

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

S ECI 2022 03446

IN THE MATTER of ELIANA CONSTRUCTION AND DEVELOPING GROUP PTY LTD (ACN 132 817 362) (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

BETWEEN:

CRAIG IVOR BOLWELL in his capacity as liquidator of
ROCK DEVELOPMENT & INVESTMENTS PTY LTD (ACN
168 484 811) (IN LIQUIDATION)

Plaintiff

- and -

ANTHONY ROBERT CANT in his capacity as liquidator of
ELIANA CONSTRUCTION AND DEVELOPING GROUP
PTY LTD (ACN 132 817 362) (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED)

Defendant

GENERAL FORM OF ORDER

JUDGE: The Honourable Associate Justice Hetyey

DATE MADE: 1 December 2023

ORIGINATING PROCESS: Filed on 5 September 2022

HOW OBTAINED: On the papers

APPEARANCES: Not applicable

OTHER MATTERS:

Introduction

- A. On 9 February 2023, the Court heard the plaintiff's appeal against the defendant's adjudication of a proof of debt dated 29 March 2019 ('**proof of debt**') lodged in the liquidation of Eliana Construction and Developing Group Pty Ltd (in liq) (recs & mgrs apptd) ('**Eliana**'). The appeal was made under r 5.6.54 of the *Corporations Regulations 2001* (Cth), r 14.1 of the *Supreme Court (Corporations) Rules 2013*, s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* and the inherent jurisdiction of the Court.



- B. On 2 November 2023, the Court delivered its judgment, dismissing the appeal ('**judgment**').¹ The Court indicated the parties would be heard on the appropriate formulation of orders, including as to costs. The Court also confirmed that the question of costs would be determined on the papers.
- C. The plaintiff contends that the plaintiff should pay the defendant's costs on a standard basis, to be taxed in default of agreement. He relies on written submissions dated 16 November 2023. Conversely, the defendant seeks an order that the plaintiff pay the defendant's costs of and incidental to the proceeding, including all reserved costs, on an indemnity basis. He relies on his written submissions filed 8 February 2023 and supplementary submissions of 23 November 2023. In determining the question of costs, the Court has considered the parties' submissions, the affidavits and other material filed in the proceeding, and the history of the litigation.

Relevant legal principles

- D. The Court has a wide discretion in relation to costs.² The discretion is absolute, unconfined and unfettered, but must still be exercised judicially and not with reference to irrelevant or extraneous considerations, but upon facts connected with the litigation.³ Although not designed to control the exercise of the Court's discretion, there is a general rule that, in the absence of good reason to the contrary, a successful litigant should recover their costs.⁴ An award of costs is usually ordered on a standard basis unless there are special or unusual features warranting an order for costs on an indemnity basis.⁵ Such circumstances include where:
- (i) proceedings are commenced or continued in disregard of known facts or clearly established law;⁶
 - (ii) there is unreasonable conduct causing unnecessary costs to be incurred;⁷
 - (iii) a party, properly advised, knew or should have known that it had no chance of success and persisted with its claim (in other words, the

¹ *Re Eliana Construction and Developing Group Pty Ltd* [2023] VSC 639 ('*Re Eliana*').

² *Supreme Court Act 1986* (Vic) s 24; *Civil Procedure Act 2010* (Vic) s 65C.

³ *Innes-Irons & Anor v Forrest (Costs)* [2017] VSC 10, [5] (Derham As); *Towercom Pty Ltd v Fahour (No 4)* [2013] VSC 585, [6] (Derham As) ('*Towercom*'); *Latoudis v Casey* (1990) 170 CLR 534 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ); *Oshlack v Richmond River Council* (1998) 193 CLR 72, 86 (Gaudron and Gummow JJ) ('*Oshlack*').

⁴ See *Towercom*; *Ritter v Godfrey* [1920] 2 KB 47, 53 (Atkin LJ); *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, 809 (Viscount Cave LC); *Milne v Attorney-General (Tas)* (1956) 95 CLR 460, 477 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ); *Oshlack*.

⁵ See *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 (Sheppard J) ('*Colgate v Cussons*'); *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 (Harper J); *Yap v Lee* [2019] VSC 743 (McDonald J).

⁶ See *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (No 2)* (1993) 46 IR 301 (French J).

