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Précis Paper

Indemnity Costs

A discussion of the circumstances in which indemnity costs orders are awarded.

Discussion Includes

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Précis Paper

MCG Group Pty Ltd v Ftrus Pty Ltd (formerly Fortrus Pty Ltd) [2017] FCA 359

1. In this edition of BenchTV, Mike Dudman (Principal, Costs Lawyer, Blackstone Legal Costing, Sydney) and Dipal Prasad (Associate, Costs Lawyer, Blackstone Legal Costing, Sydney) discuss the decision in *MCG Group Pty Ltd v Ftrus Pty Ltd (formerly Fortrus Pty Ltd)* [2017] FCA 359 ('MCG Group') and the special circumstances that give rise to a costs order on an indemnity basis. They discuss relevant precedents that practitioners should consider when making an application, and how the particular facts and circumstances of a case can operate to determine the likelihood of an order.

Overview of circumstances in which costs are awarded on an indemnity basis

2. The MCG Group case focuses on two of the few circumstances due to which a Court can award indemnity costs. Firstly, where the other party "wilfully disregards" facts, and secondly, when the other party fails to accept a favourable Calderbank offer.

3. Indemnity costs are the highest costs order that can be awarded on a party/party basis. An indemnity costs order allows the winning party to recover, from the other party, the majority of the costs it has paid or is liable to pay to its solicitor.

4. Costs on the indemnity basis are permitted in their entirety unless they are an unreasonable amount or unreasonably incurred.

5. Practitioners should be aware of the circumstances in which costs are awarded on an indemnity basis. They include:
    1. Hopeless cases
    2. Abuse of process
    3. Unreasonable conduct or relevant delinquency in the proceedings
    4. Fraud and misconduct
    5. Offers of compromise and Calderbank letters

6. The most common basis for seeking an indemnity costs order is when Calderbank offers or offers of compromise are rejected. Essentially an indemnity costs order is enlivened when one party has done the wrong thing.

MCG Group

Facts of the case

7. The decision arises out of a hearing on costs.

8. It concerned a contractual dispute between two brothers Bill and Paul McDonald and the entities under their control. The Respondents denied the existence of an oral agreement between the brothers whereby Fortrus Pty Ltd would reimburse payments to the ATO made by MCG Group in respect of a tax liability of an entity called Fortrus Resources Pty Ltd.

9. Ultimately orders were made in favour of MCG Group against Fortrus Pty Ltd and Paul McDonald, (the Respondents), in the amount of $800,422.00 plus interest of $84,949.82.

Understanding indemnity costs

10. A special circumstance is required to allow costs to be awarded on an indemnity basis. Judges have a wide discretion when making orders with respect to costs.

11. The MCG Group case refers to the summary of these special circumstances provided by the Full Federal Court in the case of *InterTAN Inc v DSE (Holdings) Pty Ltd* [2005] FCAFC 54. They were identified as follows:
    1. The bringing of an application is "high-handed": *Australian Guarantee Corporation Ltd v De Jager* [1984] VicRp 40
        i. i.e. Where an application excessively overstates the value of the claim
    2. An application has "no chance of success": *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202.
    3. An application is "hopeless": *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers, Western Australian Branch (No 2)* [1993] FCA 70.
    4. An application is "unnecessary": *Ragata Developments Pty Ltd v Westpac Banking Corporation* (unreported, Federal Court, 5 March 1993).
    5. An application is brought and prosecuted "not for the bona fide purpose of protecting and enforcing a legal right, but to achieve an ulterior or extraneous purpose": *Ragata Developments Pty Ltd v Westpac Banking Corporation* (unreported, Federal Court, 5 March 1993);
    6. An application is commenced in wilful disregard of known facts or contrary to well established law: *Fountain Selected Meats (Sales) Pty Ltd v International Produce* Merchants Pty Ltd [1988] FCA 202.

7. There has been "some relevant delinquency on the part of the unsuccessful party": *Oshlack v Richmond River Council* [1998] HCA 11.
8. Where the justice of the case warrants such an order: *Andrews v Barnes* (1887) 39 Ch D 133.
9. Where there are some special or unusual features in a case to justify the court the exercising its discretion in this way: *Preston v Preston* [1982] Fam 17.

12. In MCG Group, Justice Greenwood reasserted that "While the circumstances identified by the Court [in *InterTAN Inc]* may serve as a guide to the exercise of the discretion, the question is always whether the particular facts and circumstances of the case at hand justify the making of an order for costs other than on a party and party basis".

13. Lawyers can use these cases to assist in their submissions on costs and to obtain an indemnity costs order.

Circumstance in focus: when a party wilfully disregards facts

14. In the MCG Group Case the Applicant argued that the Respondents should pay costs on an indemnity basis because of their wilful disregard of the facts. During the trial, Mr Paul McDonald had answered several questions in an obfuscated manner, particularly in relation to whether or not he had entered into an agreement with his brother. Indemnity costs will be justified where someone commences an action in wilful disregard of known facts or contrary to well established law. Justice Greenwood held that the obfuscation by the Second Respondent was not alone sufficient to warrant an indemnity costs order. The obfuscation was not found to amount to a wilful disregard of facts. Therefore, the special circumstances that would enliven an indemnity costs order did not exist.

