Signed by AustLII

Supreme Court

New South Wales

Case Name:	Ratkovic v Hadzic
Medium Neutral Citation:	[2019] NSWSC 1627
Hearing Date(s):	24 October 2019
Decision Date:	24 October 2019
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	1. Direct that the plaintiff pay the costs of Turner Freeman Lawyers of, and incidental to, the Notice of Motion filed by the plaintiff on 20 July 2019 on the ordinary basis, and that those costs extend to the costs of external counsel and disbursements, as well as the costs attributable to the time incurred by the employed solicitor, Ms Foo in the matter (but not the costs of the partner at Turner Freeman Lawyers involved in the matter). 2. Order that the costs payable by the plaintiff pursuant to Order 1 be the gross sum of $4,384.50. 3. Order that those costs be paid out of the costs payable to the plaintiff by way of settlement ($40,000) and therefore that the amount to be paid to the plaintiff out of the funds retained by Turner Freeman Lawyers will be $35,615.50, with the balance held to be paid to the defendant, subject to any costs orders in relation to today's hearing.
Catchwords:	COSTS – costs of and incidental to a notice of motion filed by the plaintiff – where settlement reached between the plaintiff and the defendant and the notice of motion was not dealt with on its merits – where term of the settlement was that the plaintiff was to bear the burden of any order for costs made in favour of the respondent in relation to the plaintiff's notice of motion –

AustLII AustLII AustLII

Retrieved from AustLII on 09 December 2019 at 08:51:36 Verify version

Signed by AustLII

held appropriate to make a gross sum costs order.

Legislation Cited:	Civil Procedure Act 2005 (NSW), s 98(4) Probate and Administration Act 1898 (NSW), s 63B Succession Act 2006 (NSW), s 95, Ch 3
Cases Cited:	Baller Industries Pty Ltd v Mero Mero Leasing Pty Ltd [2019] NSWSC 1067 Bell Lawyers Pty Ltd v Pentelow [2019] HCA 29 Galati v Deans (No 3) [2018] NSWSC 1861 Hamod v State of New South Wales [2011] NSWCA 375 Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia, Ex Parte Lai Qin (1997) 187 CLR 622; [1997] HCA 6
Category:	Procedural and other rulings
Parties:	Dosta Ratkovic (Plaintiff) John Draga Hadzic (Defendant)
Representation:	Counsel: T Harris-Roxas (Plaintiff) M Bridgett (Defendant) M Pringle (Respondent) Solicitors: D Stanefska & Associates (Plaintiff) GHS Legal (Defendant)
File Number(s):	2018/00202833
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR**: This an application effectively relating only to the costs of and incidental to a notice of motion filed on 20 July 2018 by the plaintiff (Dosta Ratkovic) in proceedings brought in the probate list in this Court. The plaintiff by that notice of motion sought an order that all funds held or controlled by Turner Freeman Lawyers (who were then the solicitors on the record for the defendant in the proceedings, John Draga Hadzic) on behalf or in relation to the estate of the late Michael Harrison (to whom I will refer as “the deceased”) be paid into court by 5pm on 20 July 2018; and, in the alternative, an order that

Retrieved from AustLII on 09 December 2019 at 08:51:36 Verify version

Signed by AustLII

the lawyers be restrained from transferring any of the funds referred to the defendant or other person until further order. (Other relief was sought in terms of an order restraining the defendant from dealing with or encumbering certain property at Marayong until further order.) The notice of motion sought an order that the notice of motion be made returnable *instanter*. It is not clear to me what was the reason for the urgency of the application at that stage but nothing presently turns on that.

Background

2 The background to the underlying dispute is that a claim was brought in the probate list by the deceased's brother, which claim was resolved at a mediation in December 2017. Those proceedings were completed by way of the issue of a grant of letters of administration to the defendant on 27 March 2018, which were received by Turner Freeman Lawyers acting for the defendant on or about 4 April 2018.

