

FEDERAL COURT OF AUSTRALIA

Friends of Leadbeater's Possum Inc v VicForests (No 5) [2020] FCA 705

File number: VID 1228 of 2017

Judge: **MORTIMER J**

Date of judgment: 27 May 2020

Catchwords: **COSTS** – late filing of significant evidence by respondent – adjournment of trial – whether applicant entitled to separate order for costs – whether costs payable on party party or indemnity basis

Legislation: *Federal Court of Australia Act 1976* (Cth) s 43(2)

Cases cited: *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 801; 46 FCR 225
DSE (Holdings) Pty Limited v InterTAN Inc [2004] FCA 1251; 51 ACSR 555
Friends of Leadbeater's Possum Inc v VicForests (No 4) [2020] FCA 704
Robinson v Aware Industries Ltd [1998] FCA 1256

Date of hearing: Determined on the papers

Date of last submissions: 15 March 2019

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 33

Counsel for the Applicant: Ms J Watson

Solicitor for the Applicant: Environmental Justice Australia

Counsel for the Respondent: Mr I Waller QC with Mr H Redd and Ms R Howe

Solicitor for the Respondent: Baker & McKenzie

ORDERS

VID 1228 of 2017

BETWEEN: **FRIENDS OF LEADBEATER'S POSSUM INC**
Applicant

AND: **VICFORESTS**
Respondent

JUDGE: **MORTIMER J**

DATE OF ORDER: **27 MAY 2020**

THE COURT ORDERS THAT:

1. The respondent pay, on a party party basis, the applicant's costs of and incidental to:
 - (a) the case management hearing on 14 February 2019; and
 - (b) the additional expert reports prepared by Dr Andrew Smith (dated 7 May 2019) and Professor John Woinarski (dated 2 April 2019) in response to Mr William Paul's fourth affidavit.
2. The costs payable in paragraph 1 of these orders are to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

INTRODUCTION

1 The Court delivered **Liability reasons** in this proceeding on 27 May 2020: see *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704. Abbreviations used in the Liability reasons are used in these reasons.

2 These reasons concern an earlier application for costs made by the applicant prior to the trial commencing, which the Court reserved separately for determination. The costs application related to the adjournment of the trial in February 2019, which in turn arose upon leave being granted to VicForests to file a fourth affidavit by its principal witness, Mr William Paul, on 11 February 2019.

3 The questions to be considered here are, first, whether the applicant should have a specific order in its favour for the particular costs it sought on this application, and if so whether costs should be payable on an indemnity or a party party basis. Notwithstanding the outcome in the Liability reasons, no costs orders have yet been made in relation to the proceeding as a whole. Therefore it is appropriate to determine, as the Court said it would, the outstanding costs application by the applicant.

4 For the reasons that follow, the applicants should have a separate order for the costs incurred as a result of the adjournment, but the respondent should pay the applicant's costs on a party party basis only.

PROCEDURAL HISTORY

5 The procedural history of this matter is set out in the Liability reasons at [14]-[21]. For present purposes, the relevant points are as follows:

- (a) On 2 May 2018, the Court listed the proceeding for trial to commence on 25 February 2019 for a period of three weeks. That is, the trial was approximately nine months away when it was listed.
- (b) On 15 May 2018, the Court made programming orders by consent. Those orders included an order that VicForests file and serve any lay affidavits on which it intended to rely at trial by 12 October 2018.

- (c) VicForests complied with those programming orders and by October 2018, it had filed (and thus indicated to the Court and the applicant that it intended to rely upon) three affidavits from Mr Paul.
- (d) At a case management hearing on 5 February 2019, VicForests indicated for the first time that it would seek leave to file a fourth affidavit of Mr Paul, raising new evidence of significance to VicForests' defence of the proceeding.
- (e) On 7 February 2019, the Court granted VicForests leave to file the affidavit, and on 11 February 2019 it did so.
- (f) On 14 February 2019, the applicant sought an adjournment of the trial so that it could address the matters raised in the affidavit. The application was not opposed, and on 18 February 2019 the Court adjourned the trial to 3 June 2019.

