Re Australian Federation of Consumer Organisations Incorporated v Tobacco Institute of Australia Limited [1991] FCA 329; (1991) 13 Atpr 41-138; 30 FCR 548 (25 July 1991)

FEDERAL COURT OF AUSTRALIA

Re: AUSTRALIAN FEDERATION OF CONSUMER ORGANISATIONS INCORPORATED
And: **TOBACCO INSTITUTE OF AUSTRALIA** LIMITED
No. G253 of 1987
FED No. 483
Costs
(1991) 13 ATPR 41-138
[1991] FCA 329; 30 FCR 548

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Morling J.(1)

CATCHWORDS

Costs - order for payment by respondent - appeal - application for payment of costs prior to hearing of appeal - application refused

Federal Court of Australia Act 1976, s.43

HEARING

SYDNEY
25:7:1991

Counsel for the appellant: D.M.J. Bennett QC
instructed by Cashman and Partners

Counsel for the respondent: B.W. Walker

instructed by Clayton Utz

ORDER

Order sought in para. 1 of notice of motion refused.

Notice of motion stood over to a date to be fixed.

Applicant to pay costs of hearing on 25 July 1991.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

In spite of the careful submissions put to the Court by Mr Bennett, I do not think that the substantive orders that he seeks today should be granted. However, in deference to Mr Bennett's submissions, I will state my reasons so that they may be examined elsewhere.

2. This is an unusual application. So far as my researches and the researches of counsel have revealed, it is without any precedent. On 15 April this year I made orders in these proceedings, including an order that the respondent pay the applicant's costs on an indemnity basis. The respondent has appealed from the orders made by me and the appeal is likely to be heard in February and March 1992. It will be a lengthy appeal. I understand the Court has set aside four weeks for the hearing.

3. The applicant has incurred very substantial costs in prosecuting the proceedings and in opposing an interlocutory application instituted by the respondent. It claims to have incurred costs well in excess of $1,250,000, but it is prepared, at this stage of the proceedings, to assess its costs at about that sum. Much of that sum is represented by disbursements for and liabilities to pay witnesses' expenses and counsel's fees. The applicant is without funds to pay all the costs which it has incurred. Whilst it has received substantial assistance from Legal Aid and Government sources, it is nevertheless unable to pay its solicitors the balance of the costs which have been incurred on its behalf. The balance is many hundreds of thousands of dollars. The applicant is faced with the difficulty of wishing to resist the appeal but of having no funds at its disposal to arrange for legal representation on the hearing of the appeal.

4. It is plain both from evidence which was placed before the Court on the hearing of an application for security for costs earlier in the proceedings and from what Mr Bennett has said from the bar table, that the applicant cannot, from its own resources, pay the balance of costs owing to its solicitors. It was conceded by Mr Bennett that if the respondent pays any part of the applicant's costs prior to the final determination of the appeal, then it will be unable to recover those costs should its appeal be successful. Any money which is paid to the applicant or its solicitors will be disbursed to various persons and the applicant will have no funds from which to repay money which would then be owing to the respondent. It is in those circumstances that the present notice of motion has been taken out.

5. The orders sought in the notice of motion are as follows:

"1. That the respondent pay the applicant's costs in the proceedings before His Honour Justice Morling within 14 days of the hearing of this motion.
2. That the applicant's costs be assessed without proceeding to taxation.

3. That the respondent pay interest on the applicant's costs from the date of offer of settlement.
4. In the alternative to 3 above that the respondent pay interest on the applicant's costs from the date of judgment of the proceedings."

6. It is not unusual, of course, for an unsuccessful respondent to proceedings at first instance to seek a stay of orders made against him by the trial judge. The present case, at least in form, is not such a case. At this stage of the proceedings the respondent has no need to seek a stay, since no order has yet been made that it pay a particular sum of money to the applicant. Nevertheless, it is common ground that the substantial point which arises today is whether I should order the respondent to pay to the applicant an appropriate sum of money by way of costs before the resolution of the appeal. Such an order would be tantamount to refusing a stay of the order for costs already made.