3 The present proceedings were commenced by the plaintiff (who claims to be the *de facto* spouse of the deceased) by statement of claim filed on 2 July 2018 seeking the revocation of the grant to the defendant made on 27 March 2018 and that letters of administration in solemn form be granted to the plaintiff.

4 A defence was filed by the defendant on 16 June 2018. In that defence the defendant denied that the plaintiff was the *de facto* spouse of the deceased or the appropriate person to be appointed administrator of the deceased's estate; and, in the event that the grant of letters of administration remained, there was a denial that the plaintiff was an eligible person to bring a family provision claim against the deceased's estate.

5 By cross-claim filed on 19 October 2018 the defendant sought an order confirming the grant to the cross-claimant of general letters of administration in relation to the deceased's estate pursuant to s 63(b) of the *Probate and Administration Act 1898* (NSW).

6 What appears to have happened was that the defendant filed his defence on 16 July 2018 (as noted above); the notice of motion, the subject of the present application, was filed on 20 July 2018; and on 23 July 2018 the matter was listed before the Probate List Registrar. The plaintiff was represented on that

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

occasion, as was the respondent to the notice of motion (the respondent being the law firm, Turner Freeman Lawyers, which was separately represented on that occasion by Ms Hartstein of Counsel); however, the defendant was not legally represented.

7 On 23 July 2018, it appears that orders by consent were made that the proceeds of the estate of the deceased held in the trust account of Turner Freeman Lawyers be retained in that trust account until further order of the court. Mr Goldberg, solicitor, who has sworn an affidavit on the present application, undertook on behalf of Turner Freeman Lawyers to retain the Certificate of Title for the estate realty situated at Marayong in safe custody pending further orders of the court.

8 The matter then was listed for directions before the Probate List Registrar on 20 August 2018 and came before the Probate List Judge, Lindsay J, on that occasion. His Honour made various notations and orders, including the notation that the defendant was presently self-represented, formerly having been represented by Turner Freeman Lawyers. His Honour noted that, pursuant to orders made by the court on 23 July 2018, pending further orders of the court, Turner Freeman held approximately $360,000 in the firm's trust account and the Certificate of Title folio identifier 2/246720, such property being substantially the whole of the estate of the deceased. His Honour further noted that Turner Freeman Lawyers submitted to the orders of the court save as to costs and ordered, subject to further orders, that Turner Freeman Lawyers be excused from any further appearance in the proceedings. His Honour then made notations and orders as to the state of the proceedings in terms of the pleadings and a foreshadowed application to amend the pleadings.

9 It is unnecessary to set out in detail the various directions hearings that took place in the period after Turner Freeman Lawyers creased to act for the defendant; suffice it to note that there were various occasions on which the matter came before the court and directions were made.

10 It appears that there was a court-annexed mediation held on 21 February 2019. The matter did not settle at mediation. Further directions were

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

made in relation to the proceedings and, subsequently, on 30 April 2019 the plaintiff accepted an offer made by the defendant to settle the proceedings. This is deposed to in an affidavit of the defendant's solicitor Gregory Smith sworn on 1 August 2019. A term of that agreement was that the plaintiff was to bear the burden of any order for costs made in favour of Turner Freeman Lawyers in relation to the plaintiff's notice of motion filed 20 July 2018. The agreement also included an agreement that the defendant pay the plaintiff an amount of $40,000.

11 What thereafter ensued was a dispute as to Turner Freeman Lawyers' costs (the substantive dispute between the plaintiff and the defendant having settled in principle as between the plaintiff and the defendant).

12 On 17 June 2019, orders were made for the service of evidence and submissions in relation to that costs issue and the matter was adjourned to 19 August 2019. There was further correspondence between the parties attempting to resolve the question of costs of the notice of motion and further orders made in relation to the service of submissions in relation to the costs.

13 Submissions were filed by the respective parties to the proceedings and by Turner Freeman Lawyers. On the hearing of this application, Turner Freeman Lawyers tendered two volumes of material, one of which is a confidential exhibit to the affidavit sworn 16 September 2019 by Mr Terence Louis Goldberg, who was the partner with control of the matter on behalf of Turner Freeman Lawyers.

