Re Australian Federation of Consumer Organisations Incorporated v Tobacco Institute of Australia Limited [1991] FCA 137; (1991) 13 Atpr 41-113/100 ALR 568 (15 April 1991)

FEDERAL COURT OF AUSTRALIA

Re: AUSTRALIAN FEDERATION OF CONSUMER ORGANISATIONS INCORPORATED
And: **TOBACCO INSTITUTE OF AUSTRALIA** LIMITED
No. G253 of 1987
FED No. 150
Costs
[1991] FCA 154; (1991) 13 ATPR 41-113/100 ALR 568

COURT

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

CATCHWORDS

Costs - Trade Practices proceedings - misleading advertising - tobacco industry - action by public interest group to restrain advertising - injunction granted - costs on indemnity basis - whether circumstances justify special order

HEARING

SYDNEY
15:4:1991

ORDER

The respondent its servants and agents be restrained from publishing or causing to be published, in trade or commerce, the advertisement which is Exhibit A in these proceedings.

The respondent its servants and agents be restrained from making statements in trade or commerce that it is the fact that:
(a) there is little evidence and nothing which proves

scientifically that cigarette smoke causes disease in
non-smokers;
(b) there is little evidence that cigarette smoke causes lung

cancer in non-smokers;
(c) there is nothing which proves scientifically that cigarette
smoke causes lung cancer in non-smokers;
(d) there is little evidence that cigarette smoke causes
respiratory disease in children under the age of one year;
(e) there is nothing which proves scientifically that cigarette
smoke causes respiratory disease in children under the age
of one year;
(f) there is little evidence that cigarette smoke causes attacks
of asthma in non-smokers;
(g) there is nothing which proves scientifically that cigarette
smoke causes attacks of asthma in non-smokers;
(h) there is little evidence that cigarette smoke causes otitis
media in children.

The respondent its servants and agents be restrained from making statements

in trade or commerce that the conclusions drawn in the article "Relationship of Passive Smoking to Risk of Cancer and other Smoking-Associates Diseases" by Lee, Chamberlain and Alderson were based on statistical detail in a study involving 2,000 people.

The respondent pay the applicant's costs on the basis that such costs are to include all costs except in so far as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, the applicant will be completely indemnified by the respondent for its costs.

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

DECISION

The applicant seeks an order that the respondent pay its costs on an indemnity basis.

2. The power of the Court to make orders for costs is found in s.43 of the Federal Court of Australia Act ("the Act") which gives a general power to award costs and provides, in subs. (2) that:

"Except as provided by any other Act, the award of
costs is in the discretion of the Court or Judge."

3. The discretion to award costs is unfettered, but must be exercised judicially. Speaking of a similar discretion contained in Order 65, rule 1 of the rules of the Supreme Court of South Australia, Bray C.J. said in Cretazzo v Lombardi (1975) 13 SASR 4 at 11:
"Order 65, rule 1 provides generally that all costs shall
be in the discretion of the court or judge, subject to a
proviso irrelevant for the present purpose. Time and again
attempts have been made to fetter that general discretion by
the imposition of judge-made rules. Time and again those

fetters have been released by appellate courts. I think the
guiding principle still stands as it left the House of Lords
in the famous case of Donald Campbell and Co. v Pollak (1927)
AC 732, that the general discretion is absolute and
unfettered, except that it must be exercised judicially, not
arbitrarily or capriciously, and that it cannot be exercised
on grounds unconnected with the litigation."

4. This passage was quoted with approval by Fisher J in Trade Practices Commission v Nicholas Enterprises Pty Ltd (1979) 28 ALR 201 at 206-207. See also Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd [1986] FCA 85; (1986) 71 ALR 287 at 288 where Woodward J said that the general power given by s.43 of the Act to award costs authorised the making of an order for costs on a solicitor and client basis in an appropriate case where there is some special or unusual feature in the case to justify the exercise of the discretion. See also Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd [1988] FCA 202; (1988) 81 ALR 397 at 400-401. In Thors v Weekes (1989) 92 ALR 131 Gummow J made an order for costs on a solicitor and client basis and observed (at p 152) that in an appropriate case costs may be awarded on an indemnity basis.

5. In Mudginberri Station Pty Limited v AMIEU (1986) ATPR 40-734, I declined to make an order for payment of the successful applicant's costs on a solicitor and client basis. I expressed the view (at p 47-993) that it was very unusual for an order for costs to be made on that basis and that, in my experience, such an order had not previously been made in a case arising under the Trade Practices Act. I think what I said in that case was correct, but I do not think it is of relevance in the present proceedings. Mudginberri was a case in which the applicant sought relief to protect its private commercial interests. It had none of the features of the present case.

