FEDERAL COURT OF AUSTRALIA

US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation) (No 3)

[2015] FCA 1072

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| Citation: | US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation) (No 3) [2015] FCA 1072 |
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| Parties: | **US SHIPPING LIMITED v LEISURE FREIGHT & IMPORT PTY LTD (IN LIQUIDATION) (ACN 142 865 307) and SCOTT MURPHY** |
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| File number(s): | QUD 272 of 2014 |
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| Judge(s): | **GREENWOOD J** |
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| Date of judgment: | 1 October 2015 |
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| Catchwords: | **ADMIRALTY** – consideration of the disposition of the reserved costs of the proceedings  |
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| Legislation: | Federal Court of Australia Act 1976 (Cth), s 43(2) |
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| Cases cited: | *US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation)* [2015] FCA 347 – cited *US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation) (No 2)* [2015] FCA 413 – cited and quoted*Calderbank v Calderbank* [1975] 3 WLR 586; [1975] 3 All ER 333 – cited *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 - cited*Oshlack v Richmond River Council* (1998) 193 CLR 72 – cited*Seven Network Limited v News Limited* (2009) 182 FCR 160 – cited*Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 – cited*Kazar v Kargarian* (2011) 197 FCR 113 – cited*Commissioner of Taxation v AusNet Transmission Group Pty Ltd (No 2)* [2015] FCAFC 124 – cited  |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 31 July 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 30 |
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| Solicitor for the Applicant: | HWL Ebsworth Lawyers |
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| Solicitor for the Respondents: | Carrolls Law Practice |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 272 of 2014 |

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| BETWEEN: | US SHIPPING LIMITEDApplicant |
| AND: | LEISURE FREIGHT & IMPORT PTY LTD (IN LIQUIDATION) (ACN 142 865 307)First RespondentSCOTT MURPHYSecond Respondent |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 1 OCTOBER 2015 |
| WHERE MADE: | BRISBANE |

**THE COURTS ORDERS THAT:**

1. Pursuant to r 1.32 and r 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published from Chambers.
2. The second respondent pay the costs of the applicant of and incidental to the proceedings including reserved costs.

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

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| BETWEEN: | US SHIPPING LIMITEDApplicant |
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| JUDGE: | GREENWOOD J |
| DATE: | 1 OCTOBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. These proceedings are concerned with the disposition of the costs of the principal proceedings. The costs were reserved for later determination pursuant to orders made on 16 April 2015 and 4 May 2015. These reasons should be read together with the orders and reasons for judgment in *US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation)* [2015] FCA 347 (the “principal judgment’) and *US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation) (No 2)* [2015] FCA 413.
2. After a trial of the proceedings, the Court on 4 May 2015 made a declaration that the applicant was entitled to exercise a contractual lien over a vessel described as a 1989 Sea Ray 400 Flybridge (leaving aside other numerical identifiers) and to sell the vessel by public auction or private treaty and a further declaration that the applicant was entitled to appropriate from the proceeds of sale of the vessel outstanding freight and charges incurred by the respondents with the applicant in an amount of $71,036.04 as set out in a table forming part of Declaration 2 made on 4 May 2015.
3. On 4 May 2015, the Court made orders that within 14 days of the settlement of the sale of the vessel the applicant was required to file an affidavit deposing to the outcome of the sale and the proceeds received; pay into Court any surplus funds; file any application in relation to any claim the applicant may have concerning the surplus funds; and file any application and affidavit material upon which it intended to rely in respect of the question of costs.
4. The applicant relies upon an affidavit of Glenn William O’Brien sworn 20 July 2015 and a further affidavit sworn 31 July 2015. As to the first affidavit, Mr O’Brien says that the vessel was sold on 24 May 2015 by Marine Auctions Pty Ltd for a gross total sum of $73,000 which included GST of $6,636.36. An auction fee of $4,015 was payable to Marine Auctions Pty Ltd. Marine Auctions Pty Ltd also charged the applicant $4,693.90 for various expenses relating to the sale of the vessel. As a result, the net proceeds realised by the sale of the vessel was $64,291.10 which is an amount less than the amount of $71,036.04 which the applicant was entitled to appropriate from the proceeds of sale by operation of the declaration made on 4 May 2015.
5. By the second affidavit, Mr O’Brien deposes to the chronology concerning the commencement and prosecution of the proceedings.
6. In these reasons, it is not necessary to set out all of the details of that chronology. Some aspects of the events, however, ought to be mentioned in relation to the question of costs. On 25 September 2013, Mr O’Brien who is a Partner with HWL Ebsworth Lawyers, the Solicitors for the applicant, caused a letter to be sent to the second respondent, Mr Scott Murphy, by email by which an offer was made to release the vessel to Mr Murphy on payment of $40,906.27. On 4 October 2013, Mr O’Brien caused a letter to be sent to Mr Murphy by email advising that there had been a change in the fees for storing the vessel and made an offer to release the vessel to Mr Murphy on payment of $39,088.68. Mr O’Brien said in that letter that if the proposed amount was not received by 11 October 2013, the applicant would take steps to commence the proceedings to obtain the appropriate relief concerning the amount of its claim.
7. On 23 October 2013, Mr Murphy, by email, advised Mr O’Brien’s firm that Mr Murphy had already paid “all monies due for his vessel” and requested that the applicant’s claim over the vessel be abandoned. On 24 October 2013, Mr Murphy sent a further email to Mr O’Brien’s firm disputing the applicant’s claim and requested that the applicant remove its security registered over the vessel. On 25 October 2013, Mr O’Brien caused an email to be sent to Mr Murphy advising that no payment in respect of the vessel had been received. Mr O’Brien’s firm provided Mr Murphy with documentation in support of the applicant’s claim.
8. On 27 October 2013, Mr Murphy sent an email to Mr O’Brien’s firm disputing the applicant’s entitlement to assert any claims over the vessel. On 25 November 2013, Mr Murphy requested further information from Mr O’Brien’s firm concerning the applicant’s entitlement to assert an interest in the vessel.
9. On 2 March 2014, Mr O’Brien’s firm received an email from Mr Murphy enquiring about how much it would cost Mr Murphy to have the vessel released by the applicant and all registered security interests removed. Mr Murphy also sought information about any other charges in respect of the vessel.
10. On 12 March 2014, Mr O’Brien caused an email to be sent to Mr Murphy advising that Mr O’Brien’s firm was in the process of preparing an application to the Federal Court in relation to these matters. Mr O’Brien advised Mr Murphy that total charges owing on the vessel were $47,482.44. On 8 July 2014, Mr O’Brien caused an email to be sent to Mr Murphy serving the applicant’s originating application filed on 13 June 2014 and the affidavit of Mr Michael Holden filed on the same date.
11. On 16 September 2014, Mr O’Brien sent an email to the Solicitor for Mr Murphy offering to settle the proceedings for the sum of $50,000 inclusive of costs. That offer was said to be made in accordance with the principles in *Calderbank v Calderbank* [1975] 3 WLR 586; [1975] 3 All ER 333. The offer was open for acceptance until 4.00pm on 23 September 2014. On 18 September 2014, Mr O’Brien received an email from the Solicitor for Mr Murphy rejecting the offer. As to the *Calderbank* offer, Mr O’Brien’s email containing the offer is GWO‑19 to his affidavit. In the email, Mr O’Brien says this:

