Supreme Court

New South Wales

Case Name:	Commonwealth Bank of Australia v Daleport Pty Limited (in receivership) (No 4)
Medium Neutral Citation:	[2018] NSWSC 842
Hearing Date(s):	1, 11 May 2018
Decision Date:	11 May 2018
Jurisdiction:	Common Law
Before:	McCallum J
Decision:	Plaintiff ordered to pay two thirds of the defendant's costs of the discovery motion including the hearing, such costs to be payable forthwith
Catchwords:	COSTS – application for payment forthwith – consideration of relevant factors – protracted dispute as to discovery – where refusal to order payment forthwith would stultify defence of bank's claim – whether defence of claim futile – whether payment forthwith should be refused on that basis
Cases Cited:	Bitannia Pty Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9; [2006] NSWCA 238 Commonwealth Bank of Australia v Daleport Pty Ltd (in receivership) (No 3) [2017] NSWSC 1584 Fiduciary Ltd v Morningstar Research Pty Ltd (2002) 55 NSWLR 1; [2002] NSWSC 432 HP Mercantile Pty Ltd v Dierickx [2012] NSWSC 1005 Secure Funding Pty Ltd v Stark; Secure Funding Pty Ltd v Conway [2005] NSWSC 223
Category:	Costs
Parties:	Commonwealth Bank of Australia (plaintiff) Daleport Pty Ltd (in receivership) (first defendant) Alexander Raymond Walton (second defendant)

Representation:	Counsel: T Castle (plaintiff) N Obrart (defendants) Solicitors: Gadens Lawyers (plaintiff) Ledger Lawyers (defendants)
File Number(s):	2008/287869
Publication Restriction:	None

JUDGMENT – EX TEMPORE

1 HER HONOUR: In these proceedings, the Commonwealth Bank of Australia sues a company, Daleport Pty Ltd, and its director, Mr Walton. The proceedings arise out of a loan to Daleport guaranteed by Mr Walton. The funds were advanced for the purpose of a development at Leura which was to be completed in stages. The loan fell into default and was enforced, and Daleport placed in receivership, prior to the completion of the development.

2 The history of the proceedings is lengthy and complex and has been addressed in some of my earlier judgments. For today's purposes, it is sufficient to summarise the issues in this way.

3 Daleport and Mr Walton have a current pleading which pleads, by way of defence, alleged representations made by the bank concerning its capacity to continue to fund the future stages of the development. That allegation gave rise to a lengthy and complex dispute as to the scope of the discovery the bank should be required to give. I determined the discovery application in my judgment published on 21 November 2017; *Commonwealth Bank of Australia v Daleport Pty Ltd (in receivership) (No 3)* [2017] NSWSC 1584.

4 On 28 November 2017, I heard submissions as to the costs of that motion. The bank submitted that, although Daleport had been successful in obtaining an order for additional discovery beyond that which the bank had already given, for the reasons addressed in oral submissions there should be no order as to the costs of the motion. Daleport and Mr Walton submitted that they should have all of their costs of the motion and, further, that, contrary to the usual position, those costs should be payable forthwith.

5 On the same day, the desirability of ordering the parties to participate in a mediation was debated and I made that order.

6 Towards the conclusion of argument, I indicated my preliminary view that Daleport should have one-third of its costs of the discovery motion. I further indicated that I was not persuaded at that stage that the costs should be payable forthwith because there was no evidence as to whether it would have a stultifying effect on the proceedings if that order was not made. I indicated my preparedness to revisit the issue of whether the costs should be payable forthwith at some later point.

7 My thinking in that respect was informed by the view I expressed at page 4 of the transcript as follows (at T4.18):

> "HER HONOUR: I certainly would accept that. I must say, perhaps I should focus what you might address me on; my sense of it in the interlocutory stages there was an ambitious claim met with complete resistance and I would think as a rough assessment of that period that Daleport was successful in pushing things forward over resistance but that consideration is tempered by the fact that the claim was plainly ambitious, and that similarly in the determination of the final result that Daleport's application succeeded (but in a limited way) and that should be tempered with what was considered more ambitious. My sense of it after I read Ms Obrart's submissions was to think that Daleport probably should have some of its costs, but not all. Did you want to address me about that?"