THE AFFIDAVIT

6 Mr Paul's fourth affidavit is 696 pages long, including annexures. Most relevantly to the question of costs, it addresses matters relating to VicForests' attempts to obtain FSC certification for its products, and its development of policies about its silvicultural practices that might enable it to obtain such certification.

7 This part of VicForests' case is discussed in the Liability reasons at [314]-[353]. For present purposes, the relevant points to emerge from Mr Paul's affidavit are as follows:

- (a) In 2017, VicForests engaged an auditing body accredited by the FSC "to conduct an audit of VicForests' forest management system for its eastern operations against the [FSC's] Controlled Wood Standard" (at [62]).
- (b) In November 2017, it prepared the 2017 High Conservation Values Management Systems document, being an update of a 2014 document created in the context of a previous audit (at [66]-[67]).
- (c) On 8 December 2017, VicForests was informed by the auditing body that it did not meet the requirements of the Controlled Wood Standard (at [75]) and on 23 May 2018 it received the auditing body's report (at [78]).
- (d) Around this time, VicForests decided that it would continue to seek Controlled Wood Certification by 2020. Mr Paul deposed that this decision "was not a new decision of the business [but rather] was a confirmation of a pre-existing goal endorsed earlier by VicForests' Board" (at [80]).

- (e) In pursuit of Controlled Wood Certification, VicForests established an “FSC 2020 Steering Committee”, which met for the first time on 22 May 2018 (at [81]-[82]).
- (f) Over the following months, the Steering Committee reported to VicForests’ Senior Management Team on its progress. Mr Paul deposed that, at a meeting of the Senior Management Team on 21 August 2018, “it was reported that work was to commence on planning and revising documents including the Ecologically Sustainable Forests Management System and High Conservation Value Forests documents” (at [88]).
- (g) On 11 October 2018, VicForests held a workshop at which “there was discussion concerning various areas within VicForests that could be reviewed with a view to developing a broader project plan [to] address the non-conformance gaps identified in the Controlled Wood Audit” (at [94]-[95]). The outcomes of the workshop were reported to the Senior Management Team (at [96]) and, around that time, VicForests finalised a “roadmap” explaining the timeline VicForests had set for obtaining Controlled Wood Certification by 2020 (at [98]).
- (h) In January 2019, VicForests started developing “an overall adaptive silvicultural system” (at [106]). A first draft of the system was prepared on 17 January 2019 and, as at the date of the affidavit, the most current version of the draft was dated 11 February 2019 (at [106]-[107]). Mr Paul deposed that work on the guidelines was “underway but [was] not in any final form as at the date of affirming [the] affidavit” (at [110]).

THE PARTIES’ SUBMISSIONS

The applicant’s submissions

- 8 Drawing an analogy with this Court’s decision in *Robinson v Aware Industries Ltd* [1998] FCA 1256, the applicant submits that VicForests’ conduct “can be characterised as misconduct that caused loss of time to the Court and to the parties” (at [7]). It notes that VicForests’ defence had been amended only weeks before it sought leave to file the affidavit, and VicForests had not given any indication before the case management hearing on 5 February 2019 that it intended to file further lay evidence (at [10]).

- 9 The applicant rejects the explanation VicForests advanced at the case management hearing for the late filing of the affidavit: namely, that it was a “new development” (at [11]). It points to matters deposed to by Mr Paul going back to 2017 and it submits that VicForests must have known about much of what is contained in the relevant part of the affidavit “at critical points throughout [the] proceeding” (at [11]).
- 10 The applicant submits that if VicForests had wanted to rely on documents produced after the date for the filing of lay evidence, it should have discovered them as they were produced and filed a further affidavit limited to the newly produced documents (at [13]).
- 11 The applicant submits that it has incurred the following costs that were, as a result of VicForests’ conduct, thrown away (at [15]):
- (a) Costs of and incidental to the case management hearing on 5 February 2019, at which time was spent timetabling the 25 February 2019 trial and dealing with the question of whether VicForests should be permitted to adduce further lay evidence.
 - (b) Costs of and incidental to the case management hearing on 14 February 2019, at which time was spent dealing with the adjournment application.
 - (c) Costs of and incidental to its further expert reports in response to the affidavit.
- 12 The applicant submits that these costs should be paid by VicForests on an indemnity basis (at [16]).

