Supreme Court

New South Wales

Case Name:	The Owners-Strata Plan 47027 v McGinn (No 2)
Medium Neutral Citation:	[2019] NSWSC 219
Hearing Date(s):	On the papers
Date of Orders:	6 March 2019
Decision Date:	6 March 2019
Jurisdiction:	Equity
Before:	Darke J
Decision:	Order made that the plaintiffs are entitled to costs in a specified gross sum instead of assessed costs.
Catchwords:	COSTS – specified gross sum costs order – where defendant made unmeritorious applications in the course of the proceedings – where defendant sent numerous inappropriate or irregular communications to the Court and to plaintiffs' solicitors – baseless allegations of fraud or serious misconduct – whether the defendant's conduct increased the costs of the proceedings – whether the defendant's conduct suggests a costs assessment likely to be delayed and protracted – quantum of specified gross sum costs order – no challenge to evidence of quantum – specified gross sum costs order made
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 98 Legal Profession Uniform Law 2014 (NSW), s 172
Cases Cited:	Ghougassian v Fairfax Community Newspapers Pty Ltd [2015] NSWCA 307 Hamod v New South Wales [2011] NSWCA 375 Harrison v Schipp (2002) 54 NSWLR 738 Owners Strata Plan No 47027 v McGinn [2018]

	NSWSC 1230
Category:	Costs
Parties:	The Owners-Strata Plan 47027 (First Plaintiff/First Applicant) Peter Miller (Second Plaintiff/Second Applicant) Sophia McGinn (First Defendant/Respondent)
Representation:	Counsel: Mr J R Bennett (First and Second Plaintiffs/First and Second Applicants) Solicitors: Madison Marcus Law Firm (First and Second Plaintiffs/First and Second Applicants) Tom Howard Legal (First Defendant/Respondent)
File Number(s):	2017/331810
Publication Restriction:	None

JUDGMENT

1 By Notice of Motion filed on 24 August 2018, the plaintiffs seek orders against the first defendant ("Ms McGinn") that certain costs be paid on a gross sum basis. These are the costs ordered in favour of the plaintiffs by Parker J on 4 April 2018 in respect of an application to set aside a subpoena, and the costs to be ordered in the plaintiffs' favour as foreshadowed in the final judgment handed down on 8 August 2018 (see the *Owners Strata Plan No 47027 v McGinn* [2018] NSWSC 1230, "the principal judgment"). The plaintiffs also seek an order that the costs of this Notice of Motion be paid on the same basis.

2 The substantive proceedings to which this application refers were commenced by the plaintiffs on 2 November 2017. The factual and procedural background to the proceedings can be found in the principal judgment. In summary, Ms McGinn, purporting to act as a member of a strata committee, collected approximately $11,000 in levies from various lot owners in the strata scheme between August and November 2017. That money was deposited in a bank account with Westpac Banking Corporation ("Westpac"). The critical issue in the proceedings was whether the defendant had authority to act as a member of the strata committee. The plaintiffs sought injunctive relief to restrain the

defendant from holding herself out as representing the strata committee and also sought orders directing that Westpac pay the money held in the bank account to the first plaintiff. The plaintiffs were successful in obtaining certain interlocutory relief by orders made by Lindsay J on 9 November 2017. The plaintiffs ultimately succeeded in obtaining final relief by orders made by me on 8 August 2018.

3 On 8 March 2018, at the behest of the plaintiffs, a subpoena was issued to Westpac to produce bank statements in relation to the account in which Ms McGinn deposited the money she had collected.

4 By Notice of Motion filed 12 March 2018, Ms McGinn sought orders setting that subpoena aside. The motion eventually came before Parker J for callover in the Application List on 3 April 2018. His Honour listed the motion for hearing the following day.

5 On that day Parker J dismissed the motion (with costs) after delivering an ex tempore judgment. His Honour granted leave to the plaintiffs to apply for an order that the costs of the motion be payable on a gross sum basis or forthwith, or both, within 21 days.

6 On 3 May 2018, the plaintiffs filed a Notice of Motion pursuant to that leave. However, by the time that motion was due to be heard on 19 June 2018, the hearing of the substantive dispute was imminent. In those circumstances, Parker J preferred to leave the issue of costs of the motion to be determined following the determination of the substantive proceedings.

7 After delivery of the principal judgment on 8 August 2018, the Court granted leave to the plaintiffs to file a Notice of Motion seeking a gross sum costs order. The Notice of Motion presently before the Court was filed in accordance with that leave. Directions were made for the filing and serving of evidence in relation to the motion, and for written submissions, with a view to the matter being determined on the papers.

8 The plaintiffs rely upon the affidavit of their solicitor, Maciej Getta affirmed on 24 August 2018, and affidavits of Suzanne Ward, an expert in costs assessment, sworn on 20 September 2018 and 30 October 2018. Ms McGinn

relies upon her affidavit sworn on 3 October 2018. I have read and considered those affidavits.

