expeditious way forward, including granting a short further extension to the undertaking and accepting short service.
17. In its 23 February 2020 submissions, the ABC had indicated it required until 9 March 2020 (i.e. three weeks after publication of the primary judgment) to file any notice of appeal. It was not until the matter came on for hearing on 24 February 2020 that the ABC indicated a willingness to file any notice of appeal by 28 February 2020.
18. The ABC had twice given an unequivocal indication of its intention to appeal (on 19 February 2020 and in the interlocutory application itself), but some uncertainty was created by Mr McAvaney’s affidavit (see at [9] above).
19. Once the Court indicated at the outset of the hearing on 24 February 2020 that an expedited hearing of an appeal could be accommodated, the second respondent undertook to extend the undertaking. At the 24 February 2020 hearing, the ABC for the first time:
20. indicated that it would consent to the matter proceeding on an expedited timetable;
21. committed to the filing of any notice of appeal by 28 February 2020 (10 days earlier than the date proposed in the ABC’s written submissions on the Urgent Application Before Start of a Proceeding); and
22. committed to any appeal requiring no more than one day.
23. In those circumstances, I accept the AFP parties’ submission that they cannot fairly be criticised for requiring the ABC formally to enliven the Court’s jurisdiction and, subsequently, for the 24 February 2020 hearing to commence. Doing so involved no inconsistency with their obligation to act as a model litigant in Appendix B to the *Legal Services Directions 2017* (Cth), which obligation “does not prevent … Commonwealth agencies from acting firmly and properly to protect their interests”: see note 4 to para 2 of Appendix B.
24. The matters raised by the ABC concerning the McBride trial do not alter the position. It is irrelevant that the McBride trial, originally listed to commence on 2 March 2020, could theoretically have commenced prior to delivery of the primary judgment. Judgment was reserved in October 2019 and, at the instigation of the AFP parties, the Court was made aware on 18 December 2019 that the McBride trial was listed for hearing for ten days commencing on 2 March 2020. As noted above, this changed in February 2020 but, as the AFP parties point out, it may be inferred that the primary judge took the McBride trial timetable into account in publishing her reasons for judgment when she did.
25. I reject the ABC’s submission that the concern of the AFP parties regarding the timing of Mr McBride’s trial was “illusory”. I do not doubt the genuineness of the AFP parties’ concern to comply with the CDPP’s Statement on Disclosure, nor the legitimacy of their concern to ensure that any appeal and subsequent application for special leave occur expeditiously with a view to the outcomes being known before Mr McBride’s trial took place.
26. Finally, I do not accept the ABC’s submission that the ultimate outcome on 24 February 2020 reflected the very proposal advanced by the ABC in its correspondence. In particular, the date fixed on that day for the ABC to file any notice of appeal was well in advance of any date previously put forward by the ABC.
27. Having regard to all these matters, I do not consider that the ABC has demonstrated that it was unreasonable of the AFP parties to require the ABC to approach the Court as it did, let alone that their conduct was sufficiently grave to warrant an order for indemnity costs.

## Conclusion

1. For these reasons, there will be no order for costs in respect of the Urgent Application Before Start of a Proceeding filed on 20 February 2020.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 6 April 2020