Applications for personal costs orders: *Muriniti v Kali* [2022] NSWCA 109

By Catherine Gleeson

The Court of Appeal has recently clarified the circumstances in which personal costs orders against lawyers pursuant to s 99 of the *Civil Procedure Act 2005* (NSW) will be made, providing guidance as to the timing of such applications and the issues that should be raised in them.

Section 99 empowers the court to make special costs orders where it appears that costs have been incurred:

(a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or

(b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.

The orders that may be made are that a legal practitioner's costs of the proceedings are disallowed, that the legal practitioner pay the costs that the client has been ordered to be paid to a third party, or that the legal practitioner indemnify a third party against costs payable by the third party: s 99(2). Any third party costs ordered to be paid by the legal practitioner cannot be recovered from the client: s 99(6).

Before making an order under s 99, the court must give the legal practitioner a reasonable opportunity to be heard: #99(2). The section is silent as to the time at which such orders may be made by the court but s 98(3) provides that order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.

The principles governing applications under s 99 are well established, having been set down in *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300; [2005] NSWCA 153 at [92], [192]-[196], *Kelly v Jowett* (2009) 76 NSWLR 405; [2009] NSWCA 278 at [60] and *Rahman v Al-Maharmeh (No 2)* [2021] NSWCA 151 at [22]. They include that:

(a) The jurisdiction to make such orders is to be exercised 'with care and discretion and only in clear cases'.

(b) In considering such an application, courts apply a three-stage approach,

asking first, has the legal representative of whom complaint is made acted improperly, unreasonably, or negligently; secondly, if so, did such conduct cause the applicant to incur unnecessary costs; and thirdly, if so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs.

(c) The procedure on such applications must be fair but also as simple and summary as fairness permits to avoid the risk of costly satellite litigation.

(d) Courts should be astute to the risks that applications for costs orders against practitioners made during or shortly after the conclusion of proceedings may expose clients to adverse consequences as the legal practitioners that are the subject of the application may perceive a conflict of interest and cease to act.

(e) Practitioners should not make threats to apply for personal costs orders in an effort to persuade opponents to abandon particular applications, arguments, or even the proceedings.

Muriniti was a perhaps extreme example of a personal costs application descending into satellite litigation that entirely subsumed the substantive litigation. The proceedings concerned a defamation claim arising out of internet publications about the plaintiffs' conