IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2019 04231

JING HUANG — First Plaintiff

and

LIAN ZHOU — Second Plaintiff

v

AUSTRALIAN PROJECT INVESTMENT CORPORATION (ACN 603 716 249) TRADING AS APIC — Defendant

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JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	On the papers (affidavits filed 1 April 2020, submissions filed 3 April 2020)
DATE OF RULING:	12 January 2021

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	J Y Zhou	Executive Lawyers
For the Defendant	A C Blair	Hiways Lawyers

HER HONOUR:

Introduction

1 By its amended summons dated 13 December 2019 the defendant sought that the plaintiffs' amended statement of claim, as filed on 26 November 2019, be struck out, that the second plaintiff's claim be dismissed and that the plaintiffs pay the defendant's costs of the application.

2 At the return of the summons, by consent, I made orders affording the plaintiffs the opportunity to serve a proposed draft further amended statement of claim, and providing that the defendant was to advise the Court whether it consented to the filing of any such further statement of claim. On 26 March 2020 I made further orders by consent, granting leave to the plaintiffs to file their further amended statement of claim (in substantially the same form as had been provided to the defendant pursuant to my Orders dated 11 February 2020) and for the filing of a defence to the amended claim.

3 This ruling concerns the costs of the defendant's amended summons.

Parties' submissions

4 The defendant says, in substance that:

(a) The general rule is that costs follow the event.[1] By consenting to amend their statement of claim the plaintiffs conceded the inadequacy of their pleadings. Having regard to the nature and extent of the amendments, it is apparent that the defendant has substantially obtained the relief sought by its summons, albeit by consent, and that that relief (a pleading in proper form which articulates a cause of action and enables the defendant to understand the case against it) was brought about by the application. The defendant should accordingly have its costs of the application.

(b) Rule 63.17 of the *Supreme Court (General Civil Procedure) Rules 2015* (**Rules**) provides that where a pleading is amended (with or without leave) the costs of

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1 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 96-7 [66]-[67].

and occasioned by the amendment and the costs of any application for leave to make the amendment are the parties' costs in the proceeding, unless the Court otherwise orders. The Court should "otherwise order" in this case, because the plaintiffs unreasonably resisted the application until the date fixed for the hearing of the summons, in circumstances in which the defendant provided a detailed analysis of the flaws in the pleading, and advanced reasonable offers to resolve the dispute, which were rejected.

(c) The defendant's costs should be immediately taxed pursuant to r 63.20.1, because the plaintiffs have acted unreasonably and because there will likely be delay in the completion of the proceedings.[2]

5 The plaintiffs submitted, in substance, that:

(a) While the plaintiffs' initial statement of claim required amendment to address a number of deficiencies, no costs in respect of the amendment should be awarded in favour of the defendant because:

(i) At the time at which the defendant's application was filed the plaintiffs were entitled in any event to amend their statement of claim without leave or consent;

(ii) The defendant acted unreasonably by filing a defence to the original statement of claim and filing its summons, in circumstances where the plaintiffs were endeavouring to rectify their pleadings and were actively liaising with the defendant about the pleading; in so doing the defendant contributed to both parties' costs in relation to the summons and engaged in unsatisfactory conduct by taking steps that were unnecessary to facilitate a resolution of the proceedings, failed to use reasonable endeavours to resolve the dispute and failed to co-operate with the plaintiffs in respect of the statement of claim;

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2 *Setka v Abbott* (No 2) [2013] VSCA 376, [27].

(b) The defendant should *pay the plaintiffs' costs* associated with dealing with the defendant's summons, reasonably incurred during the period 25 October 2019 and 11 February 2020, fixed in the sum of $7,394.16;

(c) The defendant's costs as quantified in correspondence with the plaintiffs, were excessive;

(d) If costs are awarded to the defendant there is no basis on which immediate taxation is warranted.

Analysis

6 I consider that in substance, the defendant's application has been successful. Although, by the amended summons, the defendant sought that the second plaintiff's claim be dismissed pursuant to rule 23.01 or ss 62 and 63 of the *Civil Procedure Act 2010* (Vic), the principal focus of the application was that the statement of claim ought be struck out pursuant to rule 23.02 because the pleading did not disclose a cause of action and would prejudice, embarrass or delay the fair trial of the proceeding. The defendant's complaint was essentially two-fold: that the claim set out a recitation of facts but did not disclose a cause of action, and that what was set out was insufficient to enable the defendant to understand that case against it.

7 Although the parties' agreement meant it was unnecessary to determine the defendant's application, it is apparent on the face of the pleadings (the initial statement of claim dated 16 September 2019, a draft circulated to the defendant on 25 October 2019, an amended claim filed 26 November 2019 and a further amended claim filed 1 April 2020)[3] that there are material differences between the claim in its initial and subsequent forms. The substantive changes included the identification of the facts by which the defendant was said to have breached the agreements governing its relationship with the plaintiffs and those parts of the agreements said to have been breached;[4] the abandonment of a claim made in the initial version of the statement of

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3 The final version of the claim is dated 1 May 2020 which is substantially in the same form as the document dated 1 April 2020.