9 In essence, the plaintiffs submit that this is a case where a gross sum costs order is appropriate because the manner in which Ms McGinn conducted her herself as a self-represented litigant in the case suggests that any costs assessment process is likely to be significantly delayed and protracted. In this regard, the plaintiffs point to various instances where they say that Ms McGinn's conduct has increased the costs of the litigation, including by maintaining untenable arguments, or shown disregard or disrespect for the Court's processes. The plaintiffs further submit that the evidence of Ms Ward provides a sound basis for the Court to fairly assess an appropriate amount for the purposes of a gross sum costs order.

10 In response, Ms McGinn submitted that the determination of the Notice of Motion should be stayed because she has filed a Notice of Appeal and applied for a stay of the costs orders of 4 April 2018 and 8 August 2018. She further took issue with the plaintiffs' characterisation of her conduct, and in any event maintained that the points raised by the plaintiffs were irrelevant as the test for a gross sum costs order is not concerned with the conduct of the parties in the litigation. Ms McGinn saw no need to address the question of quantum of any gross sum costs order, and in her affidavit described Ms Ward's evidence as irrelevant.

11 The plaintiffs' application is made pursuant to s 98(4)(c) of the *Civil Procedure Act 2005* (NSW), which provides that the Court may at any time before costs are referred for assessment, order that a party to whom costs are to be paid is entitled to a specified gross sum instead of assessed costs.

12 In *Harrison v Schipp* (2002) 54 NSWLR 738, Giles JA said (at [21]-[22]) in the context of discussing the predecessor provision to s 98(4)(c):

> The power conferred by Pt 52A, r 6(2) is not confined, and may be exercised whenever the circumstances warrant its exercise. It may appropriately be exercised where the assessment of costs would be protracted and expensive, and in particular if it appears that the party obliged to pay the costs would not be able to meet a liability of the order likely to result from the assessment (*Leary v Leary* [1987] 1 WLR 72; [1987] 1 All ER 261; *Sparnon v Apand Pty Ltd* (Federal Court of Australia, von Doussa J, 4 March 1998, unreported);

Beach Petroleum NL v Johnson (No 2) (1995) 57 FCR 119; *Hadid v Lenfest Communications Inc* [2000] FCA 628).

> Of its nature, specification of a gross sum is not the result of a process of taxation or assessment of costs. As was said in *Beach Petroleum NL v Johnson*, the gross sum can only be fixed broadly having regard to the information before the Court; in *Hadid v Lenfest Communications Inc* it was said that the evidence enabled fixing a gross sum only if I apply a much broader brush than would be applied on taxation, but that … is what the rule contemplates. The approach taken to estimate costs must be logical, fair and reasonable (*Beach Petroleum NL v Johnson*; *Hadid v Lenfest Communications Inc*). The power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available (*Wentworth v Wentworth* (Court of Appeal, 21 February 1996, unreported) per Clarke JA).

13 In *Hamod v New South Wales* [2011] NSWCA 375 at [813], Beazley JA (as her Honour then was), with whom Giles JA and Whealy JA agreed, approved the aforementioned observations of Giles JA in *Harrison v Schipp*. Her Honour outlined (from [816]-[820]) a number of relevant considerations in the exercise of the Court's discretion:

> The terms of s 98(4), together with the more general considerations reflected in the *Civil Procedure Act*, ss 56(1), 57(1)(d) and 60, suggest the factors that merit particular consideration include: the relative responsibility of the parties for the costs incurred (for example, *Harrison v Schipp*); the degree of any disproportion between the issue litigated and the costs claimed; the complexity of proceedings in relation to their cost; and the capacity of the unsuccessful party to satisfy any costs liability: *Ritchie's Uniform Civil Procedure NSW* at [s 98.45].
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> The exercise of the power conferred by s 98(4) is particularly appropriate where the costs have been incurred in lengthy or complex cases and it is desirable to avoid the expense, delay and aggravation likely to be involved in contested costs assessment. This may arise either from the likely length and complexity of the assessment process: *Beach Petroleum NL v Johnson (No 2)* at 120; *Charlick Trading Pty Ltd v Australian National Railways Commission*; *Australasian Performing Rights Association Ltd v Marlin* [1999] FCA 1006; or from the likelihood that the additional costs of formal assessment would disadvantage the successful party because of the likely inability of the unsuccessful party to discharge the costs liability in any event: *Harrison v Schipp*; *Sony Entertainment (Aust) Ltd v Smith* (2005) 215 ALR 788 at [90], [194]-[195]; *Hadid v Lenfest Communications Inc* [2000] FCA 628.
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> The power may also be exercised where a party's conduct has unnecessarily contributed to the costs of the proceedings, especially where the costs incurred have been disproportionate to the result of the proceedings: *Leary v Leary* [1987] 1 WLR 72; [1987] 1 All ER 261; *Sony Entertainment (Aust) Ltd v Smith; Microsoft v Jiang* (2003) 58 IPR 445; [2003] FCA 101; *Ritchie's Uniform Civil Procedure NSW* at [s 98.60]).
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> The assessment of any lump sum to be awarded must represent a review of the successful party's costs by reference to the pleadings and complexity of

