



Supreme Court New South Wales

Medium Neutral Citation: *Cunningham v Cunningham (No 2)* [2012] NSWSC 954

Hearing Dates: 17 August 2012

Decision Date: 17/08/2012

Jurisdiction: Common Law

Before: Button J

Decision:

1. Plaintiff pay the costs of the defendant in this Court.
2. Such costs be paid within 56 days after an agreement as to the amount of costs, or the issue of a certificate of assessment of any such costs, whichever is the earlier.

Catchwords: COSTS - whether court has power to order costs in appeals under Part 5 of the Crimes (Appeal and Review) Act 2001

Legislation Cited: Crimes (Appeal and Review) Act 2001
Local Court Act 2007
Supreme Court Act 1970
Supreme Court Rules 1970

Cases Cited: ASIC v Sigalla (No. 6) [2012] NSWSC 83
Cunningham v Cunningham [2012] NSWSC 849
Director of Public Prosecutions (NSW) v Elskaf [2012] NSWSC 21
Director of Public Prosecutions (NSW) v Wililo [2012] NSWSC 713
Maritime Authority of NSW v Nikolai Rofe [2012] NSWSC 5
Ronowska v Kus (No 2) [2012] NSWSC 817

Category: Costs

Parties: Warren Cunningham (plaintiff)
Christine Cunningham (defendant)

Representation: Solicitors:
Self-represented (plaintiff)
Raj Haricharan (defendant)

Counsel:
Self-represented (plaintiff)
C Fraser (defendant)

File Number(s): 2010/321034

EX TEMPORE JUDGMENT

- 1 On 27 July 2012, I delivered a judgment dismissing the summons of the plaintiff seeking to review a refusal by a Magistrate to order costs in favour of the plaintiff after he successfully resisted an application for an ADVO brought by the defendant: see *Cunningham v Cunningham* [2012] NSWSC 849. I made no order as to costs on that day, but provided the defendant with liberty to apply. She has so applied for costs of the proceedings in this Court. Written and oral submissions have been provided by both parties on that question.
- 2 The plaintiff was unrepresented at the substantive hearing of the summons, and again today, although a portion of his written submissions today had benefited from the assistance of counsel. In light of the inchoate nature of his submissions in support of the summons, my judgment shows that I proceeded on the basis that he was appealing pursuant to s 70 of the *Local Court Act 2007*, and therefore by way of Part 5 of the *Crimes (Appeal and Review) Act 2001* ("the Act"). I also considered briefly whether prerogative relief was available.
- 3 The plaintiff having failed on the summons, I paused before ordering costs in this Court against him. That is because there is a curious lacuna in the power to order costs in the Act.

- 4 Appeals from the Local Court to the District Court pursuant to Part 3 have a specific costs power in sub-section 28(3) of the Act. That sub-section reads "[s]ubject to section 70, the District Court may make such order as to the costs to be paid by either party (including the Crown) as it thinks just." Appeals from the Local Court to the Land and Environment Court pursuant to Part 4 also have a specific costs power in sub-section 49(4). That sub-section reads "[s]ubject to section 70, the Land and Environment Court may make such order as to the costs to be paid by either party (including the Crown) as it thinks just."
- 5 However, there is no analogue of those provisions with regard to costs in appeals from the Local Court to the Supreme Court pursuant to Part 5. I am aware of sub-section 58(3). That provision reads "[i]f the Supreme Court dismisses an application for leave to appeal, it may make such order as to the costs to be paid by the prosecutor as it thinks just." But here leave to appeal was not refused by me, and in any event, by its location and terms, the provision is limited to appeals by prosecutors. Here, the plaintiff was the defendant in the Local Court. In short therefore, that provision is not applicable here.
- 6 The question therefore arises whether there is indeed a power to order costs against an unsuccessful plaintiff who was the defendant in the Local Court and who appeals to this Court pursuant to Part 5 of the Act.
- 7 In these proceedings, the defendant invited attention to a number of decisions of this Court in which costs had been ordered in appeals pursuant to Part 5 of the Act: see, for example, *Director of Public Prosecutions (NSW) v Elskaf* [2012] NSWSC 21 and *Director of Public Prosecutions (NSW) v Wililo and Anor* [2012] NSWSC 713. It is true that costs have been ordered, against both parties, in many such appeals. However, it may be, as submitted by the plaintiff, that in many cases in which costs have been so ordered, the anomalous absence of a specific costs power in Part 5 has not been brought to the attention of the Court.
- 8 There is material that suggests that the statutory gap is unintended. One such indicator is s 72 of the Act. That section is contained in Part 6, which is entitled "Provisions common to all appeals". Section 72 reads:

"72 Orders for costs

An appeal court that orders an appellant or respondent to pay costs:

- (a) (Repealed)
- (b) must state a time within which the costs or other amount must be paid."