⁷ *Ballam v Ferro (No 2)* [2022] NSWSC 1358, [68] (Hallen J), citing *Vector Corrosion Technologies Ltd v E-Chem Technologies Ltd* [2022] FCA 519, [38] (Jagot J).



proceeding was brought on the basis that the case advanced was hopeless);⁸
or

(iv) there is an imprudent refusal of an offer to compromise.⁹

E. The Court can take into consideration a *Calderbank* offer made in accordance with the principles of *Calderbank v Calderbank*¹⁰ in determining whether, in the exercise of its discretion as to costs, the party who made the offer should be awarded costs on an indemnity basis.¹¹ Where a recipient of an offer does not achieve an outcome at trial more favourable than that contained in the offer, there is a basis to award indemnity costs if the refusal of the offer was unreasonable in all the circumstances.¹² The fact that a party ultimately failed to make out their case does not mean they acted unreasonably in rejecting the *Calderbank* offer.¹³ Nor does the reasonableness of a *Calderbank* offer mean it was unreasonable to reject it.¹⁴ Factors relevant to assessing whether the rejection of a *Calderbank* offer was unreasonable include:¹⁵ the stage of the proceeding when the offer was received; the time allowed for consideration of the offer; the extent of the compromise allowed; the recipient's prospects of success, assessed as at the date of the offer; the clarity with which the terms of the offer were expressed; and whether the offer foreshadowed an application for indemnity costs in the event of its rejection.

Overview of parties' submissions

F. The plaintiff contends there are no special or unusual features of the appeal that justify an indemnity costs order being made against him. In particular, he submits:

(i) the originating process was amended on 24 January 2023 (pursuant to consent orders made on 13 January 2023 and authenticated on 23 January 2023) to limit the scope of the appeal. This followed a directions hearing on 7 October 2022, at which the Court queried the utility of the appeal (insofar as it related to the unsecured portions of the proof of debt), given the limited funds available in the liquidation of Eliana and the remote prospect of return to unsecured creditors;

⁸ *Banksia Securities Ltd v Insurance House Pty Ltd (Costs)* [2020] VSC 234, [15] (J Dixon J); *Winslow Constructors Pty Ltd v Head, Transport for Victoria (Costs)* [2021] 64 VR 200, 204 (Riordan J).

⁹ *Colgate v Cussons*, 233.

¹⁰ [1975] 3 All ER 333.

¹¹ See *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425 (Rolfe J); *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435, 441 [20] (Warren CJ, Maxwell P and Harper AJA) ('*Hazeldene's Chicken Farm*'); *Re Mandie; Mandie v Danos* [2015] VSC 55 (McMillan J); *Casey v Pel-Air Aviation Pty Ltd*; *Helm v Pel-Air Aviation Pty Ltd (No 3)* [2015] NSWSC 857 (Schmidt J).

¹² *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* (2002) 190 ALR 121, 127 [28] (Weinberg J, as his Honour then was) ('*Alpine Hardwood*'); *Hazeldene's Chicken Farm*, 441 [23]; *United Petroleum Australia Pty Ltd v Herbert Smith Freehills (No 2)* [2018] VSC 501, [19]-[22] (Elliott J), upheld on appeal in *United Petroleum Australia Pty Ltd v Freehills* [2020] VSCA 15, [125] (Whelan, McLeish and Niall JJA).

¹³ *Alpine Hardwood*, 127 [28].

¹⁴ *Ibid.*

¹⁵ *Hazeldene's Chicken Farm*, 442 [25]; *Orwin v Rickards (Ruling No 3)* [2019] VSC 388 (Osborn JA).



- (ii) the appeal was conducted in such a way as to ensure costs were reasonable and proportionate in accordance with s 24 of the *Civil Procedure Act 2010* (Vic) ('CPA');
- (iii) the plaintiff did not act unreasonably in failing to accept an open settlement offer made by the defendant by letter dated 21 December 2022 ('**21 December offer**'). The 21 December offer and subsequent letter from the defendant's lawyers on 3 February 2023 ('**3 February letter**') inviting the plaintiff to discontinue the proceeding did not constitute any compromise,¹⁶ but rather sought to put the plaintiff in the position he had been in when the proof of debt was rejected;
- (iv) the appeal was undertaken to benefit the creditors of Rock Development & Investments Pty Ltd (in liq) ('**Rock**') and it was not unreasonable to pursue the appeal given that both parties are the liquidators of related entities;
- (v) the appeal raised significant and complex issues of a technical nature; and
- (vi) the decisions in *Sentinel Orange Homemaker Pty Ltd v Bailey, in the matter of Davis Investment Group Holdings Pty Ltd (In Liquidation) (No 2)*¹⁷ and *Sentinel Orange Homemaker Pty Ltd v Bailey, in the matter of Davis Investment Group Holdings Pty Ltd (In Liquidation) (No 3)*¹⁸ support the conclusion that there is no basis for indemnity costs because the plaintiff has not acted unreasonably.