Submissions

The plaintiff's submissions

14 The position initially taken in submissions filed in relation to this costs issue by the plaintiff, was that it was agreed between the plaintiff and the defendant that the plaintiff pay the costs of Turner Freeman Lawyers, if any, arising from the notice of motion and it was submitted that the plaintiff (see [13]-[14] of the plaintiff's submissions dated 22 July 2019) should not be liable for any costs which followed the making of the orders on 23 July 2018, and that the costs orders should not extend to the attendance on 20 August 2018, because the motion had by then resolved.

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

15 The plaintiff submitted in relation to the notice of motion that the appropriate orders to be made for costs was for the plaintiff to pay the costs of Turner Freeman Lawyers of the notice of motion up to and including 23 July 2018, which was the date upon which orders were made by consent dealing with the funds held by Turner Freeman Lawyers, and that those costs orders should be on an ordinary basis. Alternatively, the plaintiff submitted that Turner Freeman Lawyers was entitled to an order that the plaintiff pay its costs on an ordinary basis, up to and including the attendance on 20 August 2018, being the date upon which Turner Freeman Lawyers submitted to the orders of the court in respect of the notice of motion and was excused from further appearing in the proceedings.

16 It was submitted that, given that the motion had then been resolved and a submitting appearance made by Turner Freeman Lawyers, any costs which followed did not arise from the notice of motion (and, in any event, Turner Freeman Lawyers having made a submitting appearance, could no longer take an active role in the proceedings without the leave of the court).

17 In reply submissions subsequently filed by the plaintiff, the position of the plaintiff in that regard was amended. In effect, reliance was placed by the plaintiff on the decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, where the High Court considered the question as to whether what has been referred to as the *Chorley* exception is part of the common law of Australia. In that case, the plurality of the High Court (Kiefel CJ, Bell, Keane and Gordon JJ said at [3]):

> The *Chorley* exception has rightly been described by this Court as "anomalous". Because it is anomalous, it should not be extended by judicial decision to the benefit of barristers. This view has previously been taken by some courts in Australia. Dealing with the matter more broadly, however, the *Chorley* exception is not only anomalous, it is an affront to the fundamental value of equality of all persons before the law. It cannot be justified by the considerations of policy said to support it. Accordingly, it should not be recognised as part of the common law of Australia. [footnotes omitted]

18 In that case, Gageler J said, of the *Chorley* exception, (at [61]-[62]):

> The *Chorley* exception was authoritatively introduced into the common law system by a decision of the English Court of Appeal at a time when it had been laid down by the Privy Council to have been "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

by the Courts should be as nearly as possible the same" with the consequence that colonial courts construing and applying colonial statutes were bound to follow decisions of the English Court of Appeal on the construction and application of English statutes in materially identical terms. The last vestiges of the policy laid down in that era were removed only with the termination of appeals to the Privy Council from all decisions of Australian courts in 1986, immediately following which this Court declared that earlier statements to the effect that decisions of the English Court of Appeal (including those on the construction and application of statutes) ought generally to be followed "should no longer be seen as binding upon Australian courts".

The timing of that cessation of institutionalised deference on the part of Australian courts to decisions of the English Court of Appeal does much to explain the contrast between the uncritical acceptance of the *Chorley* exception in *Guss v Veenhuizen [No 2]* and the subsequent acknowledgement in *Cachia v Hanes* of the *Chorley* exception as "somewhat anomalous" accompanied by the suggestion that, if the explanations for the exception were "unconvincing", "the logical answer may be to abandon the exception in favour of the general principle".

and at [65]-[68]:

The step now taken to abandon the *Chorley* exception is a step which the Supreme Court of New Zealand chose not to take only last year. That was in part because the rules of court which the Supreme Court was concerned with construing and applying were seen to have been framed on the basis of the continued operation of the exception and in part because the Supreme Court was not satisfied that it had been presented with complete arguments as to the ramifications of abandoning the exception. The Supreme Court mentioned in particular that it had been presented with no principled basis on which it could abandon the exception and yet maintain the ability of a party to recover the costs of using an employed lawyer. The Supreme Court specifically overruled a holding of the Court of Appeal of New Zealand to the effect that costs could only be awarded by way of reimbursement for fees actually invoiced. In so doing, the Supreme Court specifically noted that maintaining that holding would have been fatal to the recovery of costs by a party who used an employed solicitor as much as it would have been fatal to the recovery of costs by a legal practitioner who acted on his or her own behalf.