7. Four substantial questions arise on the motion. The first is whether the Court has power to direct the respondent to pay a lump sum of costs without a taxation in the usual way. The second question is whether, assuming the Court does have such power, it should be exercised in the present case by an order that the respondent pay to the applicant costs in the sum of about $1,250,000 or some lesser sum. The third question is the real question, i.e. whether there should be a stay of any order for payment of costs. The fourth question is whether the respondent should be ordered to pay interest on the applicant's costs and, if so, from what date.

8. The fourth question can, I think, be easily disposed at this stage of the proceedings. Consideration of that question should be stood over until after the final determination of the appeal. The amount of money involved on the interest question may be significant in one sense but it will be insignificant in relation to the total amount of costs which will be recoverable by the applicant should the appeal be dismissed. The question will almost certainly be academic if the appeal is allowed and I think that the appropriate course is not to resolve that question today but to stand the motion over in that regard.

9. In my opinion the answer to the first question must be in the affirmative. Section 43 of the Federal Court of Australia Act 1976 provides:

"43 (1) The Court or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which any other Act provides that costs shall not be awarded.
awarded.
(2) Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge."

10. There is nothing in s.43 limiting the power of a judge of the Court to himself determine the amount of costs which should be paid to a party. Indeed, there are references in the rules (and I refer particularly to Order 62 Rule 4 (2)(d) and Rule 8 (1)) to circumstances in which the Court may order a lump sum of costs to be paid by a party. In my opinion the discretion to award costs referred to in s.43 of the Act is wide enough to permit me to make an order for payment of costs in a particular amount.

11. The second question is not free from difficulty. On the one hand, I would normally shrink from undertaking the task of quantifying the costs which should be awarded against the respondent. That is a task for which the taxing officers are peculiarly fitted. On the other hand, the order for costs made in the present case was very special. Costs were ordered to be paid on an indemnity basis and I apprehend that the difficulty of assessing costs on that basis would be much less than the difficulty of assessing costs on a party and party basis.

12. Moreover, experience has shown that the taxations of costs in other major cases litigated in this Court have occupied inordinate amounts of taxing officers' time. The taxation of enormous bills of costs (such as the current one is likely to be should the appeal fail) is likely to considerably increase the already heavy costs incurred in the proceedings.

13. I have come to the conclusion that I should not determine the second question at this stage of the proceedings. I think the decision of the question whether I should myself assess the costs should await the determination of the appeal. If the appeal succeeds then the question will disappear. If the appeal fails I will be prepared to hear further argument from counsel as to whether I should myself fix the costs or whether I should not.

14. I turn to what really is the critical question in the application, that is, whether in effect there should be a stay of the costs order. I approach this question against the background of the considerable and unfortunate difficulties in which the applicant is placed because of its impecuniosity. Indeed, it is the very fact of the applicant's impecuniosity that is relied upon by Mr Bennett as the reason for opposing the staying of the costs order.

15. The principles upon which orders made at first instance should be stayed are referred to in a number of cases referred to in the practice books and I shall not refer to all of them. For present purposes it is sufficient to refer to what was said in Andrews v John Fairfax and Sons (1979) 2 NSWLR 184 and particularly to a passage quoted by Maxwell J from the unreported decision of the New South Wales Court of Appeal in Bridges v The Australian Consolidated Press Limited. In Bridges, Sugerman P. (with whom Jacobs and Mason JJA.) concurred said:

> "The two prime requirements which need to be fulfilled in order that a stay of proceedings upon a verdict at common law should be granted appear to be, first of all, that if the damages and costs were paid there would be no reasonable probability of getting them back if the appeal succeeds and, secondly, that there should be reasonably arguable grounds of appeal."

See also Alexander v Cambridge Credit Corporation (1985) 2 NSWLR 685, particularly at 689.

