

- if there is a contract (in the form of a costs agreement), the question of quantification of the costs still may be dealt with in any defence to the action in the same way as in any other contractual claim; and
- if there is no costs agreement, then the question of quantification of the costs still may be dealt with based on the statutory form of *quantum meruit* created by s 319(1)(c).⁶

Endnotes

1. Affirming *Attard v James Legal Pty Ltd* [2010] NSWCA 311.
2. At [102]-[103] per Campbell JA, and at [131] per Barrett JA.
3. *In re Park; Cole v Park* (1888-1889) 41 ChD 326 (see [71]-[76] of Campbell JA's judgment); *Woolfe v Snipe* (1933) 48 CLR 677 (see [80]-[81] of Campbell JA's judgment).
4. Section 98 also applies to proceedings in the Supreme Court, but does not apply to civil proceedings under Part 3 of the *Local Court Act 2007* that are held before the Local Court sitting in its General Division or its Small Claims Division: see rule 1.6 and Schedule 1, Uniform Civil Procedure Rules.
5. Which section confers wide jurisdiction on the court to deal with costs and, relevantly, in sub-section (4) provides that '*In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to: ... (c) a specified gross sum instead of assessed costs.*'
6. Per Barrett JA at [129].

Powers of the courts when parties have engaged in fraud or serious wrongdoing

Carmel Lee reports on *Toksoz v Westpac Banking Limited (No.2)* [2012] NSWCA 288

What role can the court play when it is discovered in the course of the proceedings that a party has engaged in serious misconduct? Recent decisions have considered the role of the court in deterring wrongdoing, whether in the conduct of the litigation or in the facts forming the basis of the action. In *Toksoz v Westpac Banking Limited (No 2)* [2012] NSWCA 288, the Court of Appeal confirmed that it was within the court's power and in the public interest for the court to forward a copy of judgment onto relevant government agencies where issues raised in the case merited further investigation. In *Fairclough Homes v Summers* [2012] UKSC 26, the Supreme Court of the United Kingdom found that the court had a variety of case management powers that could be effective in discouraging claims founded on fraud, although a cause of action would only be struck out in extreme circumstances.

Toksoz v Westpac Banking Limited (No 2)

Westpac customers were defrauded of funds totalling more than \$1 million through a series of identity theft frauds between 2005 and 2007. Westpac reimbursed its customers for the funds taken and brought proceedings in the Supreme Court against Mr and Mrs Toksoz to recover the funds. Palmer J drew the inference, on

the evidence presented, that Mrs Toksoz had actual knowledge that funds received into her account were derived from her husband's acts of fraud on the bank and that in absence of an explanation otherwise, the funds in Mrs Toksoz's bank account were the product of her husband's fraud.

Mrs Toksoz appealed to the court of Appeal, challenging the primary Judge's reasons, and claimed that on the evidence it was not possible for the primary Judge to draw the inference that he did. The Court of Appeal substantially dismissed the appeal¹ finally that the inference made by the primary judge that Mrs Toksoz received money the product of fraud could and should be made. The court made several orders, including the following:

5. Subject to rescission or variation upon receipt of any submissions by the appellant to the Court (such submissions and any affidavit in support to be filed and served within seven days) and the subsequent reconsideration of the question by the Court, direct the Registrar of the Court of Appeal to forward this judgment and the judgment of the primary judge to the relevant Minister of the Commonwealth of Australia administering social service benefits for single parents, to the Australian Taxation Office and to the Crime Commissions of New South Wales and the Commonwealth.

The appellant filed submissions in relation to the matters raised by order 5. These were the subject of the judgment *Toksoz v Wetspac Banking Limited (No 2)* [2012] NSWCA 288.

Did the court have power to forward a copy of judgments to agencies to deter wrongdoing?

The findings in the original case concerned the source of large sums of money deposited into the appellant's account when she was in receipt of means-tested social security benefits. Although the court drew no further inference beyond what was proven, it noted that such actions raised questions whether the appellant was entitled to receive social security funds, if the funds should have been declared to the Australian Taxation Office, and whether any offence had been committed by receiving funds known to be the product of theft.

The appellant made several arguments. First, that the court had no power to make an order directing that the two previous decisions be sent to agencies of executive government as there was nothing in the *Supreme Court Act 1970* (NSW), *Civil Procedure Act 2005* (NSW) or the inherent jurisdiction of the court to permit such a direction to be made. Secondly, that order 5 was oppressive as it was not necessary to determine any matter between the parties and was in the nature of an executive act.