In light of that recent decision of the Supreme Court of New Zealand, I think it important to emphasise that the step now taken in abandoning the *Chorley* exception as part of the common law of Australia encounters neither of the obstacles which were of concern to the Supreme Court and involves no adoption of the view specifically rejected by the Supreme Court that costs can only be awarded by way of reimbursement for fees actually invoiced.

As to the immediate statutory setting for the present appeal, the reasons given by Kiefel CJ, Bell, Keane and Gordon JJ show that the definition of 'costs' in s 3(1) of the *Civil Procedure Act 2005* (NSW) reflects the general principle in a manner which leaves no room for an exception for recovery of costs by a legal practitioner acting on his or her own behalf. The legislative history of the *Civil Procedure Act* contains nothing to suggest legislative endorsement of the *Chorley* exception. As to the statutory setting elsewhere in Australia, it is sufficient to record that, in an argument on behalf of the respondent legal practitioner which left no stone unturned or unflung in defence of the *Chorley* exception, no suggestion was made that the statutory costs regime presently

Retrieved from AustLII on 09 December 2019 at 08:51:36
Verify version

Signed by AustLII

> applicable in any other Australian jurisdiction has been framed in a manner which relies on the continuing existence of the *Chorley* exception. Unlike the position in New Zealand, there is in Australia no legislative impediment to its wholesale judicial abolition.
>
> Recovery of costs by a party using an employed solicitor predated introduction of the *Chorley* exception. The better view, explained in a number of cases to which the Supreme Court of New Zealand appears not to have been referred, is that recovery of costs by a party using an employed solicitor is an application of the general principle rather than an exception to it. The general rule is engaged on the basis that the costs of using the employed solicitor are still awarded as indemnity for professional legal costs actually incurred in the conduct of litigation by the employer who is a party to the litigation, albeit that those professional legal costs are incurred in the form of an overhead and are therefore not reflected in a severable liability.
>
> [footnotes omitted]

19 Accordingly, by the time of the hearing of the application before me, the plaintiff's position, as elucidated in oral submissions, appeared to be that there was no objection to an order for costs to be paid by the plaintiff to Turner Freeman Lawyers in relation to its costs, to the extent that those included costs that it had not incurred as a self-represented litigant.

The defendant's submissions

20 In essence, the defendant's position is that, on the basis: that the plaintiff filed the notice of motion; that the agreement between the plaintiff and the defendant is that the plaintiff is to bear the burden of any costs payable to Turner Freeman Lawyers for the notice of motion; and that the relief sought in the proceedings brought by the plaintiff is to be dismissed, the following orders would be the appropriate orders to be made in relation to costs of the notice of motion:

> 1. The Plaintiff to pay Turner Freeman Lawyers' costs of the motion.
> 2. There be a lump sum costs order in favour of Turner Freeman Lawyers, as determined by the Court; and
> 3. To the extent that the Defendant's costs of the motion are not otherwise recoverable from the other parties, those costs be borne by the estate on the indemnity basis.

21 The defendant did not wish to be heard in relation to the quantum of the lump sum costs order sought by Turner Freeman Lawyers (save that it was said that should there be any order that the estate should bear the burden of any costs, whether lump sum or otherwise, payable by the plaintiff to Turner Freeman Lawyers, it was submitted that burden should be limited to $40,000, so as to

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

avoid the estate from having to seek recovery of any sum paid to Turner Freeman Lawyers in excess of $40,000).

