Supreme Court

New South Wales

Case Name:	Dix Gardner Pty Ltd v The Owners – Strata Plan 82053 (No 2)
Medium Neutral Citation:	[2018] NSWSC 92
Hearing Date(s):	By way of written submissions
Date of Orders:	13 February 2018
Decision Date:	13 February 2018
Jurisdiction:	Common Law
Before:	Harrison AsJ
Decision:	The Court orders that: (1) The plaintiff is to pay the defendant's costs of the appeal on an ordinary basis and the defendant is to pay the plaintiffs' costs of the cross appeal on an ordinary basis. (2) Each party is to pay their own costs in relation to their submissions on costs.
Catchwords:	COSTS – no point in principle
Legislation Cited:	Civil Liability Act 2002 (NSW), Part 4 and Part 5 Civil Procedure Act 2005 (NSW), s 98 Environmental Planning and Assessment Act 1979 (NSW) Uniform Civil Procedure Rules 2005 (NSW), 20.26, 20.27, 36.17, 42.1 and 42.2
Cases Cited:	Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2) [2008] FCAFC 107 Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288 (2014) 254 CLR 185 Chan v Acres [2015] NSWSC 1885

	Commonwealth of Australia v Gretton [2008] NSWCA 117 Dix Gardner Pty Ltd v The Owners – Strata Plan 82053 [2017] NSWSC 940 Elias v Alloha Formwork and Construction Pty Ltd (No 3) [2017] NSWSC 1716 Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 373 Griffith v Australian Broadcasting Corporation (No 2) [2011] NSWCA 145 Hooker v Gilling (No 2) [2007] NSWCA 214 James & Ors v Surf Road Nominees Pty Limited & Ors (No 2) [2005] NSWCA 296 Lewis v Nortex Pty Ltd (In Liq); Lamru Pty Ltd v Kation Pty Ltd [2006] NSWSC 480 Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2) [2011] NSWCA 171 Moorabool Shire Council v Taitapanui (2006) 14 VR 55 Sydney City Council v Geftlick (No 2) [2006] NSWCA 374 Sydney Water v Asset Geotechnical Engineering [2013] NSWSC 1274 Sze Tu v Lowe (No 2) [2015] NSWCA 91
Category:	Costs
Parties:	Dix Gardner Pty Ltd (First Plaintiff) Lyall Dix (Second Plaintiff) The Owners – Strata Plan 82053 (Defendant)
Representation:	Counsel: R de Meyrick (Plaintiffs) N Kulkarni (Defendant) Solicitors: CBD Law (Plaintiffs) Vardenega Roberts (Defendant)
File Number(s):	2015/361408

JUDGMENT

1 **HER HONOUR:** On 18 July 2017, I delivered judgment in *Dix Gardner Pty Ltd v The Owners – Strata Plan 82053* [2017] NSWSC 940. The appeal was

upheld and the decisions of her Honour Magistrate Milledge dated 16 April 2015 and 13 November 2015 set aside and remitted to the Local Court to be determined according to law. The appeal was upheld on the basis that the Magistrate failed to determine two issues, apportionment and proportionate liability. The cross appeal was also set aside. I had intended to make an order that the defendant pay the plaintiffs' cost but I revoked that costs order too. I granted liberty to approach my associate in relation to costs within 14 days. If liberty was not exercised within 14 days, the costs order was to be restored and the proceedings finalised. Such liberty was exercised.

2 By email dated 24 July 2017, the defendant ("the Owners") sought a timetable for written submissions on the issue of costs. In relation to costs, I made orders that the Owners were to file and serve short written submissions on or before 8 August 2017; the plaintiffs ("Dix Gardner and Dix") to file and serve short written submissions on or before 22 August 2017; and the defendant to file and serve any written submissions in reply on or before 29 August 2017. These submissions have now been received.

3 By summons filed 9 December 2015, Dix Gardner and Dix raised the following issues, on appeal, joint and several liability; negligence (breach of duty of care); quantum (damages); and apportionment and proportionality (Part 4 of the *Civil Liability Act 2002* (NSW)).

4 The Owners filed a cross appeal that raised issues of adequacy of pleadings, damages and quantum. The grounds of cross appeal (except apportionment and proportional liability) were hotly contested.

