

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL DIVISION  
GENERAL LIST

Revised  
Not Restricted  
Suitable for Publication

Case No. CI-20-04630

ALL CONVEYOR PRODUCTS PTY LTD (IN LIQUIDATION)

Plaintiff

v

NATALIE MITREVSKI (aka Natalia Mitrevski)

First Defendant

AND

KRYSTAL LEE TOSEVSKI

Second Defendant

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JUDGE:

HIS HONOUR JUDGE COSGRAVE

WHERE HELD:

Melbourne

DATE OF HEARING:

The parties were directed to file written submissions in relation to the form of final order and costs, which the Plaintiff did on 9 June 2021. The First Defendant advised the Court that she would not be filing any written submissions.

DATE OF JUDGMENT:

2 July 2021

CASE MAY BE CITED AS:

All Conveyor Products Pty Ltd (in liq) v  
Mitrevski & Anor (No 2)

MEDIUM NEUTRAL CITATION:

[2021] VCC 882

**REASONS FOR JUDGMENT (No 2)**

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Subject:

COSTS

Catchwords:

Indemnity costs – offer of compromise

Legislation Cited:

*County Court Act 1958; County Court Civil Procedure Rules 2018; Supreme Court Act 1986;*

Cases Cited:

*Cretazzo v Lombardi* (1975) 13 SASR 4; *Donald Campbell & Co v Pollak* [1927] AC 732; *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397; *Latoudis v Casey* (1990) 170 CLR 534; *McFadzean and Ors v Construction, Forestry, Mining and Energy Union and Ors* (2007) 20 VR 250; *Oshlack v Richmond City Council* (1998) 193 CLR 72; *Ritter v Godfrey* (1920) 2 KB 47; *Taylor v Pace Developments Pty Ltd* [1991] BCC 406; *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189; *Woollf v Burmon* (1939) 13 ALJR 431;

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

A V M Carruthers

Frenkel Partners

For the First Defendant

Self-represented

HIS HONOUR:

### **Introduction**

- 1 On 3 June 2021, I delivered reasons for judgment in this matter (“the principal reasons”). I found that the plaintiff (“ACP”) was entitled to recover from the first defendant (“Mitrevski”) the monies which she had unlawfully taken from ACP, being \$160,000 less \$5,000 which were later re-paid to ACP by the second defendant (“Tosevski”).
- 2 I directed the parties to confer about the form of final order and costs in an effort to agree upon orders giving effect to my judgment. In the event that the parties could not agree, I directed that by 4:00pm on 9 June 2021, each party was to file with my chambers and serve on the other party a written submission setting out the orders sought and the reasons therefor.
- 3 These reasons address the final orders and the issue of costs. They assume familiarity with the principal reasons and use the same terminology.

### **ACP Position**

- 4 ACP filed an affidavit sworn by Anna Alevizopoulos on 9 June 2021 in which she referred to an offer of compromise which the plaintiff sent Mitrevski on 14 April 2021. The offer of compromise, which was expressed to be served in accordance with Part 2 of Order 26 of the *County Court Civil Procedure Rules 2018*, offered to settle the case for a payment of \$140,000 inclusive of interest and costs. The offer was open for acceptance within 14 days.
- 5 Ms Alevizopoulos deposed that, on 6 May 2021, Mitrevski sent her an email which referred to the offer made to Mitrevski to settle the claim.
- 6 Ms Alevizopoulos also filed submissions in support of ACP’s application. ACP noted that it obtained judgment for \$155,000. ACP sought interest pursuant to statute:

- (a) from the date of each advance – that is, on \$80,000 from 17 December 2014 to 18 December 2014 and on \$160,000 from 19 December 2014 to the date of the entry of judgment; or
  - (b) from the date of the first written demand to Mitrevski, being 16 June 2016; or
  - (c) from the commencement of the proceeding.
- 7 With respect to costs, ACP contended that it should obtain costs on an indemnity basis from the commencement of the proceedings or, alternatively, from the date of the offer of compromise.

### **Mitrevski Position**

- 8 Mitrevski did not file any affidavit material or submissions regarding the form of final orders or costs. However, she did send an email to the court advising that she was appealing the judgment against her.