Turner Freeman Lawyer's submissions

22 Submissions made for Turner Freeman Lawyers on the current application, in effect, were that what it sought was that the firm be indemnified for its costs of, and incidental to, the notice of motion. The application for those costs on an indemnity basis was put on the basis that Turner Freeman Lawyers has acted in the position of trustee.

23 Issue was taken with various of the assertions made in the plaintiff's submissions in relation to the costs that were incurred. Turner Freeman Lawyers maintained that the costs incurred were directly related to the plaintiff's decision to name Turner Freeman Lawyers as a respondent to the plaintiff's motion in order to obtain the injunctive relief the plaintiff had sought.

24 It is submitted that, based on the plaintiff's desire to prevent the defendant from having control of the deceased's estate until her claim was resolved, Turner Freeman Lawyers had a duty to the court to accede to the court's orders to protect and preserve the deceased's estate, pending the determination of the plaintiff's claim; and that that duty exceeded even Turner Freeman Lawyers' duty to a former client (the appointed administrator of an estate, who had a right to forfeit the estate to be paid and delivered to him unless and until the grant was revoked or recalled to the registry) (see Turner Freeman Lawyers' submissions at [28]).

25 Turner Freeman Lawyers note that the firm was not named as a party to the proceedings. It is submitted that the firm attempted to avoid incurring costs in relation to the controversy between the parties, other than to the extent the parties' own conduct required the firm to respond to their proposals and 'entreaties' and/or to intervene to protect the firm's position in relation to the costs of acting to preserve the estate pending the finalisation of the proceedings.

26 Turner Freeman Lawyers submits that the plaintiff's claim was weak by reference to the amount that the plaintiff was willing to accept (it being said that the estate itself had an estimated value of $900,000 to $1,000,000). Pausing

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

here, it is not appropriate to, and I do not here, comment on the strength or otherwise of the plaintiff's claim which has now been resolved as between the parties.

27 Turner Freeman Lawyers has obtained advice from a costs consultant as to its costs of the notice of motion. Those costs have been calculated on a solicitor/client basis at $37,287.60. Handed up on the present application (which was not formally tendered in evidence, but which I marked as MFI 1) are copies of invoices that had been rendered as at October 2018 by Turner Freeman Lawyers in relation to the notice of motion. Those tax invoices show disbursements totalling $3,807 which include counsel's fees of attendances, preparation and attendances from 23 July 2018 up to and including the attendance before Lindsay J, as well as professional charges comprised of the professional costs of the partner who was the former solicitor for the defendant and an employed solicitor in Turner Freeman Lawyers' firm.

28 An application for a gross sum costs order is made, having regard to the authorities that deal with circumstances in which a gross sum costs order may appropriately be made. Section 98(4) of the Civil Procedure Act 2005 (NSW), which empowers the court to make an order on a gross sum basis

29 See *Hamod v State of New South Wales* [2011] NSWCA 375 (*Hamod*), where Beazley JA, as Her Excellency then was, outlined some of the legal principles in relation to gross sum costs orders (at [813]-[817]; Giles and Whealy JJA agreeing).

30 In particular, her Honour said at [816 – [817]:

> The terms of s 98(4), together with the more general considerations reflected in the *Civil Procedure Act* , ss 56(1), 57(1)(d) and 60, suggest the factors that merit particular consideration include: the relative responsibility of the parties for the costs incurred (for example, *Harrison v Schipp*); the degree of any disproportion between the issue litigated and the costs claimed; the complexity of proceedings in relation to their cost; and the capacity of the unsuccessful party to satisfy any costs liability: *Ritchie's Uniform Civil Procedure NSW* at [s 98.45].
>
> The exercise of the power conferred by s 98(4) is particularly appropriate where the costs have been incurred in lengthy or complex cases and it is desirable to avoid the expense, delay and aggravation likely to be involved in contested costs assessment. This may arise either from the likely length and complexity of the assessment process: *Beach Petroleum NL v Johnson (No 2)*

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

> at 120; *Charlick Trading Pty Ltd v Australian National Railways Commission ; Australasian Performing Rights Association Ltd v Marlin* [1999] FCA 1006; or from the likelihood that the additional costs of formal assessment would disadvantage the successful party because of the likely inability of the unsuccessful party to discharge the costs liability in any event: *Harrison v Schipp ; Sony Entertainment (Aust) Ltd v Smith* (2005) 215 ALR 788 at [90], [194]-[195]; *Hadid v Lenfest Communications Inc* [2000] FCA 628.