16. Mr Bennett has referred to a number of matters which, in his submission, should incline me to exercise my discretion against the granting of a stay. I shall refer to some only of them. It is argued that the prospects of success on appeal are very slim. However, I think there are reasonably arguable grounds of appeal on at least some of the important issues which I decided. As I said during the course of the argument, I find it almost inconceivable that, if my understanding of the word "evidence" in the advertisement is correct, it could be said that there was little evidence that tobacco smoke causes disease to non-smokers. But to say that is not to

say that there are not other reasonably arguable grounds of appeal. My decision is too long for me to refer to all the issues decided, but I am not prepared to say that there are not reasonably arguable grounds of appeal.

17. Then it is said by Mr Bennett that even if the appeal meets with a measure of success it is hard to imagine that orders would be made which would entirely deprive the applicant of an order for at least a substantial part of its costs. However, I do not think I can conclude with safety that the respondent will be unable to totally disturb my order for costs. I think I must assume for present purposes that success on the appeal will lead to a reversal of the order for costs already made.

18. Then it is submitted by Mr Bennett that unless the applicant receives some part of its costs prior to the hearing of the appeal, it will be unable to provide funds to its solicitors to arrange for appropriate representation at the hearing of the appeal. I see the force of this submission. But I do not think that it would be right to, in effect, compel the respondent to fund the applicant's costs in opposing the appeal.

19. However, it is proper that I should say that it will be much in the public interest that the Full Court have the benefit of assistance of experienced counsel for both parties on the hearing of the appeal. It will not be in the public interest that the Court should be left to decide what will be a heavy appeal without proper assistance from counsel for the applicant, which is the respondent to the appeal.

20. I cannot fail to observe that the Legal Aid authorities and the Commonwealth Government have provided some hundreds of thousands of dollars to assist in the prosecution of the proceedings at first instance and that that expenditure is likely to be recovered should the appeal fail. It must be apparent that it would be very much in the interests of the Commonwealth and the Legal Aid authorities that they should ensure that the solicitors for the applicant (the respondent to the appeal) are in a position to take steps to ensure that the appeal is properly argued by senior and junior counsel.

21. Then Mr Bennett submits that the decided cases do not generally favour stays of costs orders. What is said in Alexander's Case rather diminishes the weight of this submission. But in any event I think the cases disclose that there is a well-settled approach that a stay will normally be granted where a payment of money by an appellant pursuant to an order of a trial judge will be irrecoverable in the event that an appeal against the trial judge's decision is successful.

22. Another matter relied upon by Mr Bennett was that because of the great expense incurred by the respondent in resisting the proceedings at first instance, it may be inferred that the payment of costs is not a matter of major significance to the respondent. In other words, it is said that it is more the commercial aspects of the litigation which are important to the respondent, rather than the actual costs of it. That may be so, but it does not negate the fact that if I decline to grant the stay, the consequence will be that a very substantial sum of money would have to be paid by the respondent and will be irrecoverable if the appeal succeeds.

23. It is argued by Mr Bennett that I should reduce the amount of costs which I should order the respondent to pay pending taxation of the bill, in order to diminish the prejudice which the respondent will suffer if the appeal succeeds. Such an order would diminish the prejudice but would not eliminate it.

24. I have not covered all the matters relied upon by Mr Bennett in his very careful submissions, but I have mentioned sufficient of them to indicate why I think that it would be appropriate in this case to order a stay of the costs order.

25. I decline to make an order in terms of para. 1 of the amended notice of motion. I stand over the balance of the notice of motion to a date to be fixed after the final determination of the appeal from the orders made by me on 15 April 1991.

26. The applicant should pay the costs of today.

27. I should add that nothing that I have said in these reasons is intended to prevent the applicant from taking such steps as it may be advised to tax a bill of costs. However, should that occur and a final amount be determined to be payable by the respondent, then the intent of my order is that there will be a stay of payment of that amount pending the final determination of the appeal.