FEDERAL COURT OF AUSTRALIA

Fitzpatrick v Isaacs (No 2) [2024] FCA 1454

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| File number: |  |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 18 December 2024 |
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| Catchwords: | **COSTS** – costs following review of Registrar’s decision – where Registrar ordered security for costs against two plaintiffs – where security only ordered against one plaintiff on review – whether costs should be in the cause |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) |
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| Cases cited: | *Australian Trade Commission v Disktravel* [2000] FCA 62*BHP Billiton Iron Ore Pty Ltd v National Competition Council (No 2)* [2007] FCA 557*Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219*HP Mercantile Pty Ltd v Dierickx (No 2)* [2012] NSWSC 1430*Kazar, in the matter of Frontier Architects Pty Limited (in liq) (No 2)* [2010] FCA 1474*Newtimber (Operations) Pty Ltd v Tarong Energy Corporation Limited (No 2)* [2011] FCA 363*O’Keeffe Nominees Pty Ltd v BP Australia Ltd (No 2)* (1995) 55 FCR 591*Oshlack v Richmond River Council* (1998) 193 CLR 72 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 31 |
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| Date of last submissions: | 6 December 2024 |
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| Date of hearing: | Determined on the papers  |
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| Counsel for the Plaintiffs and the Second Cross-Defendant: | Mr A Kirby |
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| Solicitor for the Plaintiffs and the Second Cross-Defendant: | Nicholas O’Donohue and Co |
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| Counsel for the Defendants and the Cross-Claimant: | Mr E Olivier |
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| Solicitor for the Defendants and the Cross-Claimant: | S&A Law |
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| Counsel for the First Cross-Defendant: | The First Cross-Defendant did not appear |

ORDERS

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|  | QUD 365 of 2023 |
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| BETWEEN: | HEATH FITZPATRICKFirst PlaintiffTOR CAPITAL PTY LTD (ACN 632 062 885)Second Plaintiff |
| AND: | SIMON ISAACSFirst DefendantOSCARSUN PTY LTD (ACN 164 998 556) AS TRUSTEE FOR THE ISAACS FAMILY TRUSTSecond DefendantEBROKER.COM.AU PTY LTD (ACN 606 329 800)Third Defendant |
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| AND BETWEEN: | EBROKER.COM.AU PTY LTD (ACN 606 329 800)Cross-Claimant |
| AND: | VINE CAPITAL PTY LTD ACN 633 897 408 (and another named in the Schedule)First Cross-Defendant |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 18 December 2024 |

THE COURT ORDERS THAT:

1. The second plaintiff is to pay 80% of the defendants’ costs of the application for security for costs, both before the Registrar and before the Court, to be taxed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

1 On 17 October 2024, the defendants obtained an order requiring the second plaintiff to provide security in the sum of $160,000 in respect of the costs of the proceedings brought against them. That decision followed a review of a determination of a Registrar of this Court made on 4 December 2023, which had required that both plaintiffs provide security in that sum.

2 The parties now ask the Court to determine the question of costs on the papers. The defendants seek an order that they be entitled to their costs of the application for review. The plaintiffs, on the other hand, seek an order that those costs be the parties’ costs in the cause.

## Background

3 The background facts relevant to the issue of costs can be briefly stated.

4 Mr Fitzpatrick is the sole director of the second plaintiff, Tor Capital Pty Ltd (Tor Capital). Through a corporate vehicle, he also holds a 25% shareholding in it.

5 Mr Fitzpatrick and Tor Capital commenced the present proceeding on 23 August 2023, which is essentially an oppression action. The oppression allegations are made against the third defendant company, Ebroker Pty Ltd.

6 Mr Fitzpatrick and Tor Capital are represented by the same solicitors and counsel.

7 On 21 September 2023, the defendants filed their interlocutory application seeking security for costs up to and including the trial of the plaintiffs’ claim.