Determination

31 The parties acknowledge that the discretion of the court in relation to the making of costs orders is a broad one, subject to it being required to be dealt with, having regard to the overriding statutory mandate and the need to take into account the interests of justice. See also the principles in relation to the exercise of the discretion in relation to costs in *Galati v Deans (No 3)* [2018] NSWSC 1861 (at [17]ff) and the principles relating to gross sum costs orders in *Hamod* (as adverted to above).

32 It should also be noted that this is a situation where the notice of motion the subject of the costs orders was one that was resolved in substance on 23 July 2018 and confirmed in orders made or notations on 20 August 2018, without a hearing on the merits and therefore falls within the category of cases where a party seeks costs to which the party was put of responding to a notice of motion that nevertheless has not ultimately been dealt with by reference to the merits of the motion (see *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia, Ex Parte Lai Qin* (1997) 187 CLR 622; [1997] HCA 6, which I considered in *Baller Industries Pty Ltd v Mero Mero Leasing Pty Ltd* [2019] NSWSC 1067).

33 I am not persuaded that the costs of responding to the notice of motion should be dealt with on the basis that the outcome of the motion was that Turner Freeman Lawyers was placed in the position of trustee in terms of retaining the funds in the trust fund and in its trust account and retaining safe custody of the certificate of title. That relates to the outcome of the notice of motion, not the circumstances in which the notice of motion was brought.

34 I am, however, of the view that in light of the agreement reached between the plaintiff and the defendant, and in light of the position taken by the plaintiff on the current application, it is appropriate to make an order for the costs of, and incidental to, the notice of motion, to be ordered in favour of Turner Freeman

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

Lawyers, the named respondent to the notice of motion, and that those costs extend up to and including 20 August 2018. Costs thereafter generally appear to relate to the costs of the communications in relation to the costs issue and otherwise in relation to the disposition of the matter and I will come to those in due course.

35 I am of the view that it is appropriate, in order to avoid further dispute and further diminution of the estate, that there be a gross sum costs order made, particularly in circumstances where there is evidence from a costs consultant in relation to those costs. I am of the view that the appropriate order is that the plaintiff pay the costs of Turner Freeman Lawyers of, and incidental to, the notice of motion filed by the plaintiff on 20 July 2018 on the ordinary basis, and that those costs extend to the costs of external counsel and disbursements, as well as the costs attributable to the time incurred by the employed solicitor Ms Foo in the matter, but not the costs of the partner at Turner Freeman Lawyers involved in the matter, on the basis that on a costs assessment it is likely that counsel's fees would be recoverable with little or no discount as disbursements.

36 The appropriate order, in my opinion, will be that the costs payable by the plaintiff be the sum of $3,807 by way of counsel's fees and other disbursements, together with 70% of the solicitor/client costs attributable to the time spent by Ms Foo on the matter. According to the tax invoice, that would equate to 70% of the following sums: $55, $35, $70, $665, which is $825 which equates to $577.50. Therefore, the total gross sum costs order will be $4,384.50. It is appropriate that those costs be paid out of the costs payable to the plaintiff by way of settlement, which were $40,000. Therefore, the amount to be paid to the plaintiff out of the funds retained by Turner Freeman Lawyers would be $35,615.50, with the balance held to be paid to the defendant, subject to any costs orders in relation to today's hearing.

****

Amendments

27 November 2019 - Deleted consent orders from decision

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version

Signed by AustLII

29 November 2019 - Amendment to paragraph 6

Retrieved from AustLII on 09 December 2019 at 08:51:36

Verify version