

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2017 00891

MICHELA JOY BURKE

Plaintiff

v

ASH SOUNDS PTY LTD
TRADING AS THE FALLS MUSIC AND
ARTS FESTIVAL (ABN 67 160 019 152)

Defendant

JUDGE: McDonald J
WHERE HELD: Melbourne
DATE OF HEARING: 2 April 2019
DATE OF RULING: 7 May 2019
CASE MAY BE CITED AS: Burke v Ash Sounds Pty Ltd (No 2)
MEDIUM NEUTRAL CITATION: [2019] VSC 290

COSTS – Whether Court can order defendant to pay plaintiff’s costs thrown away by reason of admission of liability in amended defence pursuant to r 63.17 of the *Supreme Court (General Civil Procedure) Rules 2015* – Whether Court should order defendant to pay costs thrown away in reliance on s 24(1) of the *Supreme Court Act 1986* – Whether costs order should be made prior to determination of the claim for damages of the plaintiff and group members – *Supreme Court Act 1986 s 24(1)* – *Supreme Court (General Civil Procedure) Rules 2015* rr 63.03, 63.17.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the plaintiff	Mr T Tobin SC with Mr M Guo	Maddens Lawyers
For the defendant	Mr M J Hooper	Lander & Rogers

HIS HONOUR:

1 On 15 November 2018, the defendant served an amended defence on the plaintiff. The amended defence was filed on 22 November 2018. In its original form, the defence denied the allegation in paragraph 13 of the second amended statement of claim that the plaintiff suffered injury, loss and damage by reason of the defendant's breach of the duty it owed to the plaintiff in contract, pursuant to s 14B(3) of the *Wrongs Act 1958* ('Wrongs Act') and at common law. In its amended defence, the defendant pleads:

It admits that the event described in paragraphs 1 and 2 of the second amended statement of claim was caused by the defendant's breach of the duty it owed to the plaintiff and group members at common law, which duty is admitted in paragraph 12(a), and expressly admits each of the particulars of breach of duty appended to paragraph 13, and otherwise does not admit paragraph 13.

It admits that as a consequence of the defendant's breach of duty (as admitted in paragraph 13), the plaintiff has suffered injury, loss and damage, but expressly does not admit the extent of such injury, loss and damage, and otherwise does not admit paragraph 14.¹

2 On 1 April 2019, the plaintiff filed a summons seeking orders, inter alia, that the defendant pay the plaintiff's costs thrown away by reason of the amended defence, to be taxed immediately in default of agreement. The quantum of the plaintiff's costs thrown away on a solicitor/client basis is said to be \$911,295.21.² However, the plaintiff seeks a lesser amount of costs, as yet unquantified, on a party/party basis.³

3 The plaintiff's application was heard on 2 April 2019. Thereafter the parties filed written submissions. For the reasons which follow, I have concluded that it is not appropriate, at this stage of the proceeding, to make an order that the defendant pay the plaintiff's costs thrown away by reason of the amended defence.

Background

4 The proceeding is a group proceeding commenced by writ and statement of claim

¹ Defendant, 'Amended Defence', 16 November 2018, [13]-[14].

² Affidavit of Brian Prendergast affirmed 8 April 2019, [5].

³ Ibid [7].

filed on 15 March 2017. The plaintiff was one of a number of people who attended the Falls Music and Arts Festival at Lorne on 30 December 2016. The plaintiff suffered injuries when attempting to exit 'the Grand Theatre', one of the venues for patrons to listen to music at the Festival. The plaintiff brings the proceeding on her own behalf and on behalf of group members. The group members are all those who suffered injury on 30 December 2016 when attempting to exit the Grand Theatre.