VicForests’ submissions

- 13 VicForests submits that the costs of the adjournment should be reserved, which in the circumstances means that it should be ordered to pay them on a party party basis rather than an indemnity basis (at [2]).
- 14 VicForests submits that a central issue in the proceeding was whether there were sufficiently advanced plans in relation to the harvesting of the Scheduled Coupes for the Court to find that it was likely to breach cl 2.2.2.2 of the Code in those coupes, and in this context it was always “highly probable” that it would continue to adduce evidence about its plans up to or even at the trial (at [8]-[16]).
- 15 VicForests submits that key documents annexed to the affidavit “only became sufficiently crystallised in late January 2019” (at [17]) and “[t]he mere fact of VicForests’ pursuit of FSC

certification, and audits in relation to that certification, [were] not, of themselves, matters relevant to the proceeding” (at [19]). It submits that “[i]t was only on 21 January 2019 that VicForests began informing stakeholders, including the Applicant, that it was moving to modify its ... silvicultural practices to ensure demonstrable protection of high conservation values” (at [20]). It submits that, “prior to that time, the facts were too amorphous and uncertain” to be relevant to the proceeding (at [21]).

16 VicForests submits that, in any event, the costs identified by the applicant as thrown away were in fact not thrown away (at [23]). Its submissions in fact spent considerable time advancing its principal case at trial about the Scheduled Coupes, rather than on the costs question. Putting that matter to one side, the key points made by VicForests appear to be the following.

- (a) As to the case management hearing on 5 February 2019, VicForests submits that the parties would have had to attend anyway, by reason of foreshadowed pleadings amendments and ongoing discovery issues (at [24]). It also notes that one of the matters dealt with was the granting of leave to the applicant to rely on further lay and expert evidence (at [25]).
- (b) As to the case management hearing on 14 February 2019, VicForests submits that the purpose of the hearing was to determine whether it should have leave to rely on the affidavit, with the applicant ultimately conceding the affidavit’s relevance (at [26]). It also submits that it is artificial to characterise the costs of attending a case management hearing to discuss potential adjournment as costs thrown away, because it is normal to require parties to attend a case management hearing to discuss such matters (at [26]).
- (c) As to the further expert reports, VicForests submits that the costs were not thrown away because the applicant intended to (and in fact did) rely on them at trial (at [27]). It also submits that key matters contained in the affidavit could not have been addressed in earlier expert reports, essentially for the reasons given at [15] above (at [29]).

RESOLUTION

17 At [991] of the Liability reasons, I found that no satisfactory explanation was given by Mr Paul as to why the proposed changes in VicForests’ policies and practices deposed to in his fourth affidavit were not disclosed earlier in the proceeding. The discovery failures surrounding VicForests’ plans to modify its policies about its silvicultural practices were serious. While it

might well have been the case that its legal representatives were not instructed about VicForests' position until sometime in January 2019, the evidence which was adduced at trial makes it very clear VicForests had been planning this policy change internally since around 2017. While it may have chosen not to announce its plans to the general public and interested stakeholders until early 2019, that is quite a different matter from making appropriate disclosures to the applicant and to the Court in the context of a hotly contested proceeding, as this was. Particularly when it was fully aware of the reliance the applicant had placed on VicForests' defence as pleaded in the preparation of its case. To that point, by its defence VicForests had not raised an overall change to its silvicultural practices as a matter which provided, on its contention, a complete answer to the applicant's case in relation to the Scheduled Coupes.