8 On 4 December 2023, the Registrar ordered that the plaintiffs provide security for the defendants’ costs up to but not including trial in the amount of $160,000.

9 The plaintiffs subsequently sought a review of the Registrar’s decision.

10 A decision on the review was given on 17 October 2024, the effect of which was that the first plaintiff, Mr Fitzpatrick, was not required to provide security, and that the obligation to provide security fell solely on the second plaintiff, Tor Capital.

## The appropriate order as to costs

11 It is undoubted that, under s 43 of the *Federal Court of Australia Act 1976* (Cth), the Court has a wide discretion in relation to making orders for the costs of any proceedings.

12 However, it is also well established that, as a general rule, costs should follow the event, in that they are usually awarded in favour of the successful party: see *Oshlack v Richmond River Council* (1998) 193 CLR 72, 86 [35], 96 – 97 [66] – [67], 120 – 123 [134]. In that principle, the “event” is understood as referring to the “practical result” of a particular claim: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219 [15].

13 Without in any way diminishing the broad discretion, it is also generally accepted that where, in a proceeding, there are multiple parties or issues, and the victor has met with mixed success, the Court’s legitimate discretion extends to the making of a single order for costs, albeit apportioned to reflect the partial success: see *Kazar, in the matter of Frontier Architects Pty Limited (in liq) (No 2)* [2010] FCA 1474 [10] – [13]; *BHP Billiton Iron Ore Pty Ltd v National Competition Council (No 2)* [2007] FCA 557 [11]. The task of making such an apportionment is an evaluative one: *Australian Trade Commission v Disktravel* [2000] FCA 62 [5]: which is necessarily “impressionistic and intuitive”, though informed by “the extent to which particular issues contributed to the costs” and the extent to which a party was ultimately successful: *HP Mercantile Pty Ltd v Dierickx (No 2)* [2012] NSWSC 1430 [32].

14 It was suggested that, in relation to applications for security for costs, the costs should be reserved, in the cause or, if the defendant is successful, that the costs be the defendant’s costs in the cause. The justification given for this was that, if the defendant is ultimately not successful, it should not be entitled to recover the costs of an application for security which was effectively inutile and should not have been made.

15 However, the breadth of the discretion renders it inappropriate to limit it by general rules or guidelines. Moreover, applications such as the current one are commonplace and, as such, the parties know (or should know) the relevant principles on which they will be determined. They are also cognisant of the materials required for the application. Further, it is usual that the evidence on which the parties rely for the application is not revisited in the course of the hearing of the action. In this sense, the application is self-contained, determined on its own material and principles, and any order made that security be provided is not conditional or contingent.

16 There is, therefore, no reason why parties who join issue on such an application should not be subject to the usual rule for costs: cf *Newtimber (Operations) Pty Ltd v Tarong Energy Corporation Limited (No 2)* [2011] FCA 363 [14] – [17], [32] – [33]; *O’Keeffe Nominees Pty Ltd v BP Australia Ltd (No 2)* (1995) 55 FCR 591, 598 – 599. The party against whom the application is made can consider its merits and respond accordingly. If they unwisely oppose it, it is appropriate that they pay the costs of doing so and that is so even if that party is ultimately successful in the litigation. The purpose of the order is to provide security for the contingency that the action is not successful. Its import is not diminished merely because that contingency does not come about.

### The “event”

17 In this matter there is some nuance in the identification of the “event”. The application made by the defendants was for the plaintiffs to provide security for costs in an amount of $241,890. The outcome of the application was that an order was made that Tor Capital provide security in the sum of $160,000.

18 The plaintiffs opposed the making of any order for security. They submitted that they were successful in doing so on the review of the Registrar’s decision, in that the defendants did not obtain the amount sought, and neither did they obtain an order against both parties. That submission should be rejected.

19 At the end of the day, the defendants’ application for security was substantially successful. Security was ordered and for a significant amount. Moreover, the amount was not far from that sought in the interlocutory application.