WITHOUT PREJUDICE SAVE AS TO COSTS

…

Our client is however prepared to settle this matter on a commercial basis on the following basis:

The Second Respondent [Mr Murphy] shall pay to the Claimant the sum of AUD$50,000.00 (the “**Settlement Sum**”) within 14 days of execution of terms of settlement;

The Claimant shall discharge its PPSR charge within seven days of receipt of the Settlement Sum;

The Claimant shall release its lien over the Vessel and the Second Respondent will take delivery of the Vessel “as is where is” at Rivergate Marina, Brisbane and upon receipt of the Settlement Sum the Claimant will issue to the Second Respondent a Delivery Order;

The Claimant shall pay any further outstanding storage costs up to including 30 September 2014 after which the Second Respondent shall be solely liable for those costs and charges;

The Second Respondent shall be responsible for obtaining any further approvals and consents to finalise entries and to move the vessel from Australian Customs & Border Protection. To the extent necessary the Claimant will provide its reasonable assistance to enable the Second Respondent to finalise the entries made for the Vessel in the name of the Second Respondent;

The Parties shall execute Consent Orders dismissing the proceeding with each party to pay their own costs; and

The Parties agree to release and discharge each other (and the Vessel from any claims in the Admiralty jurisdiction) from all claims arising out of or in relation to the carriage of the Vessel and the subsequent legal proceedings.