18 The question of costs should be approached taking these findings into account.

19 At the 5 February 2019 case management hearing, this is how senior counsel for VicForests described the need to file Mr Paul's fourth affidavit, and what the "new" issue was:

Principally, it is to deal with a matter that has emerged recently whereby VicForests is in the process, we're instructed, of finalising its adaptive silviculture strategy and strategy for the management of high conservation values. And that strategy will inform how the scheduled coupes may be harvested in the future. And this, I am instructed, represents a significant change in VicForests' silvicultural practices which VicForests is already implementing at a coupe level, including shifting from the predominant use of clear-fell harvesting to a more a more adaptive suite of measures including selective and disbursed harvesting.

Now, my – my instructions are that this shift has been, I think, foreshadowed in the public domain and certainly I'm instructed that some non-government entities have been part of the consultation process or at least informed of it more generally. But because, in the nature of things, the business of VicForests continues to evolve, we need to bring this matter up to an evidentiary level so that your Honour is aware of it and it does, we say, become a relevant matter and therefore it should be the subject of evidence. And rather than Mr Paul giving oral evidence about it when he gets into the witness box, we thought it would be better to prepare a – a further affidavit which we would provide to our friends and file in court as soon as we can.

20 Senior counsel indicated he did not disagree with the Court's characterisation of Mr Paul's affidavit as "rather a significant piece of evidence", and that there was a real possibility that the evidence might change the basis on which the applicant had apprehended forestry operations would be conducted in the Scheduled Coupes. At the 5 February 2019 case management hearing, the applicant opposed leave being granted to file Mr Paul's affidavit. Notwithstanding the applicant's opposition, it was clear that the contents of the fourth affidavit

formed an important part of VicForests' defence to the proceeding and leave was granted for VicForests to file the affidavit outside the time set for the filing of its evidence.

Costs of the 5 February 2019 case management hearing

21 I accept VicForests' submissions that this case management hearing was required in any event to deal with a number of case management issues ahead of the trial. The hearing in fact dealt with a number of issues: trial timetables, objections, further evidence from the applicant and the like. The parties came prepared to deal with all those issues. I accept that during the hearing VicForests revealed its modified position, based on Mr Paul's affidavit, and that this occupied a significant part of the case management hearing. However, I do not see that any costs of the case management hearing can properly be described as costs thrown away because of the introduction of that issue. The case management hearing would have occurred anyway, and the costs would have been incurred.

Costs of the 14 February 2019 case management hearing

22 As the Court indicated at the 5 February 2019 case management hearing, the 14 February 2019 case management hearing was listed to deal with whether the applicant objected to the proposed evidence from Mr Paul being adduced. I said:

[I]f there is an objection, then I propose to list that objection separately and before the commencement of the trial so that Mr Paul can be cross-examined on the matter of whether leave should be granted to the respondent to rely on it.

23 At this point, there was a live issue between the parties whether it was accurate to describe what had occurred in the terms senior counsel did in the extract at [19] above, or whether in fact VicForests had known for some time about this proposed change to its policies about its silvicultural practices, irrespective of when it might have informed its legal representatives.

24 The applicant sought to cross-examine Mr Paul on 14 February 2019, and VicForests resisted that course. Counsel for the applicant also made it clear that the applicant accepted Mr Paul's evidence was relevant to the issues in the proceeding, but submitted there was significant prejudice to the applicant such that VicForests should not be permitted to adduce the evidence at trial. The prejudice included a failure to discover documents which were obviously within the scope of VicForests' discovery obligations. It also included the need for the applicant to provide answering evidence, including expert evidence. Ultimately, the applicant did not press its application to cross-examine Mr Paul. From the start of the 14 February 2019 case management hearing, VicForests did not oppose the adjournment application. Indeed both it

and the applicant were initially content for the proceeding to go off until 2020, accepting the maintenance for that period of the injunction which then existed over some of the impugned coupes. As it turned out the Court could accommodate an earlier trial date in 2019, and the matter was adjourned to commence on 3 June 2019.

