

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

Revised  
Not Restricted  
Suitable for Publication

Case No. CI-19-04623

H & Q CAFE PTY LTD (ACN 624 852 179)

Plaintiff

V

MELBOURNE CAFE PTY LTD (ACN 605 627 487)

First defendant

and

JIANG ZHANG

Second defendant

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JUDGE:

HER HONOUR JUDGE A RYAN

WHERE HELD:

Melbourne

DATE OF HEARING:

On the papers, defendants' written submissions filed 15 July 2022, plaintiff's reply submissions filed 21 July 2022

DATE OF RULING:

26 July 2022

CASE MAY BE CITED AS:

H & Q Cafe Pty Ltd v Melbourne Cafe Pty Ltd (No 2)

MEDIUM NEUTRAL CITATION:

[2022] VCC 1158

**RULING**

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Subject: PRACTICE AND PROCEDURE – COSTS

Catchwords: Costs – whether costs should follow the event - plaintiff awarded nominal damages only – defendants seeking their costs – which party should be regarded as the successful party

Legislation Cited: *County Court Civil Procedure Rules* 2018

Cases Cited: *Cargill Australia Ltd v Viterro Malt Pty Ltd (No 31)* [2022] VSC 164; *KSG Investments Pty Ltd v Open Markets Group Ltd (No 2)* [2021] VSC 359; *NCON Australia Ltd v Spotlight Pty Ltd [No 7]* [2014] VSC 25; *Saafin Constructions Pty Ltd (in liq) & Ors v MAG Financial and Investment Ventures Pty Ltd & Ors (Costs and Orders)* [2021] VSC 702

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Ms G A Costello QC with  
Ms A Carruthers

Verge Legal

For the Defendants

Mr L Virgona

Alderuccio Solicitors

HER HONOUR:

- 1 On 8 July 2022, I delivered reasons for judgment in this matter (“the principal reasons”).<sup>1</sup> The plaintiff succeeded in its claims for misleading or deceptive conduct and breach of contractual warranty against the defendants. The plaintiff failed to prove its claim for damages in the misleading or deceptive conduct claim. I awarded the plaintiff nominal damages in the sum of \$100 for the breach of contractual warranty claim.
- 2 The parties were directed to confer and file a minute of proposed orders or, failing agreement, to file and serve submissions regarding the orders to be made consequent upon the reasons, including costs. These reasons assume familiarity with the principal reasons and adopt the same terminology.
- 3 On 15 July 2022, the defendants filed submissions on costs. The same day, the plaintiff’s solicitor sent a letter to the Court advising that the plaintiff adopts the form of costs order proposed in the principal reasons. The order proposed was that the defendants pay the plaintiff’s costs of the proceeding on the standard basis to be taxed in default of agreement.<sup>2</sup>
- 4 On 21 July 2022, the plaintiff filed reply submissions on costs.

### **Defendants’ submissions**

- 5 The defendants submit the plaintiff, having prosecuted a claim for the sole purpose of achieving a substantial award of damages but awarded only \$100 in nominal damages, must be considered the wholly unsuccessful party in the proceeding. Accordingly, they seek their costs of the proceeding, including any reserved costs, on the standard basis to be taxed in default of agreement.

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<sup>1</sup> *H & Q Café Pty Ltd v Melbourne Café Pty Ltd* [2022] VCC 1017

<sup>2</sup> *Ibid* at [150]

- 6 The defendants rely on the following passage from Dal Pont's *Law of Costs*:<sup>3</sup>

"As costs usually follow the event, and the event equates to 'success' in the suit, the court must first decide whether a party has in fact been successful. It was once said that the award of nominal damages to a plaintiff are 'a mere peg on which to hang costs'. In other words, for costs purposes, a plaintiff awarded nominal damages was treated as having succeeded. In more recent times, however, courts have doubted whether a plaintiff who recovers only nominal damages should, vis-a-vis the costs discretion, be regarded as successful. In fact, the modern view seems to be the converse of the historical one, such that 'the event will be regarded as going against a party who recovers nominal damages only'. The matter ultimately rests on the facts of each case. The award of nominal damages will not necessarily deny success for costs purpose if some other right is vindicated by the judgment. An example is an action in tort for assault where the damages are nominal but the injury to dignity is not. More generally, if the aim of the suit is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained, a plaintiff who recovers nominal damages may, to that extent, properly be regarded as a successful plaintiff. But in other circumstances, especially if the aim of the suit is to secure a substantial award of damages, an award of nominal damages may be seen as a failure by the plaintiff to establish the claim."

