

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

S ECI 2021 03672

IN THE MATTER of AMVILLE CONSTRUCTIONS PTY LTD (ACN 609 475 149)

BETWEEN:

AMVILLE CONSTRUCTIONS PTY LTD
(ACN 609 475 149)

Plaintiff

- and -

L.S. BRICKLAYING (VIC) PTY LTD
(ACN 628 370 909)

Defendant

ORDER

ASSOCIATE JUDGE: The Honourable Associate Justice Hetey

DATE MADE: 25 March 2022

ORIGINATING PROCESS: Filed on 6 October 2021

HOW OBTAINED: On the papers

APPEARANCES: None

OTHER MATTERS:

- A. This order is signed by the Associate Judge pursuant to Rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
- B. On 6 October 2021, the plaintiff filed an originating process to set aside the defendant's statutory demand dated 15 September 2021. On 17 February 2022, following a hearing on 21 December 2021, the Court published its reasons for decision in this matter.¹ The Court determined that the statutory demand be varied under s 459H(4) of the *Corporations Act 2001* (Cth) ('**the Corporations Act**').
- C. The Court's orders of 22 February 2022 contemplated that the parties should each file and serve short written submissions on the question of costs. The plaintiff filed submissions in relation to costs on 3 March 2022 and the defendant also did so on 8 March 2022.

¹ *Re Amville Constructions Pty Ltd* [2022] VSC 65 ('*Re Amville Constructions*').

- 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, that is, not by 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 his or her costs.⁴
- E. Where a company succeeds in setting aside a statutory demand, the Court will usually order that the company be awarded costs pursuant to the general principle that costs should follow the event,⁵ however, each case will turn upon its own facts.⁶ There are instances where the Court has determined that it is appropriate that the plaintiff company pay the defendant creditor's costs even where a demand is set aside.⁷
- F. Where multiple issues are raised in a proceeding and the parties achieve mixed success on those issues, the Court is entitled to adopt a pragmatic approach, taking into consideration the success (or lack of success) of the parties on an issues basis and award the successful party a proportion of its costs.⁸ In the context of a statutory demand, there are cases in which the Court has apportioned costs to reflect the respective degree of success of each party during the proceeding.⁹
- G. An award of costs is usually on a standard basis unless there are special or unusual features warranting an order for costs on an indemnity basis.¹⁰ Such circumstances include where:
- a. proceedings are commenced or continued for an ulterior motive;¹¹
 - b. proceedings are commenced or continued in disregard of known facts or clearly established law;¹²

² See s 24 of the *Supreme Court Act 1986* (Vic) and s 65C of the *Civil Procedure Act 2010* (Vic).

³ See *Innes-Irons v Forrest* [2017] VSC 10, [5] (Derham AsJ); *Towercom Pty Ltd v Fahour (No 4)* [2013] VSC 585, [6] (Derham AsJ) ('*Towercom*'); *Latoudis v Casey* (1990) 170 CLR 534; *Oshlack v Richmond River Council* (1998) 193 CLR 72, 86 (Gaudron and Gummow JJ) ('*Oshlack*').

⁴ *Towercom* [2013] VSC 585; *Ritter v Godfrey* [1920] 2 KB 47, 5 (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; *Oshlack* (1998) 193 CLR 72.

⁵ *Global Alliance Network v Sensis Pty Ltd* [2007] NSWSC 967.

⁶ *Ford Motor Co of Australia Ltd v Arrowcrest Group Pty Ltd* [2003] FCA 597; *Invest Pty Ltd v Metyor Inc* [2003] NSWSC 879; *Blazai Pty Ltd v Palasty* [2011] NSWSC 225.

⁷ *Eumina Investments Pty Ltd v Westpac Banking Corp* (1998) 84 FCR 454.

⁸ *Chen v Ors v Chan & Ors* [2009] VSCA 233 [10] (Maxwell P, Redlich JA and Forrest JA). This approach was recently followed in *Lendlease Engineering Pty Ltd v Owners Corporation No 1 & Ors (Costs)* [2021] VSC 471 at [21] (Forbes J).

⁹ *Re Tetbury Pty Ltd* [2017] NSWSC 139 [7]-[8] (Black J); *Citadel Financial Corporation Pty Ltd (No 2)* [2019] NSWSC 221.

¹⁰ See *Colgate Palmolive Company v Cussens Pty Ltd* (1993) 46 FCR 225 ('*Colgate v Cussens*'); *Ugly Tribe Co Pty Ltd v Sikola & Ors* [2001] VSC 189; *Yap v Lee* [2019] VSC 743.

¹¹ *Ragata Developments Pty Ltd v Westpac Banking Corporation* (1993) 217 ALR 175.

¹² *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301.

