JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	ACCOMMODATION WEST PTY LTD -v- AIKMAN [2017] WASC 157 (S)
CORAM	**:**	KENNETH MARTIN J
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	3 OCTOBER 2017
FILE NO/S	**:**	CIV 2063 of 2015
BETWEEN	**:**	ACCOMMODATION WEST PTY LTD First Plaintiff PAUL RAYMOND KING Second Plaintiff PETER BRIAN RAKICH Third Plaintiff AND SUSAN RUTH AIKMAN Defendant

Catchwords:

Defamation action costs orders - Claim by successful defendant for indemnity costs - Alternatively defendant claimed removal of scale limits - Indemnity cost order principles - Underlying considerations at trial - Success of qualified privilege defence - Failure of plaintiff's malice challenges against defendant - Sanction against unreasonable conduct of litigation by indemnity costs orders

Legislation:

Nil

Result:

Indemnity costs orders issued

Category: B

Representation:

Counsel:

First Plaintiff	:	On the papers
Second Plaintiff	:	On the papers
Third Plaintiff	:	On the papers
Defendant	:	On the papers

Solicitors:

First Plaintiff	:	Solomon Brothers
Second Plaintiff	:	Solomon Brothers
Third Plaintiff	:	Solomon Brothers
Defendant	:	Goldsmith Lawyers

Case(s) referred to in judgment(s):

Bend-Tech Group (A Firm) v Beek [2015] WASC 491 (S)
Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty Ltd (in liq) [2007] WASC 254 (S)
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)

1 **KENNETH MARTIN J**: In the wake of my reasons for decision dismissing the three plaintiffs' combined defamation actions brought against the defendant, delivered on 12 June 2017, the parties remain in dispute as to appropriate costs orders. By agreement of the parties and under directions I issued by consent on 27 July 2017, the matter of costs is being dealt with on the papers.

2 To that end, I hold an affidavit sworn by the defendant's New South Wales solicitor, Mr Barry Goldsmith, on 1 August 2017 with its accompanying attachments. There is on behalf of the plaintiffs an affidavit sworn by its trial counsel, Mr Christopher Williams, of 22 August 2017.

3 In terms of the parties' submissions as regards costs orders, I hold the defendant's written submissions signed by Mr Goldsmith, filed 29 August 2017, and the plaintiffs' written submissions signed by Mr Williams and filed 5 September 2017.

4 In essence, the ultimately successful defendant in the present action now seeks an order that she be awarded all her costs on an indemnity basis. There is, essentially, a threefold basis propounded for that outcome under her written submissions. First, it is contended that the plaintiffs, by their conduct, unnecessarily increased the cost of the litigation and that it is appropriate, in such circumstances, they should bear the full weight of that increased cost.

5 Second, it is argued that the plaintiffs have persisted in what on proper consideration ought always to have been seen by them as a hopeless action, which conduct supports a sanction by an indemnity costs order.

6 Third, it is contended that there has been improper, alternatively unreasonable conduct on the part of the plaintiffs which supports such an order. Upon this submission, it is contended that the defendant essentially faced and defeated what is colloquially referred to as a SLAPP suit by the plaintiffs (SLAPP being the acronym for Strategic Lawsuit Against Public Participation - a law suit that is intended to sensor, intimidate or silence a critic by burdening them with the cost of a legal defence until they abandon their criticism or opposition (that definition taken from Wikipedia, according to the defendant's submissions.)

7 As an alternative, but lesser costs outcome, if indemnity costs orders are not awarded to the defendant, she would seek special costs orders against the plaintiffs pursuant to s 280(2)(c) of the *Legal Profession Act*

2008 (WA) - which allows the adjustment or removing of the applicable scale limits that would otherwise apply, under a party and party costs taxation.

8 The alternate submission is advanced on the basis that the costs scales applicable under either the 2014 and 2016 Determinations of the Legal Costs Committee will prove inadequate to provide just allowances, given the magnitude of work required to be carried out by the defendant's legal representatives in defending the plaintiffs' litigation brought against her. Coupled to that starting proposition is the defendant's founding jurisdictional contention that there was unusual difficulty, complexity, or importance arising in this litigation - which supports a removal of scale limits, as alternatively advocated.

9 Were it necessary to decide, I would say, on the basis of the materials put before me for this application but, more importantly, having presided as the pre-trial case manager and then as trial judge, that I am amply satisfied that this litigation was of more than usual difficulty and complexity.

10 In the end, my reasons for decision needed to run to 135 pages (schedules excluded) across 503 paragraphs. The range of materials required to be considered was lengthy and dense. See, for instance, my schedule D containing the Coombs Report extracts.

11 The magnitude of the multiple alleged defamatory imputations requiring evaluation - towards both their natural and ordinary meanings but then, in the invariable alternative, under a true innuendo meaning, argued on further extrinsic facts concerning all the publications was onerous and tedious and, on my assessment, unnecessarily so.

12 There was a lack of focus in the whole approach to running far too many contended meanings assembled by the plaintiffs - each of which then had to be carefully evaluated and dealt with - in a manner more carefully than the plaintiffs had assembled them.

13 The real question, however, is whether the highest tier of exceptional costs order as is sought by the defendant (for indemnity costs) is appropriate or not?

Costs order principles

14 The unsuccessful plaintiffs' written submissions take issue with the defendant's costs arguments. They contend that the defendant's three

tiered proposition in support of indemnity costs orders is misconceived. The plaintiffs contend as well that there are no other relevant considerations to warrant an indemnity costs order or, indeed, even that any adjustment of the usual scale limits under s 280(2) of the *Legal Profession Act*, is justified. The principles in respect of such special costs orders are well known and established: ***Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty Ltd (in liq)*** [2007] WASC 254 (S) [17] (Martin CJ). As I have said, they are well met here, if indemnity costs are not ordered. I would have been satisfied in present circumstances that this trial and its associated pleadings and issues were of a magnitude and complexity that would sustain such limit removal orders as regards a taxation to be conducted without reference to the scale limits of either the 2014, or the 2016 Legal Costs Committee Scale Determination.

15 However, the anterior and more significant question is whether a basis or indemnity costs orders against the plaintiffs has been established by this defendant.

16 There does not appear to be any dispute between the parties over the applicable legal principles towards a rendering of indemnity costs orders. ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 (S) [10] discussed the exceptional circumstances in which an indemnity costs order may be justified, canvassing 10 basic principles. Relevantly to present circumstances are principles 8, 9 and 10, in the following terms:

> 8. A properly crafted special costs order may obviate the need for an indemnity costs order, where components of cost scale items are allowed above the applicable scale ceiling: see ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** [2003] WASC 122(S); (2003) 28 WAR 95 [20] - [24].
>
> 9. An indemnity costs order may not be appropriate if the claimed costs would be likely to be recovered under the standard order for party and party costs, or under a special order raising or removing a scale ceiling allowance: ***Flotilla*** [11]. In ***Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)*** (1997) 18 WAR 190 (193), Ipp J observed:
>
> > However, counsel for the plaintiffs was unable to identify any costs so incurred that would not be covered by an order for party and party costs. An order for indemnity costs on this ground is therefore not warranted.
>
> 10. Nonetheless, an indemnity costs order will constitute an appropriate sanction marking the disapproval of improper or

> unreasonable conduct: see ***Brookvista Pty Ltd v Meloni*** [2009] WASCA 180 [32], ***Flotilla*** [25]. In ***Flotilla*** Pullin J said [26]:
>
> > A solicitor should not, in my view, resort to an application for an indemnity costs order merely to secure the recovery which could be achieved by a properly formulated special costs order, unless the unsuccessful party's conduct is genuinely to be impugned by the successful party.

17 The parties' respective written submissions on indemnity costs principles also noted the observations of Pritchard J in ***Bend-Tech Group (A Firm) v Beek*** [2015] WASC 491 (S) [6] - [7].

Decision

18 Indemnity costs orders are exceptional. A court must be cautious in reaching the required degree of satisfaction at the appropriate standard that it should exercise the discretion it holds to issue such an order. The discretion, of course, is to be exercised on a principled basis - see the extract above from the ***Swansdale*** reasons.

