

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

Nicholas J

14 December 2006

20074/05 Redeemer Baptist School Ltd v Graeme Francis Glossop &
5 ors
20077/05 Redeemer Baptist School Ltd v Fairfax Community
Newspapers Pty Ltd

JUDGMENT - ex tempore on costs

- 1 **His Honour:** In this matter, I have had the considerable benefit of written submissions from the representatives of the parties some time before their oral submissions this morning. These have assisted me in coming to a decision about the proper costs order to be made in the circumstances of this case.
- 2 The defendants seek orders that the plaintiff pay their costs of the proceedings as agreed or assessed. The plaintiff submits that the ordinary costs rule should not apply in the circumstances of the case, and that it should not be required to pay more than 20 per cent of the defendants' party/party costs.
- 3 I delivered judgment on 16 November 2006 and ordered that the proceedings be dismissed on the ground that s 8A(1) *Defamation Act* (1974) denied the plaintiff causes of action for defamation.
- 4 The defendants' claim that the proceedings be dismissed raised two issues for determination; firstly, the proper construction of s 8A and, secondly, whether, on the evidence, the plaintiff was, at the relevant times, the

employer of fewer than ten persons. The defendants' principal ground was the proper construction of s 8A. In the alternative, and on the assumption that the plaintiff's contention that in subs 3(a) "persons" meant employees under common law contracts of employment" was correct, they contended that the staff were employees of the plaintiff under contracts of employment. The question was treated as the contract of employment issue.

5 The plaintiff's response, as I have summarised in para 30 of my reasons, was that at all relevant times it employed no one pursuant to a contract of employment in that neither the plaintiff nor the teachers intended the arrangement between them to have contractual effect. Accordingly, the plaintiff submitted that, in the circumstances, there was no contract under which the teachers performed work at the school and they worked there as volunteers. Thus it was put that the plaintiff was within subs 3 and entitled to assert, or enforce, the causes of action. The contract of employment issue was contested by the defendants as a precaution against failure on the construction issue; they thereby undertook to refute the plaintiff's denial that any of its staff were employees under contracts of employment.

6 In the result, I found (Reasons para 96) that, on the contract of employment issue, the defendants had failed to establish that, at the relevant times, the teachers were employees of the plaintiff under common law contracts of employment, and I was satisfied that the plaintiff had demonstrated that it had no employees working for it under such contracts. However, I held that the success of the plaintiff on the defendants' alternative case did not affect the outcome of the proceedings.

7 The plaintiff submits that, although unsuccessful in the outcome, it was successful on a dominant and separable issue in the case. It was put that

the majority of the hearing time was taken up by the cross-examination of the plaintiff's witnesses and submissions on this issue. It was put that it was reasonable to estimate that 80 per cent of the time involved in preparation for, and conduct of, the hearing was devoted to this issue. Accordingly, it was put that departure from the ordinary rule was warranted and the order for costs should reflect this situation.

8 The defendants, on the other hand, submitted that, in effect, the issues were neither separate, nor distinct, were interwoven and overlapped. It was put that they were entitled to canvas and dispute the issue about the status of the teachers, particularly, since the matter was raised by the plaintiff and was necessary to the plaintiff's proposition that s 8A did not prohibit the defamation action. It was put that the factual contest was an integral part of the question concerning the application of s 8A and was not clearly dominant, or separable from the question of statutory construction.

9 The defendants also submitted that they did not choose to become involved in the litigation; they were entitled to meet the plaintiff's case on all material issues; and the circumstances did not warrant departure from the general principle that costs are awarded to compensate the successful party for the expense of being put to the necessity of litigation. They relied upon the well-known passage from McHugh, J's judgment in *Oshlack v Richmond River Council* (1998) 193 CLR 72, pp 97, 98, and Kirby, J's statements, pp 121, 123. The passages from the judgment of Chief Justice Mason in *Latoudis v Casey* (1990) 170 CLR 534, p 543 was also relied upon.

