

## Indemnity Costs

If the Territory follows recent discussion in the Federal Court it may be that the range of cases in which indemnity costs orders will be made by the Northern Territory Supreme Court, as well as the Local Court and other Courts and Tribunals with the power to do so, may widen.

The issue of indemnity costs is of course not one solely applicable to Plaintiffs, but is vitally important to an individual litigant. It is a fact that the difference between standard and indemnity costs can on occasions be measured in the tens of thousands of dollars, and sums of this nature mean more to the average person than to an institutional defendant. Further, the concept of a disparity between recoverable and incurred costs of itself, does not sit well with someone who has been injured and from their point of view is simply asserting a legal right. The changes in the law of indemnity costs should be closely monitored by plaintiff lawyers so that the order can be sought in appropriate cases in an effort to relieve the applicant of the extra financial burden of the difference between standard and indemnity costs. This article considers when the order may be made in relation to an action on behalf of an individual plaintiff and does not consider class action or public interest cases in which other considerations arise.

In these cases most frequently referred to prior to 1993<sup>1</sup> much consideration was given to the "yawning gap" between the costs recovered by a successful party and those that the party was required to pay to its own solicitors. In 1993 two important decisions were handed down in relation to the question of indemnity costs. The first was *Marsland v. Andjelic* (No. 2)<sup>2</sup> which made the important point that indemnity costs were compensatory in nature and not penal.

The second was *Colgate-Palmolive Company v. Cussons Pty Ltd*<sup>3</sup> in which Shepherd J held that the cases in which a departure from the ordinary party/party costs order may be justified are not closed, and set out some circumstances in which the departure had been considered warranted. The circumstances his honour mentioned were:-

1. Where a party made allegations of fraud knowing them to be false or had made irrelevant allegations of fraud.
2. Particular misconduct that causes loss of time to the Court or to other parties
3. Commencement or continuation of proceedings for some ulterior motive or with disregard of known facts or clearly established law.
4. The making of allegations that ought not to have been made or the undue prolongation of a case.
5. The imprudent refusal of an offer to compromise.
6. Proceedings involving a contemnor

Since *Colgate-Palmolive*, Justice Einfield in *Marks v. GIO Australia Holdings Ltd*<sup>4</sup> held that the law had moved even further and that the Court was not bound to accept that the starting point was that costs should be awarded on a party/party basis. His honour felt that the Court's discretion was not limited in any way and it could on the question of costs make such order as was appropriate in each case.

The Full Court later overruled *Marks* in relation to the starting point for costs orders, and held that there was a starting point and that point was a party/party order. The Court also affirmed that the cases in which an indemnity costs order may be made were not closed and the

Court could and should look to the circumstances of each case when deciding whether to depart from the ordinary order<sup>5</sup>. While the question of the appropriate starting point is not particularly relevant in the Territory as the Supreme Court Rules provide costs shall be taxed on the standard basis except where otherwise provided by the Rules or as ordered by the Court, the reasoning in these cases continue to expand the instances in which indemnity costs may be ordered.

The present situation in both New South Wales and before the Federal Court is that the Court's discretion to depart from the usual rule be based on the circumstances within the case with which justify the Court in doing so. For example indemnity costs have been ordered where a Defendant is simply not ready to proceed through its own fault<sup>6</sup>. One further recent decision has provided a further indication of the breadth of situations in which, indemnity costs may be ordered.

"If a Respondent at any appropriate stage...puts an Applicant on notice that it regards the application as misconceived and goes further and sets out its detailed reasons for so thinking, then if the Applicant nevertheless proceeds without indicating any justification for doing so and fails, there may be good reason to consider whether indemnity costs should be ordered"<sup>7</sup>. There does not appear to be any reason why the Court's comments should be read as referring only to situations where the notice is given by the Respondent, and solicitors in particular should remain aware of the value of a frank letter pointing to deficiencies in the Defendant's case. Another issue to be aware of though is that if the defence is entirely hopeless, summary judgement should be sought. The value of a frank letter pointing to deficiencies is available only where the defence is not entirely hopeless, but is highly unlikely to succeed or continued in disregard of a legal principle<sup>8</sup>.