20 However, it is relevant that no security was ordered to be provided by Mr Fitzpatrick, even though it had been sought from him. It was found that there was insufficient evidence to establish that he was relevantly impecunious, and that there were no additional factors present which might have rendered it just to make an order for security against an individual. In that sense, the application against him failed.

21 Whilst the application against each of the plaintiffs involved a consideration of their own specific issues, the application as a whole involved many overlapping ones. In this respect, it is somewhat difficult, if not impossible, to disentangle the several issues as they applied to the two plaintiffs. To a substantial degree, the application was heard on the same evidence and the issues were sufficiently overlapping such that it can be said that the making of the claim against both plaintiffs made the application only marginally more complex than it would have been had it been made against only one. For that reason, it can be expected that the additional costs expended to make the application against Mr Fitzpatrick were not substantial.

22 The position is that the defendants were required to bring the application in order to obtain an order for security for costs against Tor Capital, and the costs and expenses involved in such an application were only marginally increased because it was brought against Mr Fitzpatrick as well. In order for the defendants to be compensated for the costs of bringing the application, they should be entitled to an order extending to nearly all of the costs (on a party and party basis) which they incurred.

23 It seemed to be suggested that, as the defendants were completely successful before the Registrar but “lost ground” on the review before the Court, some additional discounting should be made. Whilst that might be appropriate in some circumstances, it does not seem to be here. It must not be forgotten that, as a matter of substance, the hearing before the Registrar and the Court are all part of the one decisional continuum, and the *de novo* review by the Court is a necessary part of the one exercise of power to make the order. The review before the Court is not analogous to an appeal and it ought not to be treated as being wholly distinct and separate from the Registrar’s consideration.

24 Moreover, whilst orders were sought against each of the plaintiffs, the purpose of the application was so that the defendants might obtain security in respect of the costs which they will expend in defending the proceedings which have been brought against them. Ultimately, they obtained an order that achieved the application’s purpose. It was largely irrelevant whether it was achieved against either plaintiff or both.

### An apportionment

25 Nevertheless, the defendants accepted that some discounting should be made to take into account the fact that the application did not succeed as against Mr Fitzpatrick, and there are not unreasonable arguments as to why that should occur. In particular, that the overlap of issues in the application as between Mr Fitzpatrick and Tor Capital were not entirely identical, and there were some issues relevant only to Mr Fitzpatrick, such as his personal financial position.

26 This lack of coherency in issues as between the two plaintiffs can justify some discounting in circumstances such as the present. Naturally, any discounting cannot be precise, and it must necessarily adopt a broad-brush approach based on more on impression than calculus.

27 In this case, a 20% discount is appropriate given the quantum of importance of the issues which were directly relevant to the claim against Mr Fitzpatrick or which also involved Mr Fitzpatrick in a way that increased the relevance of the issue to the overall outcome.

### Conclusion on the issue of the costs of the application

28 It follows that Tor Capital should pay 80% of the defendants’ costs of the application for security for costs before the Court.

### Costs before the Registrar

29 The same order for costs should be made in relation to the hearing before the Registrar. The plaintiffs resisted the making of any order for costs before the Registrar and whilst the Registrar’s order was not entirely adopted by the Court, it was substantially the same.

30 Further, as the decision of the Registrar is part of the one decision making process, the overall outcome of the application can be taken to be the yardstick by which the costs are determined. That being so, the costs order in relation to that part of the application should also require Tor Capital to pay 80% of the defendants’ costs.

## Disposition

31 In the result, it is appropriate to order that the second plaintiff pay 80% of the defendants’ costs of the application for security for costs, both before the Registrar and before the Court, to be taxed or agreed.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 18 December 2024

SCHEDULE OF PARTIES

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|  | QUD 365 of 2023 |
| Cross-Defendants |  |
| Second Cross-Defendant | HEATH FITZPATRICK |