5 The Owners seek firstly, that Dix Gardner and Dix pay their costs of the appeal on an indemnity basis from 19 August 2016; or alternatively 13 September 2016; or in the alternative, that Dix Gardner and Dix pay their costs in respect of all issues on their appeal other than the issues of apportionment; no order as to costs in respect of the issue of apportionment; and the Owners pay Dix Gardner and Dix's costs of the cross appeal.

6 Dix Gardner and Dix seek that the Owners pay their costs of the appeal and cross appeal.

Costs generally

7 Section 98 of the *Civil Procedure Act 2005* (NSW) relevantly reads:

> "**98 Courts powers as to costs**
>
> (1) Subject to rules of court and to this or any other Act:
>
> (a) costs are in the discretion of the court, and
>
> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
>
> …"

8 Rules 42.1 and 42.2 of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") read:

> "**42.1 General rule that costs follow the event**
>
> Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.
>
> **42.2 General rule as to assessment of costs**
>
> Unless the court orders otherwise or these rules otherwise provide, costs payable to a person under an order of the court or these rules are to be assessed on the ordinary basis."

9 Dix Gardner and Dix submitted that, notwithstanding this Court permitting the Owners to make submissions on costs, this does not give the Owners the opportunity to challenge the exercise of discretion that has already occurred as to do so would be a *de facto* appeal. Dix Gardner and Dix submitted that the only reason the Court would consider varying the costs order would be if there were matters that were not before the Court during the hearing, such as offers of compromise. The Owners did make offers of compromise and the offers were to be assessed under the alternative basis of being *Calderbank* offers. However, the Owners cannot say that either offer was surpassed by the outcome of this case.

10 The matter has been remitted to the Local Court for a decision concerning apportionment under the proportionate liability provisions of the *Civil Liability Act*. Either party or both parties were at liberty to approach the Magistrate and seek that she determine these issues but they did not do so.

11 Dix Gardner and Dix submitted that their share of any such apportionment will be negligible given that the builders were responsible for the faulty

workmanship and had falsely certified to Dix Gardner and Dix that it had been rectified. This is a matter for the Local Court, not this Court, to guesstimate the apportionment which may be in order to enliven offers of compromise. I do not know what the Magistrate will decide and it is not appropriate that I make a guesstimate.

Offers of compromise

12 The Magistrate ordered that costs in favour of the Owners be paid on an indemnity basis from 19 August 2014. That order was based on an offer made by the Owners on that date to accept $35,000, inclusive of costs, in full and final settlement of the proceedings.

13 By a letter dated 19 August 2016, the Owners in these proceedings offered to settle the dispute on the basis of judgment in the amount of $45,000, with no order as to costs in these proceedings and maintaining the costs order made by the Local Court. (Annexure A).

14 By a letter dated 13 September 2016, the Owners made a further offer to settle the dispute on the basis of judgment in the amount of $30,000, with no order as to costs in these proceedings and maintaining the costs order made by the Local Court. (Annexure B).

15 The Owners' submitted that having regard to the result of this appeal and, in particular, the practical outcome for Dix Gardner and Dix, it was unreasonable for Dix Gardner and Dix not to have accepted these offers. There is a real possibility that on remittal only a negligible reduction is made in relation to apportionment to the award of $63,080. (Judgment, [86]). In that case, Dix Gardner and Dix would be significantly worse off than had they accepted any of the offers. Moreover, at the time of the offers, Dix Gardner and Dix had the benefit of the Owners' primary written submissions and may be taken to have been alive to the risk that each of their grounds of appeal excluding apportionment might fail.

16 UCPR 20.26 relates to offers. It reads:

> "**20.26 Making of offer**
>
> (cf SCR Part 22, rules 1A, 2, 3 and 4; DCR Part 19A, rules 1, 2, 2A, 3 and 4; LCR Part 17A, rules 2 and 5)

(1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.

(2) An offer under this rule:

(a) must identify:

(i) the claim or part of the claim to which it relates, and

(ii) the proposed orders for disposal of the claim or part of the claim, including, if a monetary judgment is proposed, the amount of that monetary judgment, and

(b) if the offer relates only to part of a claim in the proceedings, must include a statement:

(i) in the case of an offer by the plaintiff, as to whether the balance of the proceedings is to be abandoned or pursued, or

(ii) in the case of an offer by a defendant, as to whether the balance of the proceedings will be defended or conceded, and

(c) must not include an amount for costs and must not be expressed to be inclusive of costs, and

(d) must bear a statement to the effect that the offer is made in accordance with these rules, and

…"

17 In respect of the acceptance of offers, the UCPR reads:

"**20.27 Acceptance of offer**

(cf SCR Part 22, rule 3; DCR Part 19A, rule 3; LCR Part 17A, rule 5)

(1) A party may accept an offer by serving written notice of acceptance on the offeror at any time during the period of acceptance for the offer.