G. By contrast, the defendant argues he should be entitled to indemnity costs on the following bases:

- (i) by letter from his lawyers dated 7 November 2022 and the amended originating process filed 24 January 2023, the plaintiff reduced his proof of debt from \$4,933,668.71 to \$728,465.83, effectively abandoning 85% of his original claim, in 'an attempt to avoid further costs';¹⁹
- (ii) the defendant was forced to incur costs in relation to plainly unsupportable arguments relating to the abandoned components of the proof of debt;
- (iii) the plaintiff only conceded statutory subrogation under s 560 of the *Corporations Act 2001* (Cth) was unavailable to him in his written submissions dated 30 January 2023. This concession followed extensive

¹⁶ Citing *Djordjevich v Rohrt* [No 2] [2022] VSCA 123 (Kennedy and Whelan JJA) ('*Djordjevich v Rohrt*').

¹⁷ [2022] FCA 1200 (Stewart J) ('*Sentinel Orange (No 2)*').

¹⁸ [2022] FCA 1297 (Stewart J) ('*Sentinel Orange (No 3)*').

¹⁹ The abandoned parts of the proof of debt were in respect of unsecured debts being: the tax Integrated Client Account debt of \$3,068,681.03 guaranteed under the deed entered into with the Commissioner of Taxation and others on 5 April 2016 ('**deed**'); and \$586,521.85, comprising an alleged unsecured loan of \$503,738.92 and \$82,782.93 as a 'non-priority' balance of the settlement proceeds received by the Commissioner of Taxation from the sale of the plaintiff's property applied to a Running Balance Account. The amount of \$550,000 received by Rock from the Commissioner as an unfair preference was also deducted from the \$1,278,465.83 Superannuation Guarantee Charge ('**SGC**') amount originally claimed in priority. The remaining priority amount pursued was the \$728,465.83, claimed in respect of owed by Eliana to the Commissioner pursuant to equitable subrogation and under s 556(1)(e) of the *Corporations Act 2001* (Cth).



- exchanges between the parties' solicitors on the issue, including the 21 December offer;
- (iv) despite being afforded repeated opportunities to withdraw the appeal, the plaintiff's ongoing pursuit of the matter was uncommercial and operated to the prejudice of the creditors of both Eliana and Rock, in circumstances where any return (had the plaintiff been successful) would be disproportionate to the irrecoverable legal fees. It follows that indemnity costs are warranted to minimise the detriment to Eliana's creditors.

Consideration

- H. In accordance with the findings in the judgment, the plaintiff did not achieve an outcome more favourable than that contained in the 21 December offer. For the following reasons, the plaintiff acted unreasonably in failing to accept the offer:
- (i) the offer was stated to be made in accordance with the principles in *Calderbank v Calderbank* (although it was put on an open basis) and was sent relatively early in the proceeding. It followed the Court's query about the utility of aspects of the appeal at the initial directions hearing on 7 October 2022, and was made prior to the mediation of the matter on 12 January 2023;
- (ii) the offer set out detailed reasons as to why the appeal would fail, having regard to each of the legal issues raised. Some of those reasons had been previously identified by the defendant at the time of his later adjudication of the proof of debt on 22 August 2022;
- (iii) the plaintiff's prospects of success at the time of the 21 December offer were not strong. On a plain reading of cl 7.5 of the Deed, Rock was precluded from proving in the liquidation of Eliana.²⁰ This operated as a complete answer to the appeal;²¹
- (iv) contrary to the plaintiff's submission, the 21 December offer involved a sufficient element of compromise in that it invited the plaintiff to discontinue the matter on the basis that the defendant would bear his own costs. These costs would have otherwise been payable by the plaintiff upon discontinuance. In this way, the present case can be distinguished from *Djordjevich v Rohrt* (relied upon by the plaintiff) where the Court of Appeal found there was simply no compromise offered by the successful party in his purported settlement offers;²²
- (v) the offer was clearly expressed and foreshadowed an application for indemnity costs in the event of its rejection; and
- (vi) the offer was left open until 4.00pm on 11 January 2023, which was immediately prior to the mediation of the matter on 12 January 2023. This was an appropriate period of time for the plaintiff to consider the offer, notwithstanding the holiday period.