19 In the first place, I would not accept the defendant's submission that the plaintiffs persisted with what was to always be seen as a hopeless case. Hindsight must not be brought to bear in rendering such an assessment.

20 The plaintiffs always faced a difficult task surmounting the potential applicability of the defences of qualified privilege as a shield protecting the defendant against exposure on all the plaintiffs' alleged six defamatory publications. They attempted to thwart the effectiveness of the qualified privilege shield, by seeking to show malice in Mrs Aikman. They ultimately failed in that endeavour. It took, however, a trial with Mrs Aikman's evidence and her cross-examination in order for the end conclusion favouring her to be drawn and for all of the plaintiffs' malice contentions to be evaluated and finally rejected.

21 There were further weaknesses in the plaintiffs' case from a low circulation of publication perspective, in regard to the allegedly defamatory emails which were sent by Mrs Aikman to either one or only a small handful of aligned (to her) recipients. The emails were always of fairly mild content. There was also no suggestion that any recipient, in the consequences, had been caused to hold any of the plaintiffs in lesser regard, as regards their reputation, than they had previously been held. Hence, the plaintiffs were always exposed to a lowish award of damages given these points, even if they had succeeded at the trial.

22 Nevertheless, the case was not of a genre that could be classed before trial as hopeless - without deploying hindsight in the wake of knowing the trial result.

23 Towards the defendant's second contention of the plaintiffs unnecessarily increasing the costs of the litigation, I do accept that this occurred - to the extent of two of the four days of trial - and that this was the responsibility of the plaintiffs. I refer particularly to the observations of the primary reasons about what should have been a two day trial at [176(d)], and upon the unfocussed nature of the multiple alleged defamatory imputations as advanced - particularly extracted out of Ms Coombs' lengthy accountant's report as the fourth publication complained of. See as well my observations at [483] - [485] of the primary reasons, as regards the traversal of time consuming ancient history that was embarked on in pursuit of the serious but ultimately unsuccessful malice allegations directed against Mrs Aikman. There was also a voluminous amount of trial documents assembled to that unsuccessful end of trying to show malice in Mrs Aikman.

24 However, extra costs attributable to the plaintiffs' conduct of the action and trial can be provided for by lesser costs orders. This feature by itself would not without more support a blanket indemnity costs orders as now sought. But the considerations raised under this submission do coalesce with the third basis upon which indemnity costs are sought by Mrs Aikman - effectively as a mark of the court's disapproval when confronted with unreasonable conduct by a party in litigation, applying principle 10 from the ***Swansdale*** reasons.

25 On my assessment, the third basis to support indemnity costs orders has been established here. There has been established what must be called out as unreasonable conduct in circumstances sufficient to support the indemnity costs orders which the defendant pursues. To that end, I would highlight the following features of this trial:

(1) This was always a very curious action and trial from a defamation perspective with there being no suggestion of hurt or distress suffered by either Mr King or Mr Rakich from a publication complained about as being defamatory of them. Neither gave evidence at the trial.

(2) Pursuit of the action by the corporate first plaintiff was always curious, even if assessed as an excluded corporation under the *Defamation Act 2005* (WA), as I ultimately found. To that end, I

note from Mr Goldsmith's affidavit, attachment BG6 - being a communication of 27 July 2016 from Ms Knowles, 'Chairman' of the council of owners of Strata Plan 4881 and reporting to owners. Under s 2 of that communication (page 161 of Mr Goldsmith's affidavit), Ms Knowles reports:

> The action was taken in the name of the strata by its lawfully appointed strata manager Accommodation West Pty Ltd … (and further) [n]either Mr King nor Mr Rakich will receive any benefit from this action, other than the restoration of their reputations and integrity, unless the Supreme Court awards them personal damages.

Use of the 'strata manager' to pursue Mrs Aikman 'in the name of the strata' does not reflect a position communicated to the court at any point during the running of the trial. In fact, quite to the contrary. During trial a key distinction as between the private first plaintiff, Accommodation West Pty Ltd, and the corporate strata body manager under the *Strata Titles Act 1966* (WA) was always carefully observed. The suggestion now emerging that the action was taken in the name of the strata by its strata manager is out of alignment with my trial assessment of the personal tort claims in defamation as advanced by Accommodation West at the trial as regards its personal corporate reputation.