- 7 The defendants also relied upon on a number of Victorian Supreme Court decisions, including *KSG Investments Pty Ltd v Open Markets Group Ltd (No 2)*,<sup>4</sup> where Nichols J states:

"It is now well accepted that a party who has only been awarded nominal damages is not usually entitled to recover costs as they cannot be regarded as the successful party and, further, that the Australian common law (and, indeed, the English common law) no longer regards nominal damages as a "peg on which to hang costs". The discretion to award costs is always dependent upon the facts and circumstances of the individual case and, in particular, on which party can be characterised as the successful party, on the basis of those facts and circumstances." (citations omitted)

- 8 In *Cargill Australia Ltd v Viterro Malt Pty Ltd (No 31)*,<sup>5</sup> Elliot J observed as follows:

"In some circumstances, it may follow that a moving party who has only received nominal damages should have its costs. Such instances may include where proof of a breach of contract was a substantial and vigorously contested aspect of the case at trial, or where the primary purpose of a proceeding was not merely to recover substantial damages but to establish or vindicate some legal right. Conversely, a factor that will militate against a moving party who has only received nominal damages

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<sup>3</sup> (4<sup>th</sup> edition), LexisNexis Butterworths, 2018, 231-4

<sup>4</sup> [2021] VSC 359 at [9]

<sup>5</sup> [2022] VSC 164 at [25]

being considered the successful party is where the real purpose of the proceeding was to obtain substantial damages.” (citations omitted)

- 9 The defendants drew an analogy between this case and *NCON Australia Ltd v Spotlight Pty Ltd [No 5]*,<sup>6</sup> where Robson J found the plaintiff made out the agreement in question was repudiated and breached by the defendant, but failed to prove the damages alleged (in excess of \$1,000,000). His Honour awarded nominal damages of \$1. In assessing costs, His Honour stated:<sup>7</sup>

“As indicated in my judgment, the plaintiff was not one who was unable to prove the quantity of its loss and damage; in fact, it was reasonably able to prove the quantity of loss and damage but failed to do so. I accept that the plaintiff succeeded in establishing the contract and succeeded in establishing its breach despite the fierce opposition of the defendant. Nevertheless, the sole object of the litigation was to recover damages. There was no alternative or further objective to the proceeding other than the recovery of damages. Therefore, as indicated above, in my view, the defendant was the successful party in the litigation and is entitled to its costs.”

- 10 The defendants submit that the only purpose of the plaintiff in this proceeding was to obtain a substantial amount of money from the defendants. They point to the fact that the plaintiff did not seek a declaration that the defendants had engaged in misleading or deceptive conduct in its prayer for relief, despite amending its statement of claim multiple times. Whilst that is true, a court can grant relief when it is appropriate to the facts alleged and proved even though that relief is not claimed.<sup>8</sup>
- 11 The defendants point to the discrepancy between the amount of the claim sought (in excess of \$3,000,000, excluding costs) and the damages awarded (being \$100) as a strong indicator that the defendants should be considered the successful litigant in this proceeding.
- 12 The defendants argue the Court should also give close consideration to the plaintiff’s conduct throughout the proceeding. They contend Mrs Qiu’s conduct

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<sup>6</sup> [2012] VSC 604

<sup>7</sup> *NCON Australia Ltd v Spotlight Pty Ltd [No 7]* [2014] VSC 25 at [22]-[23]

<sup>8</sup> Civil Procedure Victoria at [113.02.40]

was more problematic than that of the second defendant, pointing to her late production or failure to produce relevant documents which the defendants had called for since June 2020, which necessitated the adjournment of the trial part heard from February 2021 to June 2021.

- 13 In conclusion, the defendants submit the plaintiff should not be entitled to any of its costs in circumstances where it:

(a) failed to properly comply with its discovery obligations;

(b) deliberately withheld information from its own expert; and

(c) was awarded only nominal damages which were significantly less than the amount claimed.

### **Plaintiff's submissions**

- 14 The plaintiff argues that substantial justice in this case favours a costs order in its favour. Even if it did not succeed on all heads of claim, the plaintiff submits that costs ordinarily follow the event and a substantially successful litigant is entitled to costs in the absence of special circumstances justifying some other order.<sup>9</sup>
- 15 It contends that the plaintiff's failure to satisfy the Court as to the difference between the purchase price and the true value at the date of acquisition is due to the defendants' conduct in destroying records and presenting false accounts.
- 16 It is further submitted that, whatever the cause of the plaintiff's trading losses, it has incurred losses and not made profits at the expected levels, and would not have proceeded with the purchase of the Parkville Café if it had known the represented financial statements were inaccurate and beset by tax and superannuation irregularities. The plaintiff has funded a trial seeking to recover its

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<sup>9</sup> Citing *Saafin Constructions Pty Ltd (in liq) & Ors v MAG Financial and Investment Ventures Pty Ltd & Ors (Costs and Orders)* [2021] VSC 702 at [28]

losses and a standard costs order will only partly restore the plaintiff's legal costs expenditure.

- 17 The plaintiff further submits that substantial justice calls for an order for the defendants to pay the plaintiff's costs, where the defendants engaged in uncorrected and unrepentant conduct including:
- (a) not lodging corrected tax returns;
  - (b) providing unlodged tax returns to their expert witness;
  - (c) admitting to taxation and superannuation irregularities that have not been corrected or made good;
  - (d) admitting they destroyed evidence and were unable to produce documents needed to show the true financial state of the business at the date of acquisition.
- 18 By comparison, the plaintiff's poor conduct in making inaccurate statements was later corrected by amending the information provided to the CBA and to its expert witness Mr Smith, lodging accurate BAS, and paying taxes owed. The plaintiff also says that the documents which it discovered after the adjournment sought and obtained by the defendants had little to no forensic impact on the trial.

### **Analysis**

- 19 The issue for determination is whether the plaintiff should be ordered to pay the defendants' costs because, having recovered only nominal damages, the plaintiff should be regarded as the unsuccessful party.
- 20 It is correct that the plaintiff was seeking very substantial sums by way of damages and it has failed in that endeavour by receiving only nominal damages.

21 It is now well accepted that the common law no longer regards nominal damages as a “peg on which to hang costs”.<sup>10</sup> But there are no set rules that apply where only nominal damages have been recovered and each case must depend on its own facts.

22 Both parties referred to a decision of Riordan J in *Saafin Constructions Pty Ltd (in liq) & Ors v MAG Financial and Investment Ventures Pty Ltd & Ors (Costs and Orders)*.<sup>11</sup> His Honour set out the various approaches a court may follow in respect of costs where a plaintiff has been awarded only nominal damages, namely:

“Where a plaintiff, whose primary purpose is to recover substantial damages, only recovers nominal damages, generally the plaintiff will not be considered ‘the successful party’ in the proceeding. However, in the exercise of its discretion, the Court may order that:

- (a) the defendant pay the plaintiff’s costs of the proceeding;
- (b) the plaintiff pay the defendant’s costs of the proceeding;
- (c) there be an issues-based costs order; or
- (d) there be no order as to costs.” (citations omitted)

23 His Honour continued at [34]:

“Relevant considerations in the award of costs, after an award of nominal damages, have been found to include:

- (a) whether the finding of a breach amounts to a vindication of rights of some significance; and
- (b) where proof of breach of duty was a substantial and vigorously contested aspect of the case at trial.” (citations omitted)

24 I agree with the defendants’ submission that there is no appropriate way for the question of costs to be addressed on an issues-based approach. The plaintiff’s failure to prove its claim for damages is not readily severable from the other issues that were in dispute.

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<sup>10</sup> See *Actrol Parts Pty Ltd v Coppi (No 3)* [2015] VSC 758 (Bell J) [90]-[91], cf *Beaumont v Greathead* (1846) 2 CB 494 at 499

<sup>11</sup> [2021] VSC 702 at [32]



- 25 The defendants' main defence was that they did not engage in misleading or deceptive conduct on the basis that the figures represented to the plaintiff prior to the sale of the café business were accurate. In support of this defence they relied upon amended but unlodged tax returns which were said to show the true position. The defendants also relied upon various source documents to support the figures in the unlodged amended tax returns but, as it turned out, many of those documents had been destroyed by the defendants. As referred to in the principal reasons, I was not persuaded that the amended tax returns, prepared during the course of the litigation, could be relied upon as presenting a true picture of the affairs of the business whilst being conducted by the defendants. The issue of the defendants' liability was a substantial focus of the case at trial with less attention being paid to the damages claim. I accept the plaintiff's submission that proof of the defendants' breach of their duties was a vigorously contested aspect of the eight-day trial.
- 26 The parties make competing submissions regarding the blame-worthiness of each other's conduct. For the reasons given in the principal reasons, the conduct of both parties was far from exemplary such that neither could be said to be blameless. As a result, this is a neutral consideration in my assessment of who should properly bear the costs of the proceeding.
- 27 As the principal reasons demonstrate, the plaintiff was misled by the defendants, which in turn caused it to buy a business it would otherwise not have purchased. Accordingly, in my view, the findings made by the Court do provide a vindication of the plaintiff's rights following what was a lengthy trial, where the liability of the defendants was a substantial and hard-fought issue. Although the plaintiff received only nominal damages, I am not persuaded that the interests of justice would be best served in this case by ordering the plaintiff to pay the defendants' costs. I remain of the view that costs should follow the event and the defendants should pay the plaintiff's costs of the proceeding.

## Conclusion

28 I will make the following declaration and orders:

- (1) The defendants engaged in misleading or deceptive conduct in contravention of s18 of the *Australian Consumer Law (Competition and Consumer Act 2010, Schedule 2)*.
- (2) Judgment for the plaintiff against the defendants for nominal damages fixed in the sum of \$100.
- (3) The defendants pay the plaintiff's costs of the proceeding, including reserved costs, such costs to be taxed on the standard basis in default of agreement.

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### Certificate

I certify that these 8 pages are a true copy of the Reasons for Ruling of Her Honour Judge A Ryan delivered on 26 July 2022.

Dated: 26 July 2022

Associate to Her Honour Judge A Ryan