25 I accept the applicant's submissions that the 14 February 2019 case management hearing was occasioned by VicForests' late reliance on new evidence from Mr Paul, and the consequential steps in the proceeding that would involve – amendment of the defence, and further expert evidence from the applicant's experts to deal with the foreshadowed new policies for silvicultural practices. The costs of and incidental to this hearing would not have occurred but for VicForests' conduct, which constituted a significant departure from the Court's existing orders in relation to the filing of evidence for what was on any view going to be a complex trial. The applicant should have its costs of and incidental to the 14 February 2019 case management hearing.

The further expert reports

26 For similar reasons, I consider the applicant should have its costs and disbursements for the preparation of additional expert reports, which had to be filed under some considerable time pressure. These additional reports were occasioned entirely because of the last minute change in VicForests' defence of the proceeding.

27 In the Liability reasons, I found that VicForests' changes to its silvicultural practices were in fact not determinative of the question of compliance with cl 2.2.2.2 or contravention of s 18. Nevertheless, VicForests sought to use those changes to rebut each aspect of the applicant's case, and the nature and extent of the changes formed an important part of VicForests' submissions.

28 As is apparent from the Liability reasons (see, eg, [1017]), I have found that VicForests' failed attempts to obtain FSC accreditation were not irrelevant to the applicant's case; on the contrary, they demonstrated an ongoing gap between VicForests' policies and conduct "on the ground". I therefore do not accept that the matters raised in Mr Paul's fourth affidavit only "crystallised" in February 2019. Those matters were the subject of working groups and planning within VicForests from at least 2017, and should have formed part of the evidence filed in October 2018. If that had occurred, Dr Smith and Professor Woinarski could have addressed them in their reply affidavits, for which the Court's orders had made provision. VicForests' delay in disclosing its proposals to change its silvicultural practices was responsible for the costs

incurred by the applicant in having to ask Dr Smith and Professor Woinarski to prepare further reports.

The basis for the costs orders: indemnity or party party

- 29 The principles relevant to the exercise of the Court’s discretion to award costs are not in doubt. The Court has a broad discretion in relation to costs under s 43(2) of the *Federal Court of Australia Act 1976* (Cth). The usual course is, of course, that costs follow the event and are payable on a party party basis. But, as Sheppard J explained in *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 801; 46 FCR 225 at 233, there may be circumstances that justify departing from the usual course, including “evidence of particular misconduct that causes loss of time to the Court and to other parties”.
- 30 In *Robinson*, Weinberg J held that the applicant’s conduct constituted misconduct of the kind described by Sheppard J in circumstances where, after the trial was listed, the applicant “did nothing of consequence ... to ensure that the trial could commence on the date fixed” and “made no effort to communicate to the respondents in a timely manner the fact that he might not be in a position to commence [the] trial on the date fixed for hearing”.
- 31 In *DSE (Holdings) Pty Limited v InterTAN Inc* [2004] FCA 1251; 51 ACSR 555; affd [2005] FCAFC 54, Allsop J (as his Honour then was) ordered that costs be paid on an indemnity basis in a case in which his Honour described the parties as having engaged in “trench warfare” (at [37]). Matters relevant to his Honour’s decision included that the respondents had deliberately chosen not to outline with clarity the position of a key witness (at [26]) and had failed to “bring forward reasonably frankly ... determinative or likely determinative evidence” (at [36]).
- 32 While I have been critical in these reasons of VicForests’ conduct, I am not satisfied it amounts to the kind of misconduct discussed in the authorities above, and which justifies the award of costs on an indemnity basis. The question of how calculated and deliberate its conduct was remains unexposed by the evidence. The applicant has not contended (nor put to Mr Paul at trial) that there was some deliberate concealment or determination to mislead the applicant, or ambush it.
- 33 Therefore, costs should be paid on the usual party party basis.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

A handwritten signature in black ink, appearing to be 'W. J. Mortimer', written over a horizontal line.

Associate:

Dated: 27 May 2020