Supreme Court

New South Wales

Case Name:	Commonwealth Bank of Australia v Daleport Pty Ltd (in receivership) (No 5)
Medium Neutral Citation:	[2018] NSWSC 1935
Hearing Date(s):	19 July 2018
Date of Orders:	19 July 2018
Decision Date:	19 July 2018
Jurisdiction:	Common Law
Before:	McCallum J
Decision:	Order that the notice of motion dated 27 June 2018 be dismissed with no order as to costs; order that the plaintiff pay, by way of part payment, the sum of $100,000 within 28 days towards the costs ordered by me on 11 May 2018
Catchwords:	COSTS – application for costs order entered be varied – application for gross sum costs order – where defendant rejected the plaintiff's offer of payment and sought assessment of costs – where plaintiff previously sought assessment of costs and opposed any lump sum quantification - whether plaintiff's position should be characterised as a capitulation
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 98(4) Uniform Civil Procedure Rules 2005 (NSW), rr 21.5(2), 36.16(3)
Cases Cited:	Nichols v NFS Agribusiness Pty Limited [2018] NSWCA 84 Perpetual Trustees Australia Ltd v Heperu Pty Ltd (2009) 76 NSWLR 196; [2009] NSWCA 84 Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin [1997] 186 CLR 622

Category:	Procedural and other rulings
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 - REVISED

1 HER HONOUR: In these proceedings I gave a decision on 11 May 2018 ordering the plaintiff to pay two-thirds of the defendants' costs of a discovery motion. The parties have subsequently brought a number of applications before the Court. One was an application by the plaintiff for the determination of a separate question, and I have heard argument on that application and reserved my decision. The applications were, however, stood over to today for further argument concerning a notice of motion filed by the plaintiff on 27 June 2018 seeking the following relief:

> "(2) Pursuant to rule 36.15 of the Uniform Civil Procedures Rules, the costs order entered on 11 May 2018 in respect of the first and second defendants' notice of motion filed on 13 June 2014 be varied.
>
> (3) Pursuant to section 98(4) of the *Civil Procedure Act 2005*, a gross sum costs order be made in favour of the first and second defendants in respect of the notice of motion filed on 13 June 2014 by the first and second defendants."

2 When the matter was called for hearing of that application this morning, the parties sought time to continue settlement discussions. Those discussions were unsuccessful but resulted in the plaintiff announcing an open offer to pay to the defendants the sum of $150,000, including GST, in satisfaction of the costs order to which I have referred, within 28 days or else to proceed to assessment on the basis that there be no order as to the costs of its motion dated 27 June 2018.

3 The defendants sought assessment and for that reason the open offer made the plaintiff's motion moot, but the defendant submitted that they should have the costs of the motion. Ms Obrart, who appears for the defendants, submitted first that the motion was incompetent, arguing that there was no basis for variation of the order made by me on 11 May 2018 and no authority pursuant to the rule invoked to make such an order. In that context, she drew my attention to the decision of the Court of Appeal in *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 196; [2009] NSWCA 84.

4 Mr Castle had accepted at the outset of argument that the rule invoked in the notice of motion was not the applicable rule and that the plaintiff should have moved under r 36.16(3) of the Uniform Civil Procedure Rules 2005 (NSW). In any event, during the course of submissions, Ms Obrart in effect resiled from reliance upon any contention that the application was incompetent, proceeding rather on the basis that the bank's position this morning reflected a capitulation, as a result of which the defendants should have their costs, the capitulation being that the defendants had previously indicated they would seek an assessment of the costs and would oppose any lump sum quantification.

5 Ms Obrart emphasised, as she has on previous applications determined by me, the vulnerability of the defendants to stultification of their prosecution of the cross-claim by an attritional process of incurring portions of the overall fighting fund available to them in what she termed satellite applications, which erode the defendants' capacity to prepare for the main hearing. That submission must be assessed in the context that the other application I heard the week before last was an application by the plaintiff for the separate determination of a question which, if the bank is successful, will or could bring the proceedings to an end.

6 In any event, the critical question is whether the bank's position this morning reflects a capitulation and, if so, whether it follows that the bank should pay the defendants' costs of its motion. For the reasons identified by Mr Castle, who appears for the plaintiff, during argument, I am not persuaded that the bank's position this morning can fairly be characterised as a capitulation.

7 There are two reasons why that is so. One is that in the intervening period since the motion was filed, the defendants have now commenced an assessment process raising a real question as to the power of the Court to award a lump sum at this stage, having regard to the terms of s 98(4) of the *Civil Procedure Act 2005* (NSW). The other is that the open offer made by the bank includes an offer in lieu of proceeding to assessment to pay a sum within 28 days which reflects a substantial increase on the amount the bank was previously prepared to pay.

8 Ms Obrart submitted that any offer or counter-offer should be put to one side in characterising the bank's position this morning. I do not accept that submission in circumstances where the premise for the bank's application was that, whereas when I ordered the plaintiff to pay two-thirds of the defendants' costs, the evidence was that those costs were "in excess of $150,000." It later transpired that an amount almost double that sum was claimed.

9 The other consideration to which I have regard is the fluid nature in any litigation of the apparent merits of costs arguments. The fortunes of litigation can appear to fluctuate in the interlocutory stages and the Court is unable to know, until after final determination of the proceedings, with any real confidence where the merits of such arguments lie. In my assessment, the bank's position this morning reflects Mr Castle's stated intention, in accordance with his instructions, to attempt to remove issues from dispute so as to obviate the risk of this litigation feeding upon itself, echoing the words of Basten JA in *Nichols v NFS Agribusiness Pty Limited* [2018] NSWCA 84.

10 Incidentally, that decision is helpful in the determination of the present application for the Court's analysis of the principles summarised by McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622 at 624. Applying those principles in the present case, in my view this is a case where there has been no hearing on the merits of the plaintiff's notice of motion, depriving the court of the factor that usually determines whether or how the costs will be awarded. Further, I do not regard this to be a case in which either party has acted unreasonably, and it is not a case in which I can

determine whether one party was almost certain to have succeeded had the matter been fully tried.

11 I do think it is unlikely that I would have reached the conclusion, leaving aside the fact that the costs assessment process has now been commenced, that the Court has no authority to quantify the costs the subject of my earlier order. In those circumstances, the proper exercise of the costs discretion in this case is, in my view, that there should be no order as to the costs of the plaintiff's motion.

12 Ms Obrart raised two further issues on behalf of the defendants. The first is that the plaintiffs, having given a list of documents resulting from my determination of the discovery application, they ought, in accordance with r 21.5(2) have produced those documents for inspection within 21 days, which has not occurred. As submitted by Mr Castle, however, I would take it, as the plaintiff evidently did, that the further interlocutory steps in the proceedings ought to be paused pending the determination of the separate question on which I am presently reserved. I would anticipate making an order for the production of the documents on the list of documents, if appropriate, after publication of that judgment.

13 Separately, the defendants seek part payment of the costs ordered to be paid forthwith on 11 May 2018. Mr Castle did not seek to be heard against such an order, and submitted that a sum in the order of $50,000 might appropriately be ordered if the Court saw fit. Ms Obrart submitted that the amount should be $100,000, being the amount originally offered by the plaintiff in satisfaction of the order. I am of the view that it is appropriate to make an order for part payment so as to give effect to the intention of the forthwith order, and that the sum should be $100,000.

14 For those reasons I make the following orders:

(1) That the notice of motion dated 27 June 2018 be dismissed with no order as to costs.

(2) That the plaintiff pay, by way of part payment, the sum of $100,000 within 28 days towards the costs ordered by me on 11 May 2018.

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