(3) Three of the emailed publications complained about by the plaintiffs were circulated to a narrow range of recipient. In the case of the first publication, this was sent to just to one recipient, namely, Mrs Orohoe. Pursuing a four-day Supreme Court trial over such a small range of circulated publication, with the correlative unlikelihood of any real damage suffered to the reputations of any of the plaintiffs, was another curious feature. Pursuit of expensive superior court litigation to teach a defendant a lesson, or attempt to shut them up, cannot not be supported. Once such an action fails, that event must carry serious costs exposure implications beyond the norm to reflect the unreasonable character of what has been attempted and then rejected, as here.

(4) Overall, my impression at this trial was that there was an unsatisfactory lack of focus by the plaintiffs by them gathering together an oppressive number of poorly formulated defamatory imputations - indicating an underlying objective of oppressing or vexing, rather than truly seeking to vindicate reputation. It is no answer to that criticism to suggest that the defendant ought to have pursued some pre-trial strike out application of an interlocutory

> kind that would thereby have narrowed the parameters of a trial, had she been successful on such an application. These days courts as a matter of resourcing necessity actively discourage pre-trial strike out applications. Hence, the longer term forensic strategy adopted by this defendant in taking the action to trial and defeating the plaintiffs head on against almost all the multiple unfocussed imputations of the plaintiffs cannot properly be criticised, subsequent to the event of her trial success.

26 I did observe in the primary reasons at between par [494] - [499] as to a perception then of an attempt to 'crush' Mrs Aikman

> by the presently oppressively collected (and expensive to fight) defamation charges.

27 By my assessment, this was not a normal trial where the usually expected objectives of logic and commerciality were underlying cornerstones for these plaintiffs in an action that was unsuccessfully pursued against Mrs Aikman in defamation. Much of the so-called documentary background evidence canvassed looked to me to traverse over trivial or petty and long past incidents.

28 The action also carried, as I observed, an underlying policy issue concerning what was an attack against the exercise of free speech by the defendant. The defamation challenges assembled against Mrs Aikman, and particularly by her conduct in circulating copies of the Coombs report to other strata owners, displayed an attempt to stifle legitimate communications about day to day issues arising in a strata complex, as between owners. No defamation action was directed against the author of the Coombs report. Mrs Aikman was attacked effectively as an alleged re-publisher of the supposedly defamatory content within that forensic accountant's report. None of that succeeded. Examination of the anodyne content of the Coombs report at the trial always suggested that unsuccessful outcome.

29 What may therefore be seen as a bullying attempt by the plaintiffs to effectively curtail discussions as between strata owners upon issues which were fully legitimate to discuss (albeit possibly not commanding majority owner support), is again conduct, where it is fought and fails, that should carry a permanent stigmata of being sanctioned under appropriate high level adverse costs orders, on my assessment.

30 So it is that the third basis of the defendant's arguments seeking indemnity costs orders must be accepted.

Conclusion

31 Having conducted the trial over four days, then assessed and evaluated the multiple documents and excessive attempted defamatory imputations contended for across six publications, then the multiple malice imputations and all the ancient history which was suggested to bear upon that, I am at the end left satisfied that this was an exceptional case which failed. It is appropriate that the court mark its disapproval of the plaintiffs' unreasonable conduct and, accordingly, for there to be indemnity costs orders against the plaintiffs favouring this defendant for, essentially, all of her out of pocket costs.

32 Upon publication of these reasons, there shall issue a further order as to costs in the following terms:

(1) The plaintiffs shall pay the defendant's costs of this action and the trial on a solicitor and client (ie, indemnity) costs basis, save for any costs that are assessed by a taxing officer to be of an unreasonable amount, or which were unreasonably incurred.

33 For avoidance of any doubt, the defendant's costs associated with preparing and exchanging these written costs submissions, provided for on a papers only costs determination, should also be the defendant's costs on the same (ie, indemnity) basis.