10 The court's powers as to costs are provided under s 98 of the Civil Procedure Act and Pt 42 of the Rules. Relevantly, s 98(1) provides:

"Subject to rules of court and to this or any other Act -

- (a) costs are in the discretion of the Court; and
- (b) the Court has full power to determine by whom, to whom and to what extent costs are to be paid.

11 Rule 42.1 is the basic rule that costs follow the event, unless it is appropriate, in the exercise of the court's discretion, that some other order should be made. The exercise of discretion is to be made with regard to the overall requirements of justice in the particular case. It is to be made with regard to principle, and it is well settled that, in an appropriate case, the court may deprive a party of its costs in relation to an issue which it lost at trial.

12 The relevant authorities were recently referred to by Crennan, J in *Dias Aluminium Products Pty Ltd v Ullrich Aluminium Pty Ltd* [2005] FCA 1400, particularly, at para 3. The authorities were also reviewed by the Court of Appeal in *James & Ors v Surf Road Nominees Pty Ltd* [2005] NSWCA 296. Relevantly, the court explained (para 32):

"32 The effect of Pt 52A r.11 is that an unsuccessful party may be ordered to pay the entirety of the costs of the successful party, even though the successful party did not succeed on all issues. However, as is specified by the rule itself, the Court is entitled to make a different order. That may occur where there are multiple issues involved. This was the subject of comment in *Waters v. P C Henderson (Aust) Pty. Limited* (unreported CA(NSW) Kirby P, Mahoney and Priestley JJA, 6 July 1994) where Mahoney JA said:

"Where the proceedings involve multiple issues the application of the rule that costs follow the event may involve hardship where a party succeeds on some issues and yet fails on others. Particularly is this so where, for example, a defendant succeeds on issues that occupied the bulk of the time taken by the proceedings. Nevertheless, unless a particular issue or group of issues is clearly dominant or separable, it will ordinarily be appropriate to

award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed.”

Their Honours also said:

“34 Where a matter involves multiple issues and the question before the court is whether it should make some other order as to costs other than the order that costs follow the event, a distinction is commonly drawn between cases which involve clearly discrete issues for determination, and those in which all issues are inseparable, or at least sufficiently linked, with respect to the overall disposition of a particular matter...”

“36 Where the Court does exercise its discretion to apportion costs, the apportionment itself involves the exercise of discretion". As Justices Gummow, French and Hill recognised in *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd*: (1993) 26 IPR 261:

“Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion for the trial judge. Mathematical precision is illusory and the exercise of the discretion often depend upon matters of impression and evaluation.”

13 In my opinion, it is realistic to treat the contract of employment issue as separate from the construction issue. It proceeded on the assumption that the defendants failed and the plaintiff succeeded on the construction issue. It necessitated adducing a substantial body of documentary evidence and the cross-examination of the plaintiff's witnesses, principally, Mr Bailey. The evidence and submissions on fact and law were, in my opinion, discrete.

14 Necessarily, I propose to take a broad-brush approach. Although the discretion is wide, it must be exercised with regard to the interests of justice in the circumstances of the case. It is recognised that questions of

apportionment depend very much upon matters of impression and evaluation (*Dodds Family Investments*).

- 15 In my assessment, much weight must be given to the overall outcome. The plaintiff's success on the contract of employment issue did not affect the defendants' entitlement to the relief they claimed from the outset, namely, orders that the proceedings be dismissed. Thus, this case differs from those in which the extent of the overall success of a party was qualified, or affected by the success of the opposing party on an issue or cross-claim.
- 16 In my opinion, although the defendants have been successful overall, nevertheless, the appropriate order for costs should make reasonable allowance for their failure on the discrete contract of employment issue which, in fact, occupied a substantial part of the hearing.
- 17 Having regard to the authorities and to all of the circumstances, I propose to order the plaintiff to pay 70 per cent of the defendants' costs of the proceedings. This, in my view, fairly reflects the significance of the defendants' success in obtaining the orders they sought and its failure to establish the alternative ground upon which they contended the proceeding should be dismissed. Accordingly, it is ordered that the plaintiff pay 70 per cent of the defendants' costs of the proceedings.

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I hereby certify that the preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Nicholas

15.12.06

Date

ADD

Associate