



Land and Environment Court New South Wales

Case Name: Fairfield City Council v Camilleri

Medium Neutral Citation: [2020] NSWLEC 43

Hearing Dates: 3-5 April 2020 (written submissions)

Date of Orders: 1 May 2020

Date of Decision: 1 May 2020

Jurisdiction: Class 4

Before: Pain J

Decision: (1) The Council's amended notice of motion dated 27 September 2020 in proceedings 16/203179 and 16/203222 is dismissed.

(2) The Council must pay the Respondent's costs of these proceedings.

Catchwords: COSTS – contempt proceedings – no basis for claim of indemnity costs by local council after finalisation of sequestration orders

Legislation Cited: Fairfield Local Environmental Plan 2013

Cases Cited: Blacktown City Council v Nitopi [2019] NSWLEC 40

EMI Records Ltd v Ian Wallace Ltd [1983] Ch 59; [1982] 2 All ER 980

Gerondal v Eurobodalla Shire Council (No 6) [2011] NSWLEC 132

Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59

Rosniak v Government Insurance Officer (1997) 41 NSWLR 608

Tate v Duncan-Strelec [2020] NSWSC 52

Category: Costs

Parties: Fairfield City Council (Applicant)
Saviour Camilleri (Respondent)

Representation: COUNSEL:
H Grace (Applicant)
C Bolger (Respondent)

SOLICITORS:
Ritchie & Castellan (Applicant)
John Fasha Solicitors (Respondent)

File Numbers: 16/203222, 16/203179

JUDGMENT

- 1 In two Class 4 civil enforcement proceedings commenced in July 2016 by Fairfield City Council (Council) orders were sought that Mr Camilleri (the Respondent) cease using two premises in Horsley Park, one at 223-235 Burley Road (matter number 2016/203222) and the other at 224-234 Delaware Road (matter number 2016/203179) (Properties) for the purpose of a waste or resource management facility as defined in the Fairfield Local Environmental Plan 2013, and remove all waste from the Properties. Since that time, the Respondent has been convicted of contempt for failing to comply with court orders and two writs of sequestration of the Respondent's proprietary interest in the Properties have been discharged.

- 2 The Council filed an amended notice of motion on 27 September 2019 seeking inter alia final orders in respect of the writs of sequestration and costs in both proceedings. Only order 5 is now pressed, being an order that the Respondent pay the Council's costs incurred after 5 July 2019 to date on an indemnity basis. The parties asked the Court to determine the matter on the papers on 30 March 2020. Orders for the filing of affidavits and written submissions to that end were made.

- 3 A brief chronology of the proceedings to date compiled from the parties' affidavits and the Court file is as follows:

Date	Event
5 July 2016	Council filed two summonses commencing Class 4 proceedings.
7 October 2016	Consent orders made including that Respondent clear all waste at Properties within six months (by 7 April 2017).
4 October 2017	Two charges of contempt laid against Respondent for failure to comply with 7 October 2016 orders.
1 December 2017	Order for mediation.

9 March 2018	Mediation.
10 May 2018	Mediation terminated.
4 October 2018	Respondent entered two guilty pleas. Council sought punishment for contempt, orders for costs, and orders for sequestration of Respondent's proprietary interest to fund clean-up.
22 November 2018	Sentencing hearing commenced before Sheahan J.
29 November 2018	Respondent gave an undertaking to remove all waste from Properties by 11 January 2019.
13 March 2019	Consent orders for Bassett Demolitions to remove all waste from Delaware Road property and for Respondent to be restrained from carrying out any work to remove any materials or waste from that property for one month, commencing 2 April 2019.
2 April 2019	Respondent applied to extend time from which second order made on 13 March 2019 would commence. Court extended time for commencement by one week.
25 June 2019	Sentencing hearing concluded.
5 July 2019	Sheahan J convicted Respondent of contempt of Court as charged on 4 October 2017 and ordered Respondent to pay a fine of \$12,500 in each case. Respondent also ordered to pay Council's costs of both proceedings, as agreed or assessed, with all those incurred by Council on or since 29 November 2018 on an indemnity basis. Orders were also made for issue of writs of sequestration in each matter.
8 July 2019	Writ of sequestration issued in both matters.
29 July 2019	Sequestrators' notice of motion filed seeking orders for conduct of sequestration and payment of Respondent's costs and living expenses and sequestrators' costs.
2 August 2019	Orders sought in sequestrators' motion of 29 July 2019 made by consent inter alia.