Christofidellis v Zdrilic [2000] FCA 679

15. The Christofidellis case is another case that considered the principles governing the exercise of the judicial discretion in the award of indemnity costs against an unsuccessful applicant. In this case the credibility of the applicants as witnesses was in question. The applicants alleged that a representative of the respondent had made misleading and deceptive oral representations about a property's dimensions and sub-divisibility to the prospective purchasers.

16. Justice Einfeld could not find any satisfactory corroborative evidence of the alleged oral representations and as such dismissed the application and ultimately made an order for indemnity costs. However, Justice Einfeld [paragraph 29] said that "such an adverse credibility finding would not by itself or in the ordinary course of events justify an order for

indemnity costs. However, the fact that these proceedings were destined to fail regardless of the applicants' credibility as witnesses suggests that this case is not of the class contended for by the applicants'.

17. The rule to remember here is if you want to seek indemnity costs on the basis of the other party's wilful disregard of facts, make sure you have a solid and extensive case for this claim. It's not usually enough to rely on the testimony of one witness.

18. An offer of compromise provides more certainty around the enlivening of such an order.

Circumstance in focus: when a party does not accept a favourable offer of compromise

MCG Group

19. The Applicant pleaded that indemnity costs should at least be awarded from 30 November 2015. This is when the Calderbank offer was made.

20. The Applicants had inadvertently claimed a lower amount in the Statement of Claim due to a calculation error, it was later amended. Nevertheless, the original statement of claim was used for the purpose of assessing whether the rejection of the applicant's offer was reasonable. The FCA accepted that the respondents would have been better off financially if they'd accepted the offer.

21. It is important to note that the applicant's offer was only available for a matter of hours. Regardless of whether or not the respondents would have been better off if they had accepted the offer, the short timeframe was unreasonable. The respondents had no reasonable opportunity to assess the costs. The court was therefore not satisfied that the respondents acted unreasonably in not accepting the offer as made.

22. Time limits are important when making offers to settle. When you make a Calderbank offer, give the other party sufficient time to consider the offer. The reasonableness of the timeframe will always depend on the facts and circumstances of the case. Calderbank offers made prior to a hearing may very reasonably have a short time frame. Similarly, it would be reasonable to reject an order made too early in the proceedings. A party needs adequate time to consider damages and the merits of a case. Furthermore, a rejection of a Calderbank offer that is conditional on a party or a third party performing an action is also likely to be considered reasonable.

23. The Applicant amended its Statement of Claim on the first day of trial to discontinue a claim for damages under s 236 of the *Competition and Consumer Act 2010* (Cth). The Respondents

sought to be compensated for costs thrown away as a result of the amendment. A setoff or cross-order with respect to costs is unlikely in circumstances in which a particular part of a proceedings has been abandoned or lacked merit. However, this ratio should be considered in the context of the facts of the MCG case. It is noteworthy that in this case, that abandoned, was a minor part of the claim.

24. It is always best to get an all-encompassing order with respect to costs. The courts appear to be adopting the approach that they are very reluctant to carve out costs in relation to failed issues.

Final lessons from *MCG Group Pty Ltd v Ftrus Pty Ltd (formerly Fortrus Pty Ltd)* [2017] FCA 359

25. Lessons from the MCG Group case include:

1. Costs are generally awarded to a successful party on a party and party basis unless special circumstances exist that justify an order as to costs on an indemnity basis.
2. While case law helps determine such special circumstances, facts and circumstances of each case are considered to determine justification of an indemnity costs order.
3. A party answering questions in an obfuscated manner in the course of the proceedings does not alone demonstrate a "wilful disregard of the primary facts in the course of the trial." Therefore such behaviour alone does not amount to a special circumstance likely to justify departure from the ordinary rule to an order of indemnity costs.
4. In addition to special circumstances, indemnity costs orders are also awarded as a result of offers of compromise and Calderbank offers.
5. Time limits are very important when putting forward offers to settle a claim.
    i. An unreasonable timeframe for an offer may cost you an order for indemnity costs
6. Errors in the amount claimed in a pleading can cost a party a costs order on an indemnity basis.
7. It is rare for set off costs orders or cross orders to be made for minor costs thrown away due to the actions of a successful party.

BIOGRAPHY

Dipal Prasad

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Dipal is a costs lawyer with broad experience in litigation, including having worked in building and construction law, personal injury, insurance, motor vehicle accidents, strata and property law. Dipal has a strong interest in every facet of legal costing with experience in costs disputes arising from the full spectrum of litigation in Federal Court, High Court, New South Wales, Australian Capital Territory, Queensland and Victorian jurisdictions. Dipal takes pride in positively contributing to the community by being committed to maximising costs recovery for successful parties in litigation and minimising costs liability for unsuccessful parties. Similarly, in solicitor/client disputes, by being committed to maximising costs recovery for solicitors and minimising costs liability for clients.

Mike Dudman

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Mike Dudman leads the Sydney practice of Blackstone Legal Costing and brings a client-centred and results-oriented approach to the legal costs arena. Mike's extensive commercial experience is complemented by a broad education that includes business, psychology and the law. In more than 17 years as a costs lawyer, Mike has worked on several thousand matters and has appeared in Court as a recognised expert in this increasingly complex area of the law. Mike has been involved in challenging or pursuing costs claims across all major jurisdictions in New South Wales, Queensland, Victoria, the Australian Capital Territory and federally.

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MCG Group Pty Ltd v Ftrus Pty Ltd (formerly Fortrus Pty Ltd) [2017] FCA 359

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Legislation

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