1. On 18 September 2014, Mr O’Brien received an email from the Solicitor for Mr Murphy rejecting the above offer.
2. The above chronology reveals that within a reasonable period of 12 March 2014 and then 16 September 2014, Mr Murphy could have settled the proceedings for an amount less than the amount of $71,036.04 the applicant ultimately established at trial.
3. By s 43(2) of the *Federal Court of Australia Act 1976* (Cth), the award of costs is in the discretion of the Court or Judge (except as provided by any other Act). Ordinarily, a successful party is entitled to an award of costs in its favour in the absence of special circumstances justifying some other order: see *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11] (Black CJ and French J); *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] (McHugh J) and [134] (Kirby J); *Seven Network Limited v News Limited* (2009) 182 FCR 160 at [1100] – [1101] (Dowsett and Lander JJ, Mansfield J agreeing).
4. Fundamentally, the principles governing the exercise of the discretion in relation to costs are those set out in *Oshlack v Richmond River Council* as earlier mentioned (see also the judgment of Gaudron and Gummow JJ in *Oshlack*); and *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at [24] to [34], per the unifying judgment of the plurality, Gleeson CJ, Gummow, Hayne and Crennan JJ. See also *Kazar v Kargarian* (2011) 197 FCR 113 per Greenwood and Rares JJ at [1] to [9]; *Commissioner of Taxation v AusNet Transmission Group Pty Ltd (No 2)* [2015] FCAFC 124 per Kenny, Edmonds and Greenwood JJ at [10].
5. Having regard to the chronology set out in Mr O’Brien’s affidavit of 31 July 2015, the applicant says that it ought to have its costs of the proceedings on an indemnity basis on the footing that Mr Murphy could have settled the proceedings for an amount less than that ultimately recovered. The applicant says that alternatively it ought to have its costs on a standard basis up to and including 18 September 2014 when the *Calderbank* offer was rejected and on an indemnity basis from 19 September 2014.
6. Mr Murphy has put on submissions by his Lawyer, Mr Carroll.
7. By those submissions, Mr Murphy says that the Court ought to depart from the usual discretionary principle that costs ought to follow the event, on the basis that, *first*, the applicant took unnecessary technical points in the proceeding concerning the application and operation of the *Factors Act 1892* (Qld) which caused the proceedings to be delayed, and *second*, the principles of fairness require the Court to depart from the normal discretionary principle that costs ought to follow the event.
8. It is important to again recognise that the shorthand description that costs ought to follow the event misstates the true nature of the broad discretion under s 43(2) and the important considerations which inform the exercise of the discretion are those discussed in *Oshlack* and *Foots*.
9. As to the question concerning the application of the *Factors Act*, I do not accept that the agitation of that question caused unnecessary delay. In the proceedings, Mr Murphy was denying any right in the applicant to assert a lien or charge. The question relating to the *Factors Act* was a question of law. It became unnecessary to consider any question relating to the *Factors Act* having regard to the factual matters the subject of the findings: see *US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation)* [2015] FCA 347 at [40]. Mr Murphy was unsuccessful having regard to all of the exchanges and factual matters addressed at [1] to [40] in the reasons in support of the orders made on 16 April 2015 in the principal judgment.
10. As to the question of fairness, Mr Carroll says that the *first respondent* did not file any defence or make submissions in the proceedings and that Mr Murphy had purchased the vessel bona fide and for value. Mr Carroll says that Mr Murphy had not contracted with the applicant and that it was only after Mr Murphy had purchased the vessel and attempted to import it into Australia that he became aware of the insolvency and liquidation of the first respondent and, in consequence, the assertion and exercise of a charge by the applicant (in support of the unsatisfied debt owed by the first respondent to it) over the vessel in support of the shipping costs and charges.
11. Nevertheless, these matters all go to the underlying factual controversy. The facts found, arising out of the exchanges between the participants, were adverse to Mr Murphy.
12. Neither of the contentions of Mr Carroll identifies grounds which would give rise to special circumstances justifying the exercise of the discretion in a way which would deprive the applicant of the costs of the proceeding. The applicant ought to have its costs of the proceeding.
13. The further question is whether it ought to have those costs on and from 19 September 2014 on an indemnity basis on the footing of the *Calderbank* letter.
14. I am not satisfied that an order for indemnity costs is appropriate. Although the findings were adverse to Mr Murphy, a number of the contentions he raised were at least arguable. The second consideration is that a number of the elements of the *Calderbank* offer involve some factors to be further worked out. More fundamentally, however, I am simply not satisfied that in the context of the issues in question, the conduct of Mr Murphy in contesting some of the contentions of the applicant gives rise to an exercise of the discretion on the footing that Mr Murphy ought to pay indemnity costs for any part of the proceedings notwithstanding the elements of the *Calderbank* offer.
15. Further, although the applicant ultimately succeeded in an amount greater than the offer, the applicant was unsuccessful on the claim of a right to demurrage under the contract and the claim for damage by way of time delay at the discharge port properly measured by US$8,000 per day for 14 days. At [11] of the reasons for judgment published on 4 May 2015, I observe that: “Thus, I am not satisfied that the applicant in the very attenuated evidence put on about this question has made out, on the balance of probabilities, a claim for demurrage of $112,000.00”.
16. In the result, the measure of the applicant’s claim was not $183,036.04 but rather $71,036.04 with the result that the claim for total charges was reduced by $112,000. It is true, of course, that the applicant was ultimately successful in an amount greater than offers made during the course of the proceedings. Plainly enough, the applicant was put to expense in proving, through litigation, a right to a claim of $71,036.04.
17. It plainly ought to have its costs doing so.
18. However, I am not satisfied that any part of those costs ought to be on an indemnity basis.
19. Accordingly, the order will be that the second respondent pay the applicant’s costs of and incidental to the proceeding including reserved costs.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 1 October 2015