12 September 2019	Notice of motion filed by Council.
27 September 2019	Amended notice of motion filed by Council to correct omission of matter number 2016/203222 from notice of motion filed 12 September 2019.
11 October 2019	Orders made by consent that both writs of sequestration issued on 8 July 2019 be discharged.
20 December 2019	Council indicated in Court that it no longer pressed orders 1, 3, 4 and 6 of amended notice of motion filed on 27 September 2019 and the only issue to be determined at the hearing is order 5 (order 2 had been dealt with by orders made on 27 September 2019 and 11 October 2019 discharging the writs of sequestration). Hearing set down for 6 April 2020.
30 March 2020, 3-5 April 2020	Order made at parties' request that costs determination proceed on the papers. Parties filed affidavits, submissions and submissions in reply addressing order 5.

Amended notice of motion

4 The Council's amended notice of motion dated 17 September 2019, filed 27 September 2019 stated:

1. An order that the Sequestrators pay their unpaid fees and expenses incurred to date out of the sequestrated estate of the Respondent and that they thereafter pay the balance of cash in their hands into Court.
2. An order that the Writs of Sequestration issued on 8 July 2019 in respect of proceedings No 2016/00203179 and No 2016/00203222 be discharged, after the payment in Order 1 is made.
3. An order that the fines of \$25,000.00 ordered payable by the Respondent by this Honourable Court on 5 July 2019 be paid out of cash held by the Court.
4. An order that after payment of the fines above, the balance of cash held by the Court be paid into the Trust Account of John Fasha, Solicitor for the Respondent.
5. An order that the Respondent pay the Applicant's costs incurred after 5 July 2019 to date on an indemnity basis.

6. Pending finalisation of the Applicant's claim for costs awarded against the Respondent, the Respondent be restrained from drawing on the cash held in trust by his solicitor.
7. Further directions or other orders.

Evidence

Council's evidence

- 5 The Council relied on the affidavit of Austin John Joseph Thompson solicitor sworn 17 December 2019 (AJJT affidavit) and annexures. Mr Thompson is the solicitor employed by Ritchie & Castellan who has had substantial carriage of the matters. The AJJT affidavit recorded the recent procedural history of the matters including that a notice of motion was filed on 12 September 2019 (Annexure AJJT-1) and listed before the Court on 27 September 2019. An amended notice of motion was filed on 27 September 2019 (Annexure AJJT-2). Short minutes of order were made by the Court on that date (Annexure AJJT-3). Although unable to attend court that day, Mr Thompson was informed that the amended notice of motion was set down for hearing on 6 April 2020.
- 6 Order 1 of the short minutes of order made on 27 September 2019, an order to discharge a writ of sequestration, erroneously only referred to one matter number. The matter was listed before the Court on 11 October 2019. Mr Thompson appeared before Duggan J who made orders that the writs of sequestration issued on 8 July 2019 in respect of both proceedings 16/203222 and 16/203179 be discharged.
- 7 Mr Thompson stated that only order 5 is now pressed. Order 1 is no longer pressed because there were no unpaid fees and expenses claimed by the sequestrators as referred to in order 2 of the short minutes of order dated 27 September 2019. Order 2 is no longer pressed because the orders made on 27 September 2019 and 11 October 2019 discharged both writs of sequestration. Orders 3, 4 and 6 are no longer pressed because order 3 made on 27 September 2019 was that the balance held and collected by the sequestrators be released to the Respondent.

- 8 Since 5 July 2019 the Council has incurred costs in the amount of \$11,616.50 for professional fees and \$408.85 for disbursements (excluding GST) as detailed in six tax invoices issued to the Council (AJJT-4). Further unbilled charges of \$396 are also outstanding.

Respondent's evidence

- 9 The Respondent relied on two affidavits of Mr John Fasha solicitor for the Respondent and annexures, sworn 30 March 2020 and 3 April 2020 respectively. Mr Fasha is the solicitor on the record for the Respondent.
- 10 The affidavit of 30 March 2020 annexed a copy of an email sent to Mr Thompson on 26 September 2019 in reply to an email from Mr Thompson asking whether the Respondent consents to the orders sought in the amended notice of motion. No reply to the email of 26 September 2019 was received. In his email Mr Fasha outlined how he was instructed to respond to the Council's amended notice of motion. Mr Fasha wrote that order 5 was not agreed and requested the Council's representatives advise the basis for the Council's claim to costs on an indemnity basis post final judgment. Legal representation for the Council was not required and its involvement could have been dealt with by way of a submitting appearance.
- 11 Mr Fasha sought leave to rely on the additional affidavit of 3 April 2020 after receiving instructions on that day to continue acting for the Respondent and not to file a notice of ceasing to act, as was previously intended. Instructions were not provided earlier because the Respondent's partner's father died and the Respondent was having reception issues impacting his ability to receive telephone calls and emails.
- 12 Mr Fasha stated that to the extent that any legal costs arose in the course of the Council acquainting the sequestrators with the terms of the judgment and related arrangements per order 7 made by Sheahan J on 5 July 2019, if the Council chose to utilise services of its lawyers that was its own decision.

- 13 Mr Fasha received an email from Mr Thompson on 15 July 2019 arranging a meeting to discuss implementation of the writs with the sequestrators in which Mr Thompson wrote “control of these matters is now in the hands of the Court appointed Sequestrators” (Annexure A). This was confirmed at the onsite meeting on 16 July 2019 for which Mr Thompson was only present at the commencement of the meeting to introduce the parties before leaving.
- 14 Mr Fasha stated that the orders the Council sought for the appointment of the sequestrators were inadequate and did not provide the sequestrators with sufficient power. This caused the sequestrators to engage lawyers and file a notice of motion dated 29 July 2019 for additional powers, causing the Respondent to incur additional costs from his estate.
- 15 The sequestrators’ notice of motion was filed on 26 July 2019 and amended on 1 August 2019 (Annexure B). Consent orders were made on 2 August 2019 that provided for the sequestrators’ costs and the Respondent’s costs and living expenses to be paid (Annexure C). The Council did not make an application for its costs to be paid.
- 16 On 13 August 2019 Mr Fasha wrote to the sequestrators requesting discharge of the writ of sequestration in matter number 2016/203222 (Delaware Road proceedings) (Annexure D). On the same date Mr Fasha also wrote to Mr Thompson seeking the Council’s consent to the discharge of the writ of sequestration in the Delaware Road proceedings (Annexure E). On 15 August 2019 Mr Fasha wrote again to Mr Thompson following inspection of the Burley Road property (Annexure F). A second onsite meeting took place on 29 August 2019 and the sequestrators subsequently agreed to discharge both writs of sequestration as indicated in a letter from their solicitor Mr James Hamilton to Mr Fasha and Ritchie & Castellan on 2 September 2019 (Annexure G).
- 17 Mr Fasha stated there was no need for the Council to file its notice of motion as he sent proposed consent orders to Mr Thompson on 9 September 2019 that included discharging the writs of sequestration (Annexure H).

- 18 Orders made on 27 September 2019 (Annexure I) disposed of all aspects of the amended notice of motion save for the order for costs. Mr Fasha sent an email on 26 September 2019 requesting the Council set out the basis for that order for which no reply has been received.

Council's submissions

- 19 The Council submitted that the Respondent has conducted himself unreasonably throughout the proceedings by breaching court orders, a mediated agreement, and undertakings provided to the Court. This conduct inflated the costs of the proceedings making it appropriate to award indemnity costs against him.
- 20 What is required for the award of indemnity costs is evidence of unreasonable conduct that need not rise as high as vexation: *Rosniak v Government Insurance Officer* (1997) 41 NSWLR 608 at 616. While not a rule, it is common practice for indemnity costs to be awarded to a successful applicant in contempt proceedings, unless there is some reason to depart from that position: *Blacktown City Council v Nitopi* [2019] NSWLEC 40 at [222]; *Tate v Duncan-Strelec* [2020] NSWSC 52 at [31]. Nothing should be done to deter a person from bringing a contempt to the notice of a court and costs are one such possible deterrent: *EMI Records Ltd v Ian Wallace Ltd* [1983] Ch 59 at 76; [1982] 2 All ER 980 at 991. There is no evidence of the Respondent's means to satisfy an indemnity costs order as compared with a costs order on the ordinary basis, meaning this is not a relevant consideration: *Tate v Duncan-Strelec* at [29]; *Gerondal v Eurobodalla Shire Council (No 6)* [2011] NSWLEC 132 at [26].
- 21 A chronology of events between 5 July 2016 and 5 July 2019 is set out at pars 9-17 of the Council's submissions outlining what the Council submits was the Respondent's unreasonable behaviour during that period.
- 22 The Council's costs and disbursements incurred after 5 July 2019 are principally costs of administering the writ of sequestration and in conducting the present notice of motion. If the Court is not satisfied that it would be

appropriate to award indemnity costs it should be persuaded that the Respondent should pay the Council's costs on an ordinary basis because the Council has been wholly successful in the proceedings.

- 23 In reply, the affidavit of John Fasha sworn 3 April 2020 was filed after the timetable ordered by the Court on 20 December 2019. Certain factual matters in the affidavit are wrong, misleading or one-sided and should be read as submissions only, namely pars 4, 8, 12, 24, 26 and 27.
- 24 The Respondent's submission that there is no evidence of unreasonableness post 5 July 2019 is beside the point. The Council would not have incurred costs after that date if the Respondent had not unlawfully used the Properties, breached court orders, breached the mediated agreement and breached his undertakings to the Court. This is not a matter of punishing the Respondent but of compensating the Council for costs it should not have had to incur.
- 25 The Council is not seeking costs incurred after the contempt proceedings were finalised, as the Respondent submits. There was no separate contempt proceeding, the proceedings are ongoing and the Council incurred costs in respect of the sequestration in order to bring these proceedings to finality. The Council has not capitulated to the other orders (1, 3, 4 and 6) in the amended notice of motion, rather, changed circumstances mean it is not necessary to seek that relief.

Respondent's submissions

- 26 The Respondent objected to annexure AJJT-4 of the AJJT affidavit, six tax invoices issued to the Council by Ritchie & Castellan, on the grounds that they were not evidence of work performed and are not in the proper form as no application for a lump sum costs order is made.
- 27 The Respondent submitted that the Council failed to identify any proper basis on which the Respondent should pay costs post 5 July 2019 on an indemnity basis, or at all. The Council is seeking an order for costs incurred after the contempt proceedings were finalised during a period of time when the

Respondent's estate was being administered and controlled by court appointed sequestrators.

- 28 Consent orders were made on 2 August 2019 for the payment of the Respondent's and the sequestrators' costs during the sequestration. The Council did not make an application for costs and no orders were made for the payment of the Council's costs. The Council caused the Respondent to incur costs during the sequestration by refusing to consent to the Respondent's proposed consent orders for discharge and by proposing orders and relief in the amended notice of motion that were not pressed except the discharge order that was consented to (order 2) and order 5 which remains in dispute. The Council has capitulated in respect of orders 1, 3, 4 and 6 of the amended notice of motion and should not be rewarded by way of a costs order for filing and pursuing claims that could not be, or were not, maintained.
- 29 The Council did not administer or conduct the sequestration, indeed, the Council's failure to obtain appropriate orders for the sequestrators caused the Respondent to incur additional costs. The Respondent did not act unreasonably during the sequestration.
- 30 The Council's submissions as to the Respondent's unreasonable conduct are not relevant as the conduct predates 5 July 2019. The Respondent has already been punished for that conduct. The Respondent did not cause any delay after 5 July 2019. The Council was not required to incur any legal costs after 5 July 2019 as the administration of the estate was in the hands of the sequestrators.
- 31 The principle that costs follow the event applies to the amended notice of motion. The amended notice of motion should be dismissed and the Council ordered to pay the Respondent's costs of the amended notice of motion.
- 32 In reply to the Council's reply submissions, the orders for filing evidence were amended on 30 March 2020 and the Respondent has already explained its delay in filing evidence.

- 33 Paragraph 11 of the AJJT affidavit is objected to on the grounds that it is in the nature of a conclusion or submission. Pars 8, 12, 24 and 26 of the affidavit of John Fasha sworn 3 April 2020 are factually correct. Paragraph 27 is agreed by the parties. The allegation that Mr Fasha has been misleading is a serious allegation and requires more than a bald statement.
- 34 Sheahan J's orders make clear that the contempt proceedings had been finalised. There was nothing more for the parties to do after final orders were made. The Council did not need to incur any further costs after 5 July 2019 and it is not fair that the Respondent pay the Council's costs of the amended notice of motion.