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The most recent decision of the Northern Territory Supreme Court was that of Kearney J in *Lin v Katamon Pty Ltd and Anor*<sup>9</sup> which reviewed the law as it was at the time, and held that indemnity costs may be awarded "in cases which are clearly exceptional in nature; for example where the conduct of the losing party has involved some unmeritorious deliberate or high-handed conduct, and element of deliberate wrongdoing" so that a departure from the ordinary rule is justified. Since his Honour's decision indemnity costs orders have been made with increasing frequency in Australian jurisdictions, particularly in order to enforce the procedural requirements of the court. Further, to the extent that the reasoning in the recent line of Federal cases expands or clarifies the cases in which indemnity costs may be ordered, it may be suggested that it is more likely than not that the Northern Territory Supreme Court will accept that reasoning and similarly consider making orders for

indemnity costs in wider instances than before. Until the issue arises before the Supreme Court again, Plaintiff's representatives can rely on the Federal Court decisions for their persuasive value.

The most important point to note however is that the classes in which indemnity costs may be ordered are not closed, and the actions of defendants in litigation are varied. Particularly in light of the financial burden the "yawning gap" places on individual litigants, practitioners acting on behalf of individuals should be aware that, while not the usual order, indemnity costs may be ordered not only where a Defendant has failed to respond to a Calderbank offer or has been guilty of misconduct in the proceedings, but also where it has failed to adequately prepare, has ignored or refused to respond to stated deficiencies in its case, or in any other number of ways which have not yet been considered.

Finally, indemnity costs are not a one

way street. An ill prepared Plaintiff is just as much at risk, and a Plaintiff's lawyer needs to be particularly on guard, once again because the quantum of the costs will in almost all cases have a far greater effect on an individual application rather than an institutional Defendant.

1 *Qantas Airways Limited v. Dillingham Corporation and Others Roger J unreported May 1987*

*Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Pty Limited and Others (1998) 81 ALR 397*

*Singleton v. Macquarie Broadcasting Holdings Limited (1991) 247 NSWLR 103*

2 (1993) 32 NSWLR 649

3 (1993) 46 FCR 225

4 (1996) 137 ALR 579

5 *re: The Honourable Murray Wilcox, a Judge of the Federal Court of Australia ex parte Venture Industries Pty Ltd, Harry Kioussis and Penny Kioussis, (unreported) 138 of 1996 - 15 January 1997*

6 *FAI general Insurance Co Ltd v. Burns & Anor (1997) 9 ANZ Ins Cases 61-383*

7 *Sammy Russo Suppliers Pty Ltd v. Australian Safeway Stores Pty Ltd - Federal Court 4 June 1998*

8 *Yates Property Corporation Pty Ltd v. John Boland & Ors (1997) 174 ALR 685*

9 Kearney J proceedings no 29 and 30 of 1995 - 31 May 1995

## Private Health Insurance Ombudsman

The new role of Private Health Insurance Ombudsman has been created in a move to increase consumer confidence about the industry and upgrade the handling of inquiries.

The Ombudsman's office is an extension of the former Private Health Insurance Complaints Commissioner, with greater powers and direct access to doctors and private hospitals.

Under the new arrangements, the Ombudsman can investigate problems raised by partners and dependents of private health fund contributors and can make recommendations to resolve complaints direct to doctors and private hospitals.

Previously, the Commissioner could receive complaints only from fund contributors and could recommend remedial action only to the health funds themselves.

Mary Perrett, formerly the Complaints Commissioner, is the first Private Health Insurance Ombudsman.

Ms Perrett, a qualified nurse and lawyer says: "The establishment of the industry Ombudsman and the legislative changes are positive steps for both the health funds and their members".

A recent study carried out by Reark Research found that 78 per cent of consumers were satisfied with the Complaints Commissioner. And the introduction of the Ombudsman's Office will make the broad range of services we provide more accessible'.

"Consumers will feel more comfortable dealing with the Ombudsman's Office, because they know an Ombudsman is an independent voice and can give advice on a wide range of health insurance issues. It can also act as a mediator to resolve disputes between members and their health funds, hospitals and doctors."

The Law Society has a range of pamphlets distributed by the Private Health Insurance Ombudsman. Contact the Law Society for the following pamphlets:

- When the Doctor's Bill makes you Ill
- The Ten Golden Rules of Health Insurance
- Service Charter; Helping, Welcoming, Listening and Answering
- Making a Complaint

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