5 The proceeding was listed for a jury trial on 19 November 2018 in respect of liability and Ms Burke's claim for damages. On 25 October 2018, a case management conference was convened. One of the issues canvassed during the conference concerned the defendant's contention that the provisions of Parts VB and VBA of the Wrongs Act apply to the plaintiff's claim for damages under s 267 of 'Schedule 2 - The Australian Consumer Law' to the *Competition and Consumer Act 2010* (Cth) ('ACL') for non-compliance with ss 61(1) and (2) of the ACL. If accepted, the effect of this contention would be to deprive the plaintiff and any group members of an entitlement to damages under the ACL unless they satisfied the significant injury threshold under the Wrongs Act. During the case management conference, I raised with the parties whether the trial should proceed before a jury given the complexity of this issue. The parties were directed to file written submissions in respect of the application of the Wrongs Act to the plaintiff's claim for damages under the ACL.

6 Following receipt of the parties' submissions, the matter was listed for a further directions hearing on 14 November 2018. At the outset of the hearing, Mr Hooper, who appeared on behalf of the defendant, informed the Court that the defendant proposed to file an amended defence admitting liability.⁴ Mr Hooper indicated that the defence would be served by 4:00 pm on 15 November 2018. The parties agreed that the hearing on 19 November 2018 would address the defendant's contention that the plaintiff's claim for damages under the ACL was subject to the Wrongs Act.

⁴ Transcript of proceeding (14 November 2018), 1.15-1.24.

7 On 15 November 2018, the defendant’s solicitors served a copy of the proposed amended defence on the plaintiff, and forwarded a copy of the proposed amended defence to my chambers. On 19 November 2018, the Court heard submissions in respect of the application of the Wrongs Act to the plaintiff’s claim for damages under the ACL. Although the amended defence had not yet been filed with the Registry, the hearing was conducted on the basis that the amended defence stood as the defendant’s response to the plaintiff’s second amended statement of claim dated 25 October 2018. No objection was raised by the plaintiff to the defendant’s reliance upon the amended defence. No submission was advanced that leave to amend should be subject to an order that the defendant pay the plaintiff’s costs thrown away by reason of the amendment.

8 On 21 November 2018, the defendant’s solicitors unsuccessfully attempted to file the amended defence electronically. The solicitors were advised by the Registry staff that the amended defence could not be filed absent an authenticated order granting leave to amend. On 22 November 2018, the Court made an order granting the defendant leave to file an amended defence in the terms of the amended defence dated 15 November 2018. The order was unconditional. No order was made as to the costs of the amendment.

9 Judgment was delivered in respect of the application of the Wrongs Act to the plaintiff’s claim for damages under the ACL on 12 December 2018.⁵ Save for an unsuccessful mediation, there have been no further events in the litigation prior to the filing of the plaintiff’s summons on 1 April 2019.

Does the Court have power to order costs thrown away under r 63.17 of the Supreme Court (General Civil Procedure) Rules 2015 (‘Rules’)?

10 The plaintiff submits that the Court has power pursuant to r 63.17 to order the defendant to pay costs thrown away by reason of the amended defence. Rule 63.17 provides:

⁵ *Burke v Ash Sounds Pty Ltd* [2018] VSC 771.

Where a pleading is amended (whether with or without leave) the costs of and occasioned by the amendment and the costs of any application for leave to make the amendment are the parties' costs in the proceeding, unless the Court otherwise orders.

- 11 Rule 63.17 refers to 'the costs of and occasioned by the amendment'. In *Edelman v Badower*,⁶ Mukhtar AsJ considered the meaning of the phrase 'costs of and occasioned by the amendment' in r 63.17. His Honour held that this phrase does not include costs incurred prior to the date of an amendment. Rather, r 63.17 is concerned with prospective or consequential costs.⁷
- 12 I agree with Mukhtar AsJ that r 63.17 does not confer power on the Court to award costs thrown away by reason of the amendment of a pleading. The Court does have power pursuant to s 24(1) of the *Supreme Court Act 1986* ('Supreme Court Act') to make an order for costs thrown away by reason of an amended pleading. Further, pursuant to r 63.03(1)(a) of the Rules, that power may be exercised at any stage of the proceeding. However, for the reasons which follow, I do not consider that it is appropriate, at this stage of the proceeding, to make an order requiring the defendant to pay the plaintiff's costs thrown away by reason of the amendment.
- 13 The defendant now admits that it breached the duty it owed to the plaintiff and group members at common law and admits the particulars of breach of duty pleaded in paragraph 13 of the second amended statement of claim. It also admits that, as a consequence of its breach of duty, the plaintiff has suffered injury, loss and damage. However, it does not admit the extent of such injury, loss and damage. The quantum of any entitlement to damages of the plaintiff and individual group members is yet to be determined.
- 14 On 2 April 2019, Mr Tobin SC, who appeared with Mr Guo on behalf of the plaintiff, informed the Court that there are approximately 70 group members who maintain a claim for damages. Approximately half of the group members have small claims