(2) An offer may be accepted even if a further offer is made during the period of acceptance for the first offer.

(3) If an offer is accepted in accordance with this rule, any party to the compromise may apply for judgment to be entered accordingly."

18 The Owners submitted that the various factors set out above make this overwhelmingly a case in which it is appropriate not only to deprive Dix Gardner and Dix of their costs of the appeal, but to order that they pay the Owners' costs of the appeal. The Owners submitted that in light of the offers made by them in the proceedings, it would be appropriate and in the interests of fairness for such costs to be on an indemnity basis from 19 August 2016, or alternatively, 13 September 2016.

19 The Owners submitted that Dix Gardner and Dix failed on all of the issues that were raised by them in the appeal apart from apportionment. They say that the

practical result of my judgment was to affirm the Magistrate's decision to award damages in favour of the Owners in the amount $63,080 plus interest, subject to a finding as to apportionment.

20 The Owners further submitted that there is a real possibility that on remittal the award of $63,080 will only be reduced by a negligible amount in relation to apportionment and Dix Gardner and Dix will be far worse off than had they accepted any of these offers. The Owners says that the incurring of costs in these proceedings is due to Dix Gardner and Dix, both in terms of their conduct of the proceedings and the failure to approach the resolution of the dispute in a commercially sensible manner.

21 The Owners submitted that "event" refers to the practical result of a particular claim: *Sze Tu v Lowe (No 2)* [2015] NSWCA 91 at [39] (Gleeson JA) (*"Sze Tu (No 2)"*). In some circumstances a party who has obtained the orders sought but has not, in substance, succeeded in the proceedings may be treated as falling outside UCPR 42.1: see *Hooker v Gilling (No 2)* [2007] NSWCA 214. There are established principles for the Court to make "some other order" where the successful party overall has failed on discrete issues in the case: see *Sze Tu (No 2*). The party may not only be deprived of the costs of those issues, but may be ordered to pay the other party's costs: *Sze Tu (No 2)* and *Lewis v Nortex Pty Ltd (In Liq); Lamru Pty Ltd v Kation Pty Ltd* [2006] NSWSC 480 at [20]-[21] per Hamilton J.

Discrete issues

22 The Owners submitted that a discrete or separable issue can relate to any disputed question of fact or law before a court on which a party fails*: James & Ors v Surf Road Nominees Pty Limited & Ors (No 2)* [2005] NSWCA 296 at [34] (Beazley, Tobias and McColl JJA). The Court of Appeal has treated contributory negligence as a separable issue from the other issues in the case, including the issue of damages: see *Elite Protective Personnel Pty Ltd & Anor v Salmon (No 2)* [2007] NSWCA 373 at [9] (Beazley, McColl and Basten JJA) ("*Salmon (No 2)*).

23 The Owners further submitted that the Court will more readily order the successful party to pay the costs of a discrete issue that failed where the issue

was raised by that party: see *Griffith v Australian Broadcasting Corporation (No 2)* [2011] NSWCA 145 at [19]-[20] (Hodgson JA) (*"Australian Broadcasting Corporation (No 2)"*); *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171 at [9]-[10] (Hodgson JA with Allsop P agreeing). That is especially so where the party is the plaintiff or appellant because it choose to bring the proceedings and cause the costs to be incurred: *Australian Broadcasting Corporation (No 2)* at [19]-[20] (Hodgson JA). It does not need to be shown that it was unreasonable for the successful party to have raised the issue: *Sze Tu (No 2)* at [40] (Gleeson JA).

24 It is relevant for the Court to consider what part of the hearing was taken up on the discrete issues that failed: see *Salmon* (No 2) at [7] (Beazley, McColl and Basten JJA). If the appellant loses on a separate issue argued on the appeal which has increased the time taken in hearing the appeal, a different order may be appropriate: *Sydney City Council v Geftlick (No 2)* [2006] NSWCA 374 at [27] (Mason P and Hodgson and Tobias JJA) ("*Geftlick (No 2)"*); see also *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 at [6] (Finkelstein and Gordon JJ) ("*Bowen Investments (No 2)*").