4 See, for example, the proposed amended statement of claim dated 25 October 2019 at [109]-[123] and

claim that the defendant breached a "fiduciary duty of care", including by making improper use of its position,[5] articulation of the role of the second plaintiff so as to plead the grounds on which the second plaintiff advances a claim,[6] and articulation of the loss and damage claim and its relationship to the alleged breaches of obligations.[7] The correspondence annexed to the parties' affidavits on this application evidences that the amendments were in substance responsive to the defendant's complaints.

8 Having regard to the nature and extent of the amendments, it is apparent that the defendant has substantially obtained the relief sought by its summons, albeit by consent, and that that relief (a pleading in proper form which articulates a cause of action and enables the defendant to understand the case against it) was brought about by the application. It is not to the point that the plaintiffs might have sought to amend their claim without leave or consent, in reliance on rule 36.04. Their amendments were in fact responsive to the defendant's complaints.

9 I do not consider that there is any factor that militates against an award of costs. I do not accept the plaintiffs' submission that the defendant acted unreasonably in issuing an application seeking to strike out the claim.

10 It is true that the plaintiffs promptly responded to the defendant's letter of 21 October 2019 (by which the defendant said that, for the reasons identified, the claim was liable to be struck out), indicating that the plaintiffs had briefed counsel to review the claim and if appropriate, prepare an amendment, and that the plaintiffs provided a proposed amended claim under cover of their letter of 25 October 2019, said to be intended to resolve the matters raised in the defendant's correspondence, and seeking a response from the defendant by 1 November 2019. The defendant did not respond to that letter and proposed amended claim prior to filing its defence to the original statement of claim, on 28 October 2019. On 30 October 2019, the defendant wrote to

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[133]-[160]; Amended statement of claim dated 26 November 2019 at [109]-[123] and [130]-[160]; Further amended statement of claim dated 1 April at [111A] and [141A].

5 Statement of claim dated 16 September 2019, [44]-[47].

6 Amended statement of claim dated 26 November 2019, [1(d)], [2(c)]; Further amended statement of claim dated 1 April 2020, [3].

7 Amended statement of claim dated 26 November 2019, [163]; Further amended statement of claim dated 1 April, [163].

the plaintiffs, raising a number of criticisms with respect to the proposed amended claim and foreshadowing the filing of an application for the striking out of the statement of claim. A summons was filed on 31 October 2019 and subsequently amended on 13 December 2019.

11 The plaintiffs submitted that by filing a defence on 30 October 2019, when the plaintiffs were awaiting a response from the defendant as to whether it consented to the filing of the plaintiffs' proposed amended statement of claim, the defendant acted unreasonably, justifying an award of costs to the plaintiffs.

12 The parties might have sought orders seeking an extension of time for the filing of a defence, and it is possible that by the exchange of further correspondence and by the plaintiffs' voluntarily making further amendments to their claim, the issue might have been resolved without the need for any application. However, in the circumstances already outlined, that possibility is not sufficient to establish that the defendant acted unreasonably or inappropriately, or failed to co-operate with the plaintiffs.

13 In circumstances in which the defendant considered that the claim remained defective notwithstanding the changes made in the draft amended claim circulated on 25 October 2019 (as set out in the defendant's letter of 30 October 2019), where the pleadings continued to evolve after the delivery of the draft claim and where the defendant was required by the Rules to file its defence by 30 October 2019, it was not unreasonable for the defendant to adopt the course it did – namely to file a defence, pleading to the extent that it could plead, and issuing an application seeking to strike out the claim.

14 The possibility that the matter might have been resolved by consent does not in this instance warrant a departure from the general rule that costs should follow the event, much less support an order that the defendant pay the plaintiffs' costs of responding to the application.

15 Prior to the hearing of the amended summons, both parties sought to reach a negotiated outcome, but were ultimately unable to do so. There was nothing unusual

or unreasonable about the conduct of either party in these negotiations.

16 Accordingly, costs should follow the event, and the plaintiffs should pay the defendant's costs of the application.

17 As recognised by the plaintiffs in their submissions, rule 63.17 is only concerned with the consequential and prospective costs of the amendment itself and not costs incurred before the amendment.[8] As such, the plaintiffs' submissions do not assist in the resolution of the primary question is issue.

Immediate taxation

18 As to the question of immediate taxation, rule 63.20.1 provides that,

> [i]f an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the Court orders that the costs may be taxed immediately.