⁶ [2010] VSC 427.

⁷ Ibid [30], [35]. This reasoning was expressly endorsed by Davies J in *Ziliotto v Dr Hakim (No 2)* [2012] NSWSC 1079, [44], [47]–[48]. The judgment of Davies J was overturned in part on appeal in *Ziliotto v Hakim* [2013] NSWCA 359 but not on this point.

comprised of items such as damage to clothes, loss of the value of tickets and some medical expenses.⁸ The plaintiff proposes that these claims should be dealt with by way of a special referee. At face value, that proposal has much to commend it. Of the balance of claims, there are presently six claimants with significant injuries who are entitled to damages for non-economic loss in addition to damages for economic loss. Particulars of the loss claimed by those six claimants have now been filed.

15 The question of whether the damages claims of individual group members (other than those which may be referred to a special referee) are to be heard individually as separate jury trials is yet to be determined.

16 I have concluded that the question of whether the defendant should be held liable for costs thrown away by reason of its admission of liability should await the determination of the claims for damages of the plaintiff and individual group members.

17 If an order were to be made requiring the defendant to pay costs thrown away by reason of the amendment and no agreement was reached as to the quantum of those costs, the Costs Court is likely to be in a better position to apportion costs as between the issues of liability and quantum, after there has been a determination of the claims for damages of the plaintiff and individual group members. Further, if the defendant has made offers to settle the proceeding by way of offer of compromise and/or *Calderbank* offers, the terms of such offers may impact upon the defendant's liability to pay costs thrown away by reason of the amendment of its defence. If so, there is a real risk of the Court having to 'unscramble the egg' if an order is made now requiring the defendant to pay costs thrown away with such order subsequently being impacted by the terms of an offer of compromise/*Calderbank* letter.

18 If I am wrong in concluding that r 63.17 does not confer power on the Court to order costs thrown away, I would in any event, for the reasons set out above, have

⁸ Transcript of proceeding (2 April 2019), 2.21-2.25.

declined to order the defendant to pay the plaintiff's costs thrown away by reason of the amendment.

- 19 The plaintiff is not precluded by this judgment from agitating at a future point in time a claim for costs thrown away by reason of the amendment. However, I consider that the determination of whether the defendant is liable to pay costs thrown away by reason of the amended defence should await the determination of the individual claims for damages of the plaintiff and group members.

Declaration of liability

- 20 The plaintiff's summons seeks, pursuant to s 33Z(1)(c) of the Supreme Court Act, a declaration that:

[T]he Defendant is liable for the loss and damage suffered by the Plaintiff and the group members arising by reason of the admissions in its Amended Defence filed on 15 November 2018.⁹

- 21 The defendant does not oppose the making of a declaration, albeit it proposes the following form of declaration:

The Defendant is liable for the loss and damage (to be proven) suffered by the Plaintiff and the group members arising by reason of the admissions in its Amended Defence filed on 15 November 2018.¹⁰

- 22 I accept the defendant's submission that the qualification 'to be proven' is appropriate to accurately reflect the admissions made in the amended defence, and to avoid any dispute that the declaration binds the defendant beyond the admissions which in fact have been made. A declaration will be made in the terms proposed by the defendant.

- 23 I shall provide the parties with an opportunity to make submissions on the costs of the plaintiff's summons of 1 April 2019.

⁹ Plaintiff, 'Summons', 1 April 2019, [1].

¹⁰ As set out in Plaintiff, 'Written Submissions', 10 April 2019, [19].