8 At the request of Ms Obrart, who appears for Daleport, rather than pronouncing an order in those terms and giving judgment at that point, I adjourned the costs argument so as to afford Daleport an opportunity to put on evidence as to stultification. Ms Obrart made plain, in making that application, that she would also wish to address the Court further in that context as to the proportion of Daleport's costs which should be the subject of the order.

9 In the intervening period, the mediation was held in accordance with the Court's order and unfortunately was unsuccessful. Following the mediation, the bank made an open offer to discontinue the proceedings on the basis that each party pay his or its own costs and on the basis that any costs orders prior to the date of the letter be vacated. It was a further term of the open offer that any costs ordered in relation to the discovery motion, namely the costs being determined today, would be met by the bank. The offer also required the parties to enter into a deed of release and was expressed to be open until a

specified date (that date was subsequently extended by the bank so as to accommodate the delivery of this judgment today).

10 The Daleport parties did put on further evidence addressing the question of stultification. That evidence is contained in the affidavit of Mr Blayne Ledger sworn 16 April 2018. Without descending to the detail of the evidence, it is enough to say that it clearly establishes that if Daleport is not able to have the costs of the discovery motion assessed and payable forthwith, its defence of the bank's claim will be stultified.

11 I did not understand the bank to take issue with that proposition. On the contrary, it was embraced and relied upon by the bank in support of a submission broadly to the effect that, if the defendants to the proceedings do not have the assets to defend the proceedings, it follows a fortiori that they will not have the capacity to meet any judgment debt. Further, the bank expressed its understanding, which I must say I shared, that as a result of previous steps in the litigation addressed in some of my earlier judgments, Daleport is at this point confined to defending the bank's claim against it by way of set-off and that it is not open to Daleport to obtain any judgment in the proceedings in its favour beyond wholly setting off the bank's debt. In other words, that Daleport can obtain no better result in the proceedings than to eliminate by way of set-off the entirety of any debt owed to the bank and cannot end up ahead, as it were.

12 On that assumption, a compelling submission was put in written submissions by Mr Castle, who appears for the bank, that the proceedings are futile. Specifically, Mr Castle submitted that, if the bank succeeds, it will obtain a hollow judgment and if it fails it will obtain no judgment. Mr Castle submitted that, in the circumstances, the only reason for the proceedings to continue to a final hearing (for which the present estimate is in the order of two weeks) is to determine whether or not the Daleport parties can obtain a costs order against the bank. He relied on that as a discretionary factor relevant to the issue whether costs should be assessable forthwith; the burden of the submission was that the Court should not be concerned by the risk of stultification of a futile claim.

13 That submission revealed what was correctly termed by Mr Castle a significant fault-line between the parties in relation to possible outcomes in the proceedings. Daleport's response was to contend that, contrary to Mr Castle's submission, it is open to Daleport to obtain a broad range of relief in the proceedings, notwithstanding the fact that the allegations it makes are pleaded by way of defence rather than by way of cross-claim.

14 Ms Obrart provided careful written submissions setting out the basis for that contention and pointing to a number of authorities which she submitted support that position. In particular, Ms Obrart submitted that the authorities are clear that section 12GM remedies can be obtained by way of defence and not only by way of a cross-claim, citing in particular the decision of Basten JA, with whom Hodgson and Tobias JJA agreed, in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; [2006] NSWCA 238 and further authorities cited therein, namely, *Secure Funding Pty Ltd v Stark; Secure Funding Pty Ltd v Conway* [2005] NSWSC 223 and *HP Mercantile Pty Ltd v Dierickx* [2012] NSWSC 1005.