6. In Concrete Constructions Pty Ltd v Plumbers and Gas Fitters Employees' Union of Australia (No. 2) [1987] FCA 117; (1987) 72 ALR 415, the successful applicants sought an order for costs on an indemnity basis. The proceedings were brought by the applicants for the purpose of obtaining the respondent's compliance with orders made by the Court pursuant to s.45D of the Trade Practices Act 1974. At p 438-439, Wilcox J said:

"The applicants each seek an order for costs in
their favour on an indemnity basis, that is costs to be
taxed as between solicitor and own client. Such an order
is not uncommon in contempt proceedings, reflecting the view
that a party should not be further prejudiced - by being
required to bear the difference between party/party costs
and solicitor/client costs - by the failure of the opponent
to comply with an order of the court. The relevant policy
was expressed by Holland J in Degmam Pty Ltd (in liq) v
Wright (No 2) (1983) 2 NSWLR 348 at 358:
`It is, in my experience, quite common to
find, in cases where an application is made to
the court for committal for contempt such orders
being made in an endeavour to ensure that the

party that has been enforced to take that extra step, in order to obtain his rights, after they have been adjudicated by the court, may be relieved entirely of the expense of doing so and, although there is nothing in the rules about it, it is in my experience common to find an order designed to give a party a complete indemnity against such costs, usually by an order that the contemnor pay the other party's costs on a solicitor and client or solicitor and own client basis but the object is to ensure an indemnity.'"

Wilcox J made an order for costs on a solicitor and client basis, although it appears from p 438 that he was asked to make an order on a solicitor and own client basis. An order of the latter kind is more or less equivalent to an order for costs on an indemnity basis: see EMI Records Ltd v Ian Wallace Ltd (1983) 1 Ch 59 at 65.

7. In the present case the applicant seeks an order for costs which will indemnify it for all costs except insofar as they are of an unreasonable amount or were unreasonably incurred. This is the type of order made by Holland J in Degmam, supra. The costs covered by such an order are described by Sir Robert Megarry VC in EMI Records at p 71.

8. Special provision is now made in the rules of the Supreme Court of New South Wales for orders for costs to be made on an indemnity basis in cases where the plaintiff makes an offer of settlement which is not accepted by the defendant and the plaintiff subsequently obtains an order from the Court no less favourable to him than the terms of the offer - vide Part 52 rule 17. Quite apart from this rule, it has been held in the Supreme Court that a letter of offer in which a party has offered as much as, or more than, that to which the opposing party ultimately establishes his entitlement following the hearing, should be taken into account by the court in determining whether to make a special costs order: Messiter v Hutchinson (1987) 10 NSWLR 525. For informative observations as to the inadequacy of costs taxed on a party and party basis to protect a successful litigant, see Qantas Airways Limited v Dillingham Corporation (14 May 1987 per Rogers J - Supreme Court of New South Wales, unreported).

9. I was referred to a number of cases in which orders for costs have been made on a solicitor and client or indemnity basis. Those orders have usually been made in circumstances where the conduct of the parties against whom the orders have been made has been deserving of criticism: see, for example, Degmam v Wright (supra), Packer v Meagher (1984) 3 NSWLR 486, and Australian Guarantee Corporation v De Jager [1984] VicRp 40; (1984) VR 483. The respondent fought these proceedings fiercely and left no stone unturned in resisting the application. But I do not think the conduct of its case is deserving of criticism of the kind referred to in the authorities relied upon by the applicant. Accordingly, the cases in which orders for costs have been made on a solicitor and client or indemnity basis by reason of the undeserving conduct of a litigant are distinguishable from the present case.

10. Three substantial matters were relied upon as justifying the making of the order sought. First, it was argued that the applicant made an offer to settle the litigation which was rejected by the respondent and which, if it had been accepted, would have left the respondent in a better position than it is in as a consequence of the Court's findings. Secondly, it was argued that the applicant performed a significant public service in bringing the proceedings and that it should not be placed in the position of being considerably out-of-pocket, as it will be if the order for costs is made on a party and party basis. Thirdly, it was argued that the conduct of the respondent's case was so lacking in merit as to justify the making of a special order for costs.

11. What I have already said about the manner in which the respondent's case was conducted is sufficient to dispose of the last-mentioned submission. However, in my opinion it would be wrong to hold that an order for costs on an indemnity or solicitor and client basis should only be made in circumstances where the conduct of the party against whom the order is made is deserving of criticism. To so hold would be to fetter the discretion referred to in s.43(2) of the Act in a manner not justified by the words of the sub-section.