- 9 Furthermore, Part 51B of the Supreme Court Rules 1970 applies to appeals under Part 5, pursuant to s 61 of the Act and r 1 of Part 51B. Rule 14 reads as follows:

"14 Security for costs

- (1) The Court may, in special circumstances, order that such security as the Court thinks fit be given of the costs of an appeal to the Court.
- (2) Subject to subrule (1), no security for the costs of an appeal to the Court shall be required.
- (3) Subrules (1) and (2) do not affect the powers of the Court under Part 53, Division 1 (which relates to security for costs)."

- 10 Those two provisions seem to envisage costs orders under Part 5 without restriction.
- 11 It may be that the lacuna arose with the commencement of the *Civil Procedure Act 2005*, and concomitant statutory rearrangements. It may also be that Parliament should consider inserting a specific costs power in Part 5 of the Act.
- 12 In short, that lacuna led me to wonder whether I had power to order costs against the plaintiff with regard to the failed summons to the extent that the proceedings were founded on Part 5 of the Act. As for the prerogative relief, because I had considered that for abundant caution, I considered that I should not order costs on the basis of the failure of any such relief.
- 13 However, counsel for the defendant has invited my attention to s 23 of the *Supreme Court Act 1970*. That section reads "[t]he Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales." He also invited my attention to two recent decisions of single judges of this Court: *ASIC v Sigalla (No. 6)* [2012] NSWSC 83 and *Ronowska v Kus (No 2)* [2012] NSWSC 817. In particular, in *ASIC v Sigalla (No. 6)*, White J said at [31]:

"[i]t is necessary for the administration of justice that the court have power to make orders for costs in cases such as the present where, possibly because of legislative inadvertence, there is a lacuna. In my view, s 23 provides the necessary power to order costs by analogy to the Court of Chancery's inherent jurisdiction to order costs, including in contempt cases, in matters within that court's jurisdiction."

Pembroke J followed that decision in *Ronowska v Kus (No 2)*. At [88], his Honour said:

"[n]onetheless, as White J held in *ASIC v Sigalla (No 6)* at [31] a power to order costs exists under the Supreme Court's inherent jurisdiction, preserved by Section 23 of the *Supreme Court Act 1970*."

- 14 The question arises whether the reasoning of White J, to the extent that it is founded to some degree on the history of the inherent power of the Court of Chancery to order costs, is applicable to this appeal pursuant to the Act.
- 15 At [32], his Honour said:
- "As noted at para [23] above, I should correct what I said in *ASIC v Sigalla (No. 4)* at [48]. On further consideration I would accept that in *Sexton*, the court had inherent jurisdiction pursuant to s 23 of the *Supreme Court Act* to make the order for costs that was made in that case, notwithstanding that it was not a jurisdiction that would have been exercisable in the Court of Chancery and notwithstanding that the courts of common law did not have such inherent jurisdiction. (The allegation in *Sexton* was contempt of court by interfering in the administration of justice by publicity that might tend to prejudice the conduct of a criminal trial.)".
- 16 I interpret that paragraph as indicating that the approach of his Honour to s 23 is not limited to proceedings that were traditionally dealt with in that Court.
- 17 It is true that the two decisions to which I have referred were with regard to contempt proceedings in the Equity Division of this Court. However, contrary to the submission of the plaintiff, that distinction seems to me to be immaterial to this question. I consider that the general principle enunciated in those proceedings with regard to the breadth of the operation of s 23 applies in these proceedings.
- 18 In short, I respectfully adopt the reasoning of White J and Pembroke J. Accordingly, I determine that I have power to order costs with regard to the proceedings brought by the plaintiff with regard to Part 5 of the Act, even despite the lacuna in the Act.
- 19 In accordance with the usual rule of costs following the event, I order:
- (1) that the plaintiff pay the costs of the defendant in this Court.
- 20 In light of s 72 of the Act, to which I have already made reference, I order:
- (2) that such costs be paid within 56 days after an agreement as to the amount of costs, or the issue of a certificate of assessment of any such costs, whichever is the earlier.

(In that regard, see the approach by Brereton J in *Maritime Authority of NSW v Nikolai Rofe* [2012] NSWSC 5).

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