Consideration

- 35 As identified above the parties requested that the Court deal with this matter on the papers. In terms of the evidence relied on, both parties filed affidavits of the solicitors with carriage of the matter. The Council objected to the late service of the affidavit of Mr Fasha dated 3 April 2020. I will allow this to be read as an adequate explanation for the delay has been provided, as summarised at [11] above. The Council objected to various paragraphs on the basis that these were misleading or wrong. Specified paragraphs should be read as submissions only. I have read those paragraphs on that basis. To the extent that the accuracy of the events attested to in Mr Fasha's affidavit may be contested, I observe that he prepared the affidavit as the solicitor with carriage of this matter and can be expected to be well familiar with the matters to which he attests. The events he describes accurately reflect the events that have occurred in the litigation. At issue is, I assume, his submissions that Sheahan J's orders were final and that the Council's lawyers had no role in the administration of the sequestration orders. As I do not accept below the principal basis for the Council's claim for costs relying on the conduct of the whole proceedings from 2016, any dispute of matters since 5 July 2019 is of limited utility, given the steps in the proceedings since then speak largely for themselves and can be objectively determined. Mr Fasha also objected to one

paragraph of the AJJT affidavit on the basis it is a submission. I have read it on that basis.

- 36 The only outstanding aspect of the Council's motion is costs in prayer 5. Costs are compensatory not punishment per *Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59. A proper basis for awarding them must be made out by an applicant. The fact alone that costs have been incurred is insufficient to justify an award of costs. The Council's costs application in the amended motion dated 27 September 2019 seeks costs incurred since 5 July 2019. Costs have already been ordered to be paid for the earlier stages of these proceedings and that part of the litigation is effectively finalised as a consequence of the orders made by Sheahan J on 5 July 2019. That is clear from the terms of the orders. The Council's submission that earlier events in the overall proceedings are relevant to the determination of whether costs on an indemnity basis are payable for the subsequent period now sought are not accepted. As that was its principal basis for being awarded costs on an indemnity basis the evidence of the chronology of what occurred from July 2016 to July 2019 is largely irrelevant. Only the events since 5 July 2019, the period for which costs are sought, are relevant to the Court's consideration.
- 37 The chronology identified in Mr Fasha's affidavit sworn 3 April 2020 and summarised above in [12]-[18] shows that since 5 July 2019, the sequestrators lodged a notice of motion dated 29 July 2019 in which they sought orders enabling them to effectively administer the writs of sequestration inter alia. None of these orders concerned the Council, as is clear on their face. I therefore accept Mr Fasha's submissions that there was no necessary role for the Council's lawyers in relation to that notice of motion. Further, Mr Thompson provided no evidence to support a role for the Council's lawyers in the administration of the writs of sequestration.
- 38 Correspondence in September 2019 with the Council's solicitors following the Council filing its notice of motion on 12 September 2019 was attached to Mr Fasha's affidavit of 3 April 2020. This demonstrates that no contested hearing on any of the other orders sought in the amended notice of motion filed on 27

September 2019 was necessary. This was ultimately conceded by the Council when it did not press any of the other orders apart from order 5. Mr Fasha sent consent orders which provided for the discharge of the writs of sequestration which could have been made easily by the Court and which would have negated the need for the Council's motion.

39 The role of the sequestrators and their lawyers in administering the writs is identified by Mr Fasha's evidence and the events in the chronology. It is not apparent that the Council's lawyers had any role to play in that regard. While Mr Thompson did not have the opportunity to respond to Mr Fasha's affidavit he did have the opportunity to establish the basis on which the Council seeks costs from 5 July 2019 and did not take that opportunity in his first affidavit.

40 The Council has not demonstrated on its evidence why it was necessary to file its motion, incur the costs that it apparently has and therefore obtain the costs it seeks. Mr Thompson's affidavit attaches four invoices sent by his firm to the Council. These do not establish that work was done in relation to the execution of the writs of sequestration or that there was any proper basis for filing the notice of motion including as amended. The objections of Mr Fasha to these invoices are well founded. No proper basis for an award of costs at all, let alone on an indemnity basis, has been provided by the Council.

41 None of the authorities cited by the Council in its submissions, summarised above in [20], to support an award of costs on an indemnity basis have any role to play.

42 The Council's notice of motion will be dismissed. As legal costs have been incurred in the determination of the notice of motion the Council as the unsuccessful party should pay the Respondent's costs of this costs determination.

Order

43 The Court orders:

- (1) The Council's amended notice of motion dated 27 September 2020 in proceedings 16/203179 and 16/203222 is dismissed.
- (2) The Council must pay the Respondent's costs of these proceedings.

I CERTIFY THAT THIS AND THE 14 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE ACTING JUSTICE SIMON MOLESWORTH AO



Associate

Date **1 May 2020**