12. I therefore turn to consider whether in the exercise of the discretion I have under s.43(2), it would be proper to accede to the first two arguments advanced by counsel for the applicant as justifying a special order as to costs. As to the first argument, I am satisfied that before heavy costs were incurred the applicant made an offer of settlement which, in the light of my findings, it would have been prudent for the respondent to accept. I do not think it is correct to say, as was submitted by counsel for the respondent, that the applicant's offer of settlement sought much more than the relief it ultimately obtained. The respondent was not obliged to accept the applicant's offer, but its failure to do so led to the applicant incurring very great costs which might have been avoided.

13. The applicant's second argument requires careful consideration. So far as I am aware, there is no precedent for the making of an order for costs on an indemnity basis in favour of a public-interest group such as the applicant. But lack of precedent should be no bar to the making of the order: cf the observations of Bray CJ in Cretazzo v Lombardi, supra. Counsel for the respondent submitted that a public-interest group should be in no better position on the question of costs than an ordinary litigant: John Fairfax and Sons Ltd v Palmer (1987) 8 NSWLR 297 at 306 and 309 was relied upon. In that case it was held that the status of the plaintiff (a well known physician) was irrelevant in determining whether a special order for costs should be made in his favour in a defamation action. I do not think that case is of much relevance in the present context. The plaintiff in Fairfax sued to vindicate his own reputation and to recover damages for himself. There is no parallel between that litigation and the present proceedings.

14. In any case, it is not the fact that the applicant is a public-interest group which is of relevance. What is relevant is that the proceedings were brought for the purpose of restraining the respondent from making misleading or deceptive statements on important matters of public health. I would have taken the same approach to the question whether a special order for costs was justified in the present proceedings if the applicant had not been a public-interest group, but, say, a medical society whose members were concerned about the respondent's advertising.

15. The applicant must have incurred very considerable costs in prosecuting these proceedings. In a real sense, the costs were incurred in the public interest. It is very much in the public interest that the respondent be restrained from making statements which might mislead members of the public on matters affecting their health. I do not think it would be in the public interest for a litigant in the position of the applicant to be heavily out-of-pocket in consequence of the public-spirited action it has taken.

16. Counsel for the respondent submitted that I should not have regard to what was said from the bar table as to the extent of legal aid which the applicant has received. The state of the applicant's finances was referred to during the course of the hearing of an application for security for costs, which the respondent subsequently withdrew. However, I do not think the extent of the applicant's financial resources and the degree of legal aid it has received are significant for present purposes. I think its claim for a special order for costs rests on a more secure footing than its limited financial resources.

17. In Baltic Shipping v Dillon (New South Wales Court of Appeal, unreported, 19 February 1991) the court was concerned with the question whether it was appropriate to make an order for costs on a solicitor and client basis in an Admiralty matter in the New South Wales Supreme Court. Rule 126 of that Court's Admiralty Rules confers a discretion as to costs not dissimilar to the discretion conferred by s.43(2) of the Act. It provides:

"126. In general, costs shall follow the result but
the judge may, in any case, make such order as to costs as
to him shall seem fit."

18. Kirby P (with whose reasons Gleeson CJ concurred) was of the opinion that it was not a prerequisite of the making of an order for costs on a solicitor and client basis in an Admiralty matter that the unsuccessful party's conduct of the litigation had been unmeritorious. He thought that it was appropriate, in that case, that an order for costs should be made on a solicitor and client basis because the proceedings were in the nature of a test case. With respect, I agree with Kirby P's reasoning.

19. In a sense, these proceedings were in the nature of a test case on the issue whether passive smoking is a hazard to the health of non-smokers. The respondent went to great lengths to demonstrate that it was not such a hazard. It is reasonable to infer that the respondent represents the interests of the tobacco industry in Australia. It was apparent from the conduct of the litigation that it expended a vast sum of money in mounting its defence. The appellant had no alternative but to incur very considerable costs if it wished to meet the challenge to its case and rebut the respondent's evidence. Its costs must run into several hundred thousand dollars. Whilst much of them will be recoverable under an order for costs on a party and party basis, the costs which will be irrecoverable are likely to be considerable.

20. I think some general support for the making of a special order for costs in this case can be found in the contempt cases. It seems to me that in such cases one of the reasons for making special orders for costs is that contempt proceedings serve the public interest by ensuring that the court's orders are obeyed. It is inappropriate in such cases that a person acting in the public

interest should be left to meet part of his costs. Likewise, in the present case, the proceedings instituted by the applicant served the public interest, and in a very important respect.

21. There may well be cases where proceedings are successfully prosecuted in the public interest but in which it would be inappropriate to make orders for costs on an indemnity basis. Each case must be determined on its own facts and merits. However, in all the circumstances of the present case, I think it is appropriate that the respondent should pay the applicant's costs on an indemnity basis, and I so order.