### **Consideration**

- 9 ACP argued that it was entitled to pre-judgment interest. It submitted that because Mitrevski had unlawfully deprived ACP of its money from the time she transferred the funds from its account, it was appropriate to order interest for the entire period from when the initial transaction occurred until the entry of judgment. ACP relied upon section 58 or, alternatively, section 59 of the *Supreme Court Act 1986*.
- 10 Section 58(1) of the *Supreme Court Act 1986* provides as follows:

*“If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the Penalty Interest Rates Act 1983 or, in respect of any bill of exchange or promissory note, at 2% per annum more than that rate from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain) or, if payable otherwise, then from the time when demand of payment was made.”*

11 Section 59(1) of the same Act provides:

*“The Court, on application in all proceedings for trover or trespass concerning goods, must, unless good cause is shown to the contrary, give damages in the nature of interest over and above the value of the goods at the time of the conversion.”*

12 I regard section 59(1) of the *Supreme Court Act 1986* as irrelevant in the present context. The cause of action was not for trover or trespass concerning goods but the recovery of monies taken from the ACP bank account without permission.

13 In general terms, I agree with ACP’s submission that where a plaintiff recovers a debt or a sum certain, that party is prima facie entitled to interest from the time the debt or sum was payable unless the defendant satisfies the court that there is good cause for a contrary order. Here, because Mitrevski effectively stole the money, ACP argues that it should recover interest from the time when Mitrevski appropriated the funds.

14 Alternatively, ACP says it should obtain interest from the date of first demand, which I infer from ACP’s submissions, was 16 June 2016.

15 In my view, it is appropriate to make an order for interest from the date when the respective funds were removed from ACP’s account and put into Mitrevski’s account in December 2014. This means that interest runs on \$80,000 from 17 September 2014 and then on \$160,000 from 19 December 2014. Because ACP received \$5,000 earlier this year, after the mediation held in May, the interest should be calculated on a principal amount of \$160,000 until 1 May 2021, and, thereafter, on a principal of \$155,000. Accordingly, I find that the interest payable to ACP is \$102,956.44. I attach as Annexure A to this judgment the relevant calculations. Hence, the total judgment amount payable to ACP is approximately \$263,000.

## Costs

- 16 ACP seeks the costs of the proceeding on an indemnity basis or alternatively, on a standard basis until the making of its offer of compromise and thereafter, on an indemnity basis. ACP contended that Mitrevski ought never to have taken its monies because there was no proper basis for her either to take them in the first place or to resist their immediate return when demanded. Having wrongfully appropriated the money, she ought to have repaid it on any of the occasions when ACP demanded the money before it issued proceedings.
- 17 In considering the award of costs to ACP, the court has a broad discretion which is to be exercised judicially and not arbitrarily or capriciously.
- 18 There are some well accepted legal principles with respect to the court's powers regarding costs:
- (a) the only immutable rule in relation to costs is that there are no immutable rules;<sup>1</sup>
  - (b) the award of costs is within the discretion of the court or the particular judge hearing an application or trial;<sup>2</sup>
  - (c) the discretion must be exercised judicially.<sup>3</sup> It cannot be exercised arbitrarily or capriciously. Nor can it be exercised on grounds unconnected with the litigation<sup>4</sup> or the circumstances leading up to the litigation;<sup>5</sup>
  - (d) costs are compensatory in the sense they are awarded to indemnify the successful party against the expense to which it has been put by reason of

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<sup>1</sup> *Taylor v Pace Developments Pty Ltd* [1991] BCC 406.

<sup>2</sup> *s 78A County Court Act 1958* (Vic).

<sup>3</sup> *Donald Campbell & Co v Pollak* [1927] AC 732.

<sup>4</sup> *Cretazzo v Lombardi* (1975) 13 SASR 4.

<sup>5</sup> *Oshlack v Richmond City Council* (1998) 193 CLR 72.

the legal proceedings. The aim of a costs order is not to punish the unsuccessful party;<sup>6</sup>

(e) as a general rule, costs should follow the event with the result that, in the absence of special circumstances, a successful party should obtain its costs of the proceeding even if it fails to establish some of its alternative heads of claim;<sup>7</sup> and

(f) rule 63A.04 of the *County Court Civil Procedure Rules 2018* permits the court, in its discretion, to make an order not only as to a distinct question or issue in the pleading sense, but also to any part of the proceeding.<sup>8</sup>

19 In the present case ACP seeks a costs order on an indemnity basis as opposed to the more usual standard basis. Traditionally, a party such as ACP seeking such an order would need to establish that there was something special about this case to warrant an award of costs at the higher level. In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*<sup>9</sup> Woodward J said:

*"I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs whenever it appears that an action had been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion."*

20 In *Ugly Tribe Co Pty Ltd v Sikola*<sup>10</sup>, Harper J said that circumstances in which it had been held proper to order indemnity costs included the following:

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<sup>6</sup> *Latoudis v Casey* (1990) 170 CLR 534.