25 The existence of an offer of compromise or Calderbank letter is also relevant for the Court in deciding whether to make "some other order" for the purposes of UCPR 42.1: see *Geftlick (No 2)* at [27] (Mason P and Hodgson and Tobias JJA).

26 Underlying both the usual rule that costs follow the event and the qualifications to that rule is the idea that costs should be paid in a way that is fair, having regard to what the Court considers to be the responsibility of each party for the incurring the costs: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121] (Hodgson JA). Therefore, it is recognised that an award of costs under the usual rule can be quite unfair where its effect is that the winner is entitled to all of his costs even if he raises a plethora of issues on which he is unsuccessful: *Bowen Investments (No 2)* at [4] (Finkelstein and Gordon JJ). Fairness should dictate how the discretion as to costs is to be exercised, and if an issue by issue approach will produce a result that is fairer than the

traditional rule, it should be applied: *Bowen Investments (No 2)* at [5] (Finkelstein and Gordon JJ).

27 By written submissions filed 20 July 2016, Dix Gardner and Dix raised the argument as to the application of Part 5 of the *Civil Liability Act*. Dix Gardner and Dix failed on all of the issues that were raised by them in their appeal, apart from apportionment and proportionality liability. The Owners submitted that the practical result of my judgment as set out at [101] was that the Magistrate's decision to award damages in favour of the Owners for $63,080 plus interest was affirmed subject to a finding as to apportionment.

28 The Owners say that the duty of care issue was undoubtedly the dominant issue in the proceedings. So much is clear from the parties' written submissions, the time that was occupied at the hearing on it and from my judgment. Most of the cases in the four folders of authorities related to this issue. The duty of care issue required consideration and analysis of Part 5 of the *Civil Liability Act*, the provisions of the *Environmental Planning and Assessment Act 1979* (NSW) and in particular, the cases of *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185, *Chan v Acres* [2015] NSWSC 1885, *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55 and *Sydney Water v Asset Geotechnical Engineering* [2013] NSWSC 1274. It also required addressing in written submissions and at hearing a number of sub-issues, including vulnerability and assumption of reliance.

29 The Owners say that Dix Gardner and Dix's failure on the duty of care issue, and the joint and several liability issue, was brought about because of the manner in which they conducted their case in the Local Court proceedings; in particular, the inadequate nature of the submissions which were only properly developed on appeal. This explains why Dix Gardner and Dix would not have been granted leave to appeal on the duty of care issue, notwithstanding it being a question of law, had it not been otherwise necessary to remit the apportionment issue. (Judgment, [29]).

Consideration

30 So far as the apportionment and proportionate liability issues are concerned, either party or both parties could have made an application pursuant to UCPR

36.17 for the Magistrate to reopen her judgment to deal with the apportionment and proportionate liability arguments raised by Dix Gardner and Dix but not dealt with by her. They did not do so - for a recent example of the approach, see *Elias v Alloha Formwork and Construction Pty Ltd (No 3)* [2017] NSWSC 1716.

31 The Owners made submissions as to their offers of compromise but as the matter has been remitted to the Local Court on the apportionment and proportionate liability issues, I cannot guess the findings the Magistrate will make. Hence, I am unable to make any orders in relation to them.

32 The Owners' submissions on the discrete issues overlook the ramifications of their raising appeal grounds in their cross appeal, namely the calculations of damages and pleading issues and the date from which interest should be calculated. Working out how damages were calculated took some time.

33 As there was another remedy in relation to the undecided apportionment and proportionate issues and had it been properly exercised by either party, the result of the appeal would have been that it was dismissed. The cross appeal has and would have been dismissed. In my view neither party, in substance, succeeded in their appeal. In the exercise of my discretion and in these circumstances, there is no reason to depart from the general rule that costs follow the event. The unsuccessful party in each the appeal and cross appeal should pay costs.

34 The plaintiff should pay the defendant's costs of the appeal on an ordinary basis and the defendant should pay the plaintiffs' costs of the cross appeal on an ordinary basis. Each party is to pay their own costs in relation to their submissions on costs.

The Court orders that:

(1) The plaintiff is to pay the defendant's costs of the appeal on an ordinary basis and the defendant is to pay the plaintiffs' costs of the cross appeal on an ordinary basis.

(2) Each party is to pay their own costs in relation to their submissions on costs.

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