> the issues raised on the pleadings; the interlocutory processes; the preparation for final hearing and the final hearing: *Smoothpool v Pickering* [2001] SASC 131. In the exercise of its discretion the court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment: *Harrison v Schipp* at 743; *Hadid v Lenfest Communications Inc* at [35]; *Auspine Ltd v Australian Newsprint Mills Ltd* (1999) 93 FCR 1 at 5; [1999] FCA 673.
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> The costs ordered should be based on an informed assessment of the actual costs having regard to the information before the court (for example, by relying on costs estimates or bills): *Beach Petroleum NL v Johnson (No 2)*; *Leary v Leary*; *Harrison v Schipp* at 743; *Sparnon v Apand Pty Ltd* (FCA, 4 March 1998, unreported). The approach taken to estimate the costs to be ordered must be logical, fair and reasonable: *Beach Petroleum NL v Johnson* at 164-165; *Hadid v Lenfest Communications Inc* at [27]; *Harrison v Schipp* at 743. This may involve an impressionistic discount of the costs actually incurred or estimated, in order to take into account the contingencies that would be relevant in any formal costs assessment: *Leary v Leary* at WLR 76 per Purchas LJ; *Beach Petroleum NL v Johnson (No 2)* at 123; *Auspine Ltd v Australian Newsprint Mills Ltd* at 164- 165.

14 In her written submissions, Ms McGinn contended that because the Court's power to award a gross sum cost order is concerned with avoiding the expense and delay involved in the process of assessment, consideration of a party's conduct in the proceedings is irrelevant. I cannot accept this submission. It is true that one of the principal purposes of such orders is to avoid further expense and delay arising from the process of assessment. However, as *Hamod v New South Wales* (supra) and the authorities cited in that case make clear, the Court's discretion to make an order of this kind involves consideration of whether a party to the dispute materially contributed to the costs of the proceedings.

15 Ms McGinn also contended, as I understood it, that because she had filed a Notice of Appeal and applied for a stay of the cost orders, the costs are no longer assessable, and hence this motion should itself be stayed. I also do not accept this submission. The mere filing of a Notice of Appeal or the seeking of a stay does not operate as a stay on orders made at first instance. In the absence of a stay order, there is no impediment to, and I can see no good reason to delay, dealing with the plaintiffs' application.

16 I turn then to consider whether Ms McGinn's conduct has increased the costs of the proceedings, or otherwise been of a character that would suggest that

any costs assessment process is likely to be significantly delayed and protracted.

17 Mr Getta's affidavit refers to a great many documents in this regard. I have considered this material, but it is not necessary to refer to it in detail. It is sufficient to state the following:

(a) in March 2018 Ms McGinn sent numerous inappropriate or irregular communications to the Court (mainly to the Registrar in Equity and to the Associate to Parker J), and to the plaintiffs' solicitors, in relation to her complaint about the subpoena to Westpac. Baseless allegations of fraud or serious misconduct were made against the solicitors and the Registrar;

(b) Ms McGinn's application to set the subpoena aside was ultimately dismissed by Parker J after Ms McGinn left the courtroom and failed to present her application;

(c) it is in any event difficult to perceive any reasonable basis to attack the subpoena on the grounds apparently advanced by Ms McGinn, namely, that leave was required for the issue of the subpoena and that the subpoena sought the production of irrelevant documents;

(d) following the dismissal of her application in relation to the subpoena, Ms McGinn sent numerous inappropriate or irregular communications to the Court (mainly to the Associate to Parker J) in relation to an application that Parker J disqualify himself from hearing certain other interlocutory applications. These applications concerned a Cross-Claim for damages for defamation brought by Ms McGinn, which had been ordered to be heard separately from the plaintiffs' case. A number of these communications were sent notwithstanding clear advice to the effect that the manner of communication was not appropriate; and

(e) on 30 May 2018 Parker J dismissed the disqualification application. His Honour gave his reasons ex tempore. His Honour described the application as hopeless. It is again difficult to perceive any reasonable basis for the application. I note that in her affidavit of 3 October 2018 Ms McGinn deposed that she was "entitled to apply for recusal when Justice Parker is not List Judge for Summons and the subpoena relates to Summons not Cross claims."