15 The revelation of that significant fault-line between the parties' positions made it necessary for me to give Mr Castle an opportunity to address the position relating to those authorities. It is clear enough from his helpful supplementary submissions that there is a real fight to be had on that issue.

16 Upon reflection, I have come to the view that it is neither possible nor appropriate for me to attempt to resolve that issue, arising as it does in the present context as a matter relied upon as a discretionary factor to resist an application for a departure from the usual rule that the costs of an interlocutory application are not payable until the conclusion of the proceedings. It is an issue of considerable complexity the determination of which is of substantial importance to the parties in these proceedings and I do not think I should express a view one way or the other as to the correctness of either party's position.

17 For that reason I have determined that I should set aside that consideration in determining the costs of the discovery motion although, as I have indicated during argument, I am grateful to Mr Castle for having identified and flushed

out the issue, which may well have an impact on the future case management of the proceedings.

18 That takes me back then to the competing positions of the parties as to the costs of the discovery motion as set out in a number of written submissions of the parties. The further evidence put on in respect of stultification also included matters relevant to the determination of the Daleport parties' entitlement to costs. Important considerations in my preliminary view (to which in one respect I adhere) that Daleport should have part of its costs of the discovery motion are the matters addressed in Ms Obrart's supplementary submissions dated 16 April 2017, particularly including the fact that the discovery motion did not involve the litigation of multiple issues, but ultimately essentially one issue, namely whether Daleport was entitled to discovery of documents in respect of the funds allegations.

19 It was submitted on behalf of the bank that Daleport had enjoyed limited success in that respect.

20 An important consideration in my limiting the extent of discovery on that issue was the question of proportionality, the consideration of which arose largely as a result of an affidavit served, as Ms Obrart put it, at the eleventh hour by the bank setting out alternative reasons for the bank's non-funding (to attempt to adopt a neutral term) of future stages of the development.

21 The further submissions put by Ms Obrart and the further affidavits put on by her instructing solicitor have persuaded me that the proportion of costs I previously thought Daleport should have is not adequate to compensate Daleport for the lengthy dispute that has resulted in the discovery judgment. Two particular matters stand out. One is that, as Ms Obrart has submitted, the bank adopted a uniform position throughout the entire dispute (which, for reasons recorded in earlier judgments, spanned a number of years) of contending that there was no occasion for any additional discovery beyond that which it had previously provided and that the funds allegation was fanciful. The second is the bank's decision at an earlier point not to go into evidence on the funds allegation when directions were made contemplating that course, coupled with the lateness of the affidavit to which I have referred.

22 Doing the best I can, based on the competing arguments as to the way in which the matter unfolded, I remain of the view that Daleport should have part of its costs of the application, but I consider that, contrary to the view I expressed on 28 November 2017, the proportion Daleport should have of its costs is two thirds rather than one third. Further, the evidence as to stultification has persuaded me that Daleport should have its costs forthwith.

23 The basis for coming to that conclusion is the principle identified in the judgment of Barrett J in *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1; [2002] NSWSC 432 based on a combination of factors. First, the discovery dispute is a discrete and separate dispute; secondly, it is clear that there is some way to go until a final hearing; and thirdly, it is abundantly clear that if those costs are not received by Daleport now, that will stultify its defence of the proceedings, including the agitation of the issue whether it is entitled to obtain a remedy other than set-off of any debt owed to the bank.

24 Ms Obrart did also submit that aspects of the bank's behaviour were unreasonable, invoking an additional consideration under the *Morning Star* principles. I am not persuaded that the bank behaved unreasonably in opposing the application, although its opposition was certainly robust. I have, however, had regard to the fact that a significant consideration in my narrowing the categories for discovery ordered to be given by the bank was the evidence set out in the affidavit served very shortly before the hearing.

25 For those reasons, I order the plaintiff to pay two thirds of the defendant's costs of the discovery motion including the hearing and I order that that those costs be payable forthwith.

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