19 The defendant submitted that an order for immediate taxation was warranted because the plaintiffs were guilty of unsatisfactory conduct involving unreasonableness and want of competence and diligence, and separately because there was a prospect of considerable delay in the completion of the proceedings. Where one of those factors is present a departure from the rule against immediate taxation may be justified, although the factors warranting such an order are not closed.[9]

20 While there was considerable force in the defendant's criticisms of the statement of claim (particularly the original form of the claim), and the plaintiffs may be justly criticised for issuing a pleading without engaging counsel to settle the proceeding (and in that sense the claim was initially incompetently pleaded), I do not accept that those facts of themselves amount to unsatisfactory or unreasonable conduct sufficient to warrant immediate taxation, particularly in circumstances in which the plaintiffs promptly engaged with the defendant in an endeavour to remedy the problems with

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8 *Burke v Ash Sounds Pty Ltd* (No 2) [2019] VSC 290, [11]-[12]; *Edelman v Badower* [2010] VSC 427, [30], [35].

9 See *Setka v Abbott MP* (No 2) [2013] VSCA 376.

their claim.

21 The defendant submitted that the "plaintiffs' continual insistence that there be no costs consequence of their conduct" was unreasonable and showed a "want of diligence and competence" which justified the granting of costs orders pursuant to ss 28 and 29 of the *Civil Procedure Act 2010* (Vic). I reject that submission. The parties' correspondence evidences that the plaintiffs were willing to negotiate throughout the period of time from when the defendant first raised issues with respect to the statement of claim and until the making of the orders resolving the summons on 26 March 2020. The plaintiffs took active steps to resolve issues with their pleading, including by engaging counsel, effectively immediately upon the defendant raising its complaint.

22 The defendant submitted that its application for joinder of necessary parties for the purposes of apportionment would likely lead to an application for a stay of the proceeding pursuant to s 57 of the *Domestic Building Contracts Act 1995* (Vic) by one of the proposed joined parties, which may result in the proceeding being heard at VCAT, causing "considerable and unknowable delay". That submission was speculative. In the absence of any evidence as to the intention of any potential joined party, this is a factor to which I attribute little weight.

23 Finally, the defendant relied upon its offers to resolve the proceedings, made in without-prejudice correspondence to the plaintiffs, which were said to have been unreasonably rejected by the plaintiffs. I do not consider that the plaintiffs' failure to accept the defendant's offers was itself unreasonable for the purposes of rule 63.20.1. It is unnecessary to consider as a matter of general principle, the circumstances in which, if any, a failure to accept a settlement offer to resolve an interlocutory application might found a departure from the rule against immediate taxation of the costs of interlocutory applications.

24 In this case, two offers were made. On 7 February 2020, the defendant proposed that the application listed for 11 February 2020 be adjourned; that the plaintiffs have leave

to file a further amended statement of claim; and that the plaintiffs pay the sum of $26,000 for the defendant's costs thrown away by reason of the application. That offer was expressed as being open until 10am on Monday 10 February 2020. On 10 February 2020, the plaintiffs responded to the defendant's offer accepting the terms sought by the defendant, except on the question of costs, which they refused to pay. The application was listed on 11 February 2020. At the hearing, the parties agreed to allow the plaintiffs to propose a further amendment to their statement of claim, with respect to which the defendant would indicate to the Court their consent or otherwise by 24 March 2020.

25 On 16 March 2020, the defendant offered to accept the filing of the further amended statement of claim, if the plaintiffs agreed to pay $30,000 by way of the defendant's costs thrown away as a result of the application. It expressed this offer as being open until 4:00pm on 20 March 2020. On 20 March 2020, the plaintiffs responded with a counter-offer, stating that they would pay $10,000 in respect of the defendant's costs, if the defendant consented to the filing of the proposed further amended statement of claim. The defendant did not accept the counter-offer. On 25 March 2020, the parties submitted consent orders which allowed the plaintiffs to file the proposed further amended statement of claim but reserved for determination the question of the costs of the application.

26 Nothing in the material before me establishes that the demand for costs thrown away by reason of the applications (assessed at $26,000 on 7 February and $30,000 on 16 March) was reasonably quantified or, more relevantly, represented an outcome more favourable than the plaintiffs could expect to receive by failing to accept the offer, such that the plaintiffs' refusal to accept the offer must now be regarded as having been unreasonable. Separately, the first offer was open for an unreasonably short period of time, being one business day.[10]

27 The quantum of the defendant's costs, if not agreed, will be a matter to be dealt with on taxation. No party sought an order that any costs be taxed on other than a standard

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10 *Thomopolous v Faulks (No 2)* [2006] VSC 286, [13]-[14]; *Messiter v Hutchison* (1987) 10 NSWLR 525.

basis.[11]

Orders

28 For the reasons above, I will make orders to the effect that the plaintiffs pay the defendant's costs of its amended summons dated 13 December 2019. No order for immediate taxation will be made.

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11 See *Supreme Court (General Civil Procedure) Rules 2015*, r 63.31.

CERTIFICATE

I certify that this and the nine preceding pages are a true copy of the reasons for Judgment of Nichols J of the Supreme Court of Victoria delivered on 12 January 2021.

DATED this twelfth day of January 2021.

Associate