- c. a defendant raises issues that could not succeed in establishing a defence and the proceeding was entirely unnecessary;¹³ or
 - d. there is an imprudent refusal of an offer to compromise.¹⁴
- H. The plaintiff was partially successful in its application to set aside the defendant's statutory demand as the demand was varied under s 459H(4) of the Act. In essence, the Court held that there was a genuine dispute in respect of the defendant's entitlement to payment for a portion of alleged defective and incomplete brickwork and that, if required, a genuine offsetting claim would have been found for the same amount on the same basis. However, the plaintiff failed to establish a number of other grounds including that:
- a. the plaintiff was not responsible for payment of the defendant's invoice;
 - b. there was a genuine dispute as to the parties to the relevant subcontract;
 - c. there was a genuine dispute about whether the defendant had overcharged for work; and
 - d. the statutory demand should be set aside for 'some other reason' because it was accompanied by a covering letter which made an improper demand for payment of legal costs.
- I. The plaintiff contends that given the partial success of the matter, an apportionment of costs is warranted. Specifically, the plaintiff seeks an order that the defendant pay 25 per cent of the plaintiff's costs of the proceeding on a standard basis. In the alternative, the plaintiff seeks a 25 per cent reduction in any award of costs in the defendant's favour.
- J. Conversely, the defendant seeks an order that the plaintiff pay its costs of the application as to 25 per cent on a standard basis and 75 per cent on an indemnity basis. Alternatively, an order is sought that the entirety of the defendant's costs be paid on a standard basis. The defendant contends indemnity costs are appropriate given that:
- a. the demand was not set aside;
 - b. the plaintiff did not succeed on most of the arguments it raised;
 - c. the Court stated that the offsetting claim 'barely succeeded' in relation to a portion of the alleged defective and incomplete brickwork;¹⁵
 - d. the time and cost of the application has been disproportionate to the quantum sought in the demand;
 - e. the majority of the material filed was held to be unmeritorious;
 - f. the Court noted various deficiencies in the plaintiff's evidence;
 - g. the plaintiff's case was constantly changing;¹⁶ and

¹³ *Specialist Australian Security Group Pty Ltd (in liq) v Onwatch Pty Ltd* [2017] VSC 184.

¹⁴ *Colgate v Cussens*, 223 (Sheppard J).

¹⁵ *Re Amville Constructions* [40]. Similarly, the genuine dispute in relation to the same portion of the alleged defective and incomplete brickwork was found to have belatedly, but barely, cleared the requisite evidentiary hurdle (at [39]).

¹⁶ In relation to this contention, it is noted that a different offsetting claim and argument about abuse of process and a purported collateral purpose were formally abandoned at the hearing. The offsetting claim ultimately pressed was only clearly articulated at

- h. notwithstanding its obligations under the *Civil Procedure Act 2010* (Vic) ('the CPA') (particularly, ss 23-24), the plaintiff failed to use reasonable endeavours to narrow the issues in dispute, or to ensure costs were reasonable or proportionate to the complexity and quantum involved.
- K. Despite the criticisms about the manner in which the plaintiff conducted the application, it is not appropriate that costs be paid on an indemnity basis. The Court's ultimate finding of the existence of a genuine dispute required a close consideration of the affidavit evidence relied upon by the parties and the plaintiff's position was not in obvious disregard of known facts or clearly established law. Further, there is insufficient material before the Court to conclude that the plaintiff has clearly contravened its obligations under the CPA in order that such a contravention be taken into account on the question of costs in accordance with s 28 of the CPA. Nor has any formal application in respect of the alleged contravention been made as contemplated by s 29 of the CPA. Further, the Court considers the defendant's proposed formulation of costs order (as to 25 per cent on a standard basis and 75 per cent on an indemnity basis) to be impracticable for the purposes of taxation.
- L. In the exercise of the Court's discretion, and balancing all of the considerations referred to above, it is appropriate that the defendant be awarded its costs of the proceeding on a standard basis. Although the plaintiff obtained a slight variation on the statutory demand, the manner in which it conducted the proceeding was haphazard and productive of unnecessary costs. This conduct distinguishes the case from *Re Citadel Financial Corporation Pty Ltd (No 2)*¹⁷ in which a demand was slightly varied and the plaintiff was awarded 25 per cent of its costs. The plaintiff here was also ultimately unsuccessful in relation to most of the arguments it advanced.
- M. The plaintiff will be required to pay the defendant's costs on a standard basis, such costs to be taxed in default of agreement.

THE COURT ORDERS THAT:

1. The plaintiff pay the defendant's costs of the proceeding, including reserved costs, on a standard basis, such cost to be taxed in default of agreement.

DATE AUTHENTICATED: 25 March 2022

THE HONOURABLE ASSOCIATE JUSTICE HETYEY



the final hearing of the matter. Further, the brickwork said to be defective or incomplete was only specifically identified at the hearing of the matter and not in the affidavit material filed by the plaintiff.

¹⁷ [2019] NSWSC 221.