²⁰ Re Eliana [54]-[55].

²¹ Ibid [55].

²² *Djordjevich v Rohrt* [9], [12] (Kennedy and Whelan JJA).



- I. Further, the 3 February letter clearly explained that, as at 12 January 2023, the asset pool available for distribution to priority creditors of Eliana was approximately \$117,343 and rapidly diminishing, on account of the legal costs of the appeal. In the event the plaintiff was successful on the appeal in respect of the remaining \$728,465.83 priority claim, the best commercial return that was available to Rock was \$53,152.67, being a return of 7.3 cents in the dollar. Given the plaintiff's unrecoverable costs of the appeal, it is difficult to regard the continuation of the appeal as being reasonable and proportionate in accordance with the overarching obligation in s 24 of the CPA, or for the ultimate benefit of creditors of Rock. Moreover, the fact the parties are liquidators of related companies is irrelevant to the question of costs.
- J. By the time the plaintiff amended the originating process to confine the appeal, significant costs had already been incurred. There is also a strong argument that one of the grounds abandoned – the tax Integrated Client Account debt of \$3,068,681.03 guaranteed under the Deed – should never have been included to begin with. It is difficult to see how Rock was entitled to prove in the liquidation of Eliana in relation to amounts it guaranteed but never paid. Similarly, the appeal should not have originally included the SGC amount of \$550,000, which had already been recovered by Rock from the Commissioner as an unfair preference, as it entailed Rock claiming twice.²³
- K. The concession made by the plaintiff concerning statutory subrogation also came late (in its written submissions of 30 January 2023) and after further costs were incurred, including in relation to the preparation of additional affidavit material and participation in the mediation. As was repeatedly explained by the defendant (including in the 21 December 2022 offer) and by *obiter dicta* in the judgment,²⁴ statutory subrogation under s 560 of the *Corporations Act 2001* (Cth) could not, on any view, apply.
- L. Whilst the plaintiff argues the appeal raised significant and complex issues of a technical nature, the Court construed the Deed as operating to clearly restrain Rock from proving in Eliana's liquidation or subrogating to the rights of the Commissioner of Taxation, in respect of the \$728,465.83 priority claim, until such time as the taxation liabilities claimed in the Commissioner's 7 December 2021 revised proof of debt were paid in full, or the Commissioner otherwise directed.²⁵ That finding was dispositive of the appeal. The remaining issues of equitable subrogation and the rule against double proofs, whilst involving technical and complex areas of law, were dealt with in the judgment because of way the appeal was argued and the overlapping nature of the issues jointly identified by the parties.²⁶
- M. Lastly, the decisions in *Sentinel Orange (No 2)* and *Sentinel Orange (No 3)* do not assist the plaintiff in resisting an indemnity costs order. *Sentinel Orange (No 2)* was a substantive judgment in which Stewart J dismissed an appeal from a liquidator's decision to reject a proof of debt. At the conclusion of his decision, his Honour

²³ Re Eliana [95].

²⁴ Ibid [56]-[60].

²⁵ Ibid [55].

²⁶ Ibid [55].



made a provisional costs order: that the unsuccessful plaintiff pay the liquidator's costs of the appeal on a standard basis – with liberty for the parties to revisit the question. *Sentinel Orange (No 3)* concerned the liquidator's application to vary that costs order and seek indemnity costs. The liquidator agitated for the establishment of a general rule of indemnity costs against creditors who unsuccessfully appeal a liquidator's rejection of a proof of debt, which was not accepted by the Court in that case. It is not an argument advanced by the defendant here. Further, whilst his Honour was not satisfied the conduct of the plaintiff justified an indemnity costs order having regard to the particular facts of that case, there were apparently no *Calderbank* or other settlement offers in evidence (unlike in this case).

- N. In the exercise of the Court's discretion, and balancing all the considerations referred to above, it is appropriate that the plaintiff pay the defendant's costs of and incidental to the proceeding on a standard basis until the receipt of the 21 December 2022 letter, and on an indemnity basis thereafter.
- O. This Order is authenticated by the Associate Judge pursuant to r 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* ('**Rules**').

THE COURT ORDERS THAT:

1. The proceeding is dismissed.
2. The plaintiff pay the defendant's costs of and incidental to the proceeding, including all reserved costs, on a standard basis until 21 December 2022, and on an indemnity basis thereafter. Such costs are to be taxed in default of agreement.

DATE AUTHENTICATED: 1 December 2023

THE HONOURABLE ASSOCIATE JUSTICE HETYEY