The Court of Appeal found that a court could bring the conduct of litigants to the attention of relevant agencies of the executive and that such an action did not deny a person their civil, human, or common law rights.² If a court could not direct matters of significant importance raised before it to appropriate authorities, then public confidence in the courts would falter.

The appellant said that specific offences had not been identified and that the order was based on speculation. The court clarified that the question concerned not questions of an identified offence but questions relating to large amounts of money being knowingly received and the receipt of otherwise large unexplained sums. The court stated that no finding of fact was made by the court apart from those arising in the dispute between the parties.

The appellant submitted that the order was inconsistent with the findings of the trial court. The court of Appeal

found that the order was not inconsistent. It was not an attempt to punish the appellant for a crime that she had not committed, and nor did the order raise an imposition by the court on Mrs Tokosz of an onus to disprove a prima facie case of fraud. Rather, the totality of the evidence raised serious questions for investigation by relevant authorities raised by the findings made in the exercise of judicial power by the primary judge and this court.

The Court of Appeal also found that, given the statutory purposes and functions of the *New South Wales Crime Commission Act 1985* (NSW) and the *Australian Crime Commission Act 2002* (Cth), it was not appropriate to direct that judgments be sent to those bodies. The order was amended accordingly.

Dealing with proceedings commenced on a fraudulent foundation: *Fairclough Homes v Summers* [2012] UKSC 26

The Supreme Court of the United Kingdom found that the court had a role in discouraging wrongdoing when asked to consider how best to respond to an increase in the number of cases brought before it on a fraudulent basis.

In a trial on liability for a workplace injury, the claimant gave evidence of his injuries that was not disputed. The Judge found for the claimant on liability with damages to be assessed.

In the period before the hearing on damages, the defendant had the complainant filmed in undercover surveillance. The footage demonstrated that the claims made by the plaintiff relating to the effect of his injuries were fraudulent. In fact, the plaintiff was fit for work and was able to go about his ordinary duties several months earlier he had claimed.

At the conclusion of the hearing an application was made to strike out the statement of case as it had been affected by fraud. The claimant accepted that the presentation of a dishonest case as to the extent of his injuries, supported by false evidence, represented a serious abuse of process.

The Supreme Court found that although it had the power to strike out proceedings under the *Civil Procedure Rules 1998* (UK) for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of

both liability and quantum,³ the power should be exercised only in exceptional circumstances. The strike out power was not an appropriate tool to deter parties from wrongdoing, it being not a power to punish but to protect the court's processes. A court it should only strike out a statement of claim where it is satisfied that the abuse of process was such as to cause the party to forfeit the right to have their claim determined. .

The court had regard to the need to comply with the right to a fair and public hearing enshrined in Article 6 of the European Convention on Human Rights, including the right of access to a Court.⁴ In exercising the strike-out power consistently with Article 6, a court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly. The consequence of this was that an order striking out a claim should only be last resort, particularly where the court has determined that the claimant had been held to be entitled to a substantive right after a fair trial.

Finally, the Supreme Court found that a court had a wide range of case management powers. The action of striking out a claim should be a last resort as to do so would deprive the claimant of a right to a fair trial. The Supreme Court accepted the need to deter fraudulent claims being made, but found that a balance had to be struck. In most cases, deterrence could be achieved by demonstrating by findings on the evidence before the court that dishonesty does not increase the award of damages, the making of adverse costs orders (including costs on an indemnity basis), or limiting the interest awarded.

Contempt was another effective sanction, the Supreme Court observing that there was nothing preventing the trial judge hearing the contempt proceedings, subject to any questions of bias. Moreover, it was open to a Judge to refer a matter to the appropriate prosecuting agency.

In every case the test is what is just or appropriate in the circumstances. Often a combination of the above methods would prove an effective deterrent, especially when the risks were explained by a party's solicitor to them. Finally, nothing in the above decision would affect a case being struck out at an early stage in the proceedings, or where fraud or dishonesty affected the whole claim.

In the present case, the Supreme Court held that there was no error in the trial judge's determination that the proceedings should not be struck out, it being neither just nor proportionate to do so.

Conclusion

In both the above cases the courts took the view that it was not only within the court's power to take action against wrongdoing it was in the public interest that courts deter or facilitate investigation of wrongdoing. However such involvement by the court could not compromise the rights of the parties to a fair determination of the dispute before the court.

Endnotes

1. *Toksoz v Wetspac Banking Limited* [2012] NSWCA 199
2. In doing so the court distinguished the present situation from that presented in *Reid v Howard* [1995] HCA 40; 184 CLR 1.
3. Civil Procedure Rules (1998) (SI 1998/3132)
4. *Golder v United Kingdom* (1975) 1 EHRR 524

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