<sup>7</sup> *Ritter v Godfrey* (1920) 2 KB 47; *McFadzean and Ors v Construction, Forestry, Mining and Energy Union and Ors* (2007) 20 VR 250.

<sup>8</sup> *Woolf v Burmon* (1939) 13 ALJR 431; *Cretazzo v Lombardi* (1975) 13 SASR 4.

<sup>9</sup> (1988) 81 ALR 397, 401.

<sup>10</sup> [2001] VSC 189.

- (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;
- (b) the making of an irrelevant allegation of fraud;
- (c) conduct which causes loss of time to the court and to other parties;
- (d) the commencement or continuation of proceedings for an ulterior motive;
- (e) conduct which amounts to a contempt of court;
- (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and
- (g) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which would have considerably shortened, and very possibly avoided, the trial.

21 Here, Mitrevski continued to defend the proceeding in circumstances where, properly advised, she should have known that she had no chance of success. She continued the litigation in disregard of known facts and clearly established law. Because she was self-represented, Mitrevski is perhaps less at fault than she might have been if she were represented by competent lawyers. However, the defendant has caused ACP to spend significant time and resources dealing with the litigation. The intent of an award of costs is to provide some indemnity to the successful party in relation to the expense of legal fees incurred in conducting the litigation. It is both just and reasonable for the unsuccessful party who caused the other to incur significant litigation costs to reimburse that party, at least in part, for those costs.

22 While Mitrevski was self-represented, I consider an order for indemnity costs is appropriate. Mitrevski intentionally took money from ACP notwithstanding that she



knew that company did not owe her money and was not the legal person against whom she claimed the debt.

- 23 Alternatively, ACP sought an order for indemnity costs from 16 April 2021. Consistently with the provisions of rule 26.08(2)(b), ACP asked that the order for indemnity costs take effect from 11:00am on the second business day after the offer of compromise was served (being 14 April 2021).
- 24 Under rule 26, the offer of compromise must be in writing, expressed to be served in accordance with rule 26 and either inclusive or exclusive of costs. Further, its terms must be clear and the recipient must have a minimum period of 14 days to accept the offer. I consider that ACP's offer of compromise satisfied these criteria.
- 25 Where a defendant fails to accept a plaintiff's offer and the judgment is no less favourable than the terms of the offer, then unless the court otherwise orders, the plaintiff is entitled to an order for costs to be taxed on a standard basis until 11:00am on the second business day after the offer was served, and thereafter on an indemnity basis. This applies to all cases other than for damages arising from death or bodily injury.
- 26 The judgment was for \$155,000 exclusive of interest and costs. The offer was for \$140,000 all in. Because the offer of compromise included both interest and costs, the judgment obtained was significantly more favourable. In addition to the \$155,000, there was interest exceeding \$100,000 and an order for costs of the proceeding which included a 3 day trial. I expect the costs order to be substantial. In the circumstances I consider that ACP is entitled to an order for costs of the proceeding, such costs to be taxed on a standard basis until 11:00am on 16 April 2021 and thereafter, on an indemnity basis.

## Conclusion

27 Accordingly, I make the following orders:

- (a) there be judgment for the plaintiff against the defendant in the sum of \$155,000 together with interest in the sum of \$102,956.44; and
- (b) the defendant pay the plaintiff's costs of the proceeding, including reserved costs, such costs to be taxed on an indemnity basis in default of agreement.

## "Annexure A"

Interest						
Amount	Start Date	End Date	Days	Rate	Amount per Day	Total
\$80,000	17.12.2014	19.12.2014	3	10.5%	\$23.0137	<b>\$69.04</b>
\$160,000	20.12.2014	30.04.2021				<b>\$100,806.58</b>
	(20.12.2014 - 31.05.2015)		163	10.5%	\$46.0274	\$7,502.47
	(01.06.2015 - 31.01.2017)		611	9.5%	\$41.5757	\$25,402.74
	(01.02.2017 - 30.04.2021)		1550	10%	\$43.8073	\$67,907.37
\$155,000	01.05.2021	18.06.2021	49	10%	\$42.4658	<b>\$2,080.82</b>
					<b>TOTAL</b>	<b>\$102,956.44</b>