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Where the costs fall: When a successful party is not entitled to a costs order

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In the recent decision of *Larsen v Grace Worldwide (Aust) Pty Limited (No 3)* [2015] NSWSC 1706, the Supreme Court of New South Wales was required to consider when the ordinary rule of costs following the event should not apply. The court also considered whether the rejection by the plaintiffs of an offer (which dwarfed the ultimate judgment) entitled the defendant to an award for costs on an indemnity basis.

Background

Earlier this year the court entered judgment[1] for Mr and Mrs Larsen (**plaintiffs**) against Grace (**defendant**). In doing so, the court only ruled in favour of the plaintiffs on a minor issue - otherwise concluding that the bulk of the claim failed.

The plaintiffs had sought damages of over $30 million[2] for personal injuries, property damage, and consequential losses, however were only awarded $5,500 (plus interest) in their successful claim for damage sustained to some goods.

The matter was brought back before the court to resolve the issue of costs.

The claim for costs

The plaintiffs argued that, as their claim succeeded, costs should follow the event as per the ordinary rule. In response, the defendant argued that the court should exercise its discretion and, given that the bulk of the plaintiffs' claim failed, ought depart from the ordinary rule and award costs in its favour.

The court accepted that, ordinarily, there should be no apportionment between issues on which a successful party succeeded and those on which it failed. Generally, when a party succeeds, it ought be entitled to its costs. However, the court noted that this rule can operate unfairly and, in some cases, may not be the most appropriate outcome. This can be particularly so when the successful party failed on the dominant issue in the proceedings, or on clearly separable or unreasonably pursued matters. In such circumstances, a discretionary evaluation is required by the court.

While the court noted that it could apportion the costs order between successful and failed matters, it ultimately ruled that the plaintiffs were not entitled to any costs – even in relation to the issue on which they had succeeded. It was highlighted by the court that the defendant successfully defended the dominant issues in the proceedings. The plaintiffs were held to have *'comprehensively failed to make out their case, apart from a relatively small award of damages in respect to damage to goods'.*

The court therefore exercised its discretion *'to reflect the outcome of the proceedings'* and made a costs order in favour of the defendant.

The claim for indemnity costs

The defendant had made a *Calderbank* offer to the plaintiffs shortly before trial in the amount of $650,000 plus costs. The offer was rejected. Given the offer (significantly) exceeded the ultimate judgment, the defendant sought an order that its costs be paid on an indemnity basis from the date the offer was rejected.

In resolving this issue, the court had to determine whether the offer was a genuine one and whether it was unreasonable for the plaintiffs to have rejected it. The defendant bore the onus of proving these points.

The court found that the defendant's offer was a genuine one. In concluding so, it was relevant that the defendant had analysed the plaintiffs' claim and highlighted what it believed were potential weaknesses. The fact the defendant had set out its views on the claim and sought to substantiate its offer was an important point given the plaintiffs were unrepresented as at the time the offer was made / rejected.[3]

The plaintiffs made various submissions to explain why their rejection of the offer was not unreasonable. In addition to stressing that, based on the claim they were pursuing, the offer was inadequate (a point apparently aimed at criticising the judgment rather than bolstering their position on costs), the plaintiffs also argued that they were not given a real opportunity to consider the offer.

Interestingly, despite the plaintiffs admitting that they had rejected the offer on two occasions because it was inadequate, the court held this did not necessarily mean they had a reasonable opportunity to consider it. Noting the position the plaintiffs were in at the time the offer was made (unrepresented, of ill health and preparing for an imminent trial), the court held they did not have a reasonable opportunity to consider the offer, let alone seek advice on it.

Notwithstanding that the court believed it was entirely likely the plaintiffs would have rejected the offer even with a reasonable opportunity to consider it, the fact there might have been a different outcome could not be ignored. As such, the court rejected the defendant's claim for indemnity costs.

Considerations

This case is a timely reminder of the factors a court will consider when determining an order for costs. Merely because a plaintiff succeeds on a part of their claim does not necessarily mean they will be entitled to costs. Certainly, and as seen in this decision, courts will consider the outcome of the proceedings as a whole and, if appropriate, seek to find an appropriate balance on costs – whether that be apportioning the order or finding wholly for one party.

In making its claim for costs, a party should look closely at the respective parties' responsibility for incurring costs and whether those costs attach to successful or unsuccessful issues. Parties should be wary of allowing issues to proceed to trial for the sole purpose of brinkmanship or negotiation tools, rather than on the basis of any true belief they ought to be disputed.

This decision was also useful in highlighting when a party may be held not have had a reasonable opportunity to accept an offer. That said, this case was unique given the plaintiffs were unpresented and reportedly distracted by ill health. Nonetheless, in presenting an offer of compromise, a party should ensure it is a genuine offer, allows reasonable time for acceptance, and includes arguments in support of the reasonableness of the offer made. It is also important to note that, to gain the most costs protection as possible from the offer, it should be expressly stated that non-acceptance of the offer will be relied upon in seeking a claim for *'costs, including indemnity costs.'*

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[1] *Larsen v Grace Worldwide (Aust) Pty Limited (No 2)* [2015] NSWSC 1224.
[2] The majority of which was claimed in Euros for alleged damage/contamination to property in Germany.
[3] They remained unrepresented through the trial.

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