18 I am satisfied that Ms McGinn's conduct in relation to the subpoena to Westpac added to the costs of these proceedings to a more than minor degree. The application to set the subpoena aside should not have been brought at all, but even if there was some arguable basis for it, the manner in which it was

pursued clearly made it more costly than it should have been. I put aside the costs associated with Ms McGinn's conduct in relation to the disqualification application, as this concerns the Cross-Claim ordered to be heard separately.

19 Ms McGinn's conduct in relation to both applications suggests to me that any costs assessment process is likely to be delayed and affected by Ms McGinn inappropriately raising unmeritorious arguments which would add to the cost and complexity of the process. It is open to draw an inference from the evidence that if the costs proceeded to assessment, the defendant may well employ a similarly disruptive attitude to those processes too (see *Ghougassian v Fairfax Community Newspapers Pty Ltd* [2015] NSWCA 307 at [63]).

20 I am also satisfied, based on Ms Ward's evidence, that the Court is in a good position to make an informed decision as to a gross sum for costs that is fair and reasonable.

21 In her 20 September affidavit, Ms Ward deals with the quantification of costs for the substantive claim. She explains her assessment process by referring to decisions of this Court, the Court of Appeal and the Full Court of the Federal Court. In her assessment of party/party costs, she starts from the proposition that such assessment be "fair and reasonable" based on assessing reasonable costs on a solicitor-client basis and then making relevant reductions.

22 In relation to the assessment of solicitor-client costs, Ms Ward sets out the hourly rates of each of the solicitors and paralegals attending to the matter. She then refers to the Guidelines issued by the New South Wales Costs Assessment Rules Committee on 16 March 2016. Those Guidelines set out what the Committee views is a reasonable range for hourly charge rates by solicitors of various levels of experience in New South Wales. Ms Ward states that in her opinion the charge rates for the plaintiffs' solicitors are likely to be considered reasonable on a party/party assessment.

23 Ms Ward further states that after taking into account the matters listed in *Legal Profession Uniform Law 2014* (NSW), s 172(2), the charge rates are reasonable and would not be reduced on a formal party/party assessment. Ms Ward has taken into account that the subject matter of the proceedings was of

moderate complexity and she states that the work was conducted appropriately between team members at each level of professional seniority.

24 Ms Ward states that she carried out a detailed review of the tax invoices issued. Her approach is clearly shown in her affidavit. I am satisfied that her review was detailed and thorough.

25 Based on her review, Ms Ward concluded that a discount of 15% should be applied to the solicitor-client costs to arrive at a fair and reasonable assessment of party/party costs on a lump sum basis.

26 In relation to the assessment of disbursements, Ms Ward notes that she applied the same "fair and reasonable" standard in her assessment. She notes that unparticularised disbursements relating to telephone, printing and other similar services are generally not recoverable on assessment but that in this case charges are particularised and are minimal. She states that a 10% discount should be applied to the disbursements.

27 Ms Ward also states that the charge rate for the senior counsel was reasonable when measured against other benchmarks such as the Guidelines referred to above. She states that she would nevertheless apply a discount of 10% because it is highly unusual for there to be no reduction on these items on assessment. This is to allay any risk of overestimating reasonably recoverable counsel's fees.

28 Ms Ward's additional affidavit of 30 October includes her opinion concerning the costs of the motion to set aside the Westpac subpoena. In that affidavit, she adheres to the method of assessment used in her 20 September affidavit.

29 Ms Ward, based on her approach as outlined above, sets out her assessment of recoverable costs on an ordinary party/party assessment as follows:

- Assessment of Reasonably Incurred Fees on an Ordinary Basis (excluding GST): $112,661.13
- Assessment of Reasonably Incurred Disbursements on an Ordinary Party/Party Basis: $43,590.08
- Estimate of the Costs of Gross Lump Sum Costs Application: $15,000.00 (excluding GST):
- Total: $171,251.21 (excluding GST).

30 As noted earlier, Ms McGinn did not address, either by way of evidence or submissions, the question of quantum of any gross sum costs order.

31 In all the circumstances, I have concluded that it is appropriate to make a gross sum costs order in respect of the costs of the application to set aside the Westpac subpoena and the costs of the proceedings generally. I further consider, based on Ms Ward's evidence, that a gross sum rounded down to $170,000 (excluding GST) would be appropriate. It seems to me that this course is preferable to the undertaking of a costs assessment process. It brings finality to the matter, and avoids the real risk that an assessment would be unduly delayed and disrupted by conduct of the type exhibited by Ms McGinn in these proceedings.

32 Accordingly, the Court orders pursuant to s 98(4)(c) of the *Civil Procedure Act* that the first defendant pay the plaintiffs' costs of the motion to set aside the Westpac subpoena, and of the proceedings generally (including in relation to the Notice of Motion filed on 24 August 2018), in the specified gross sum of $170,000 (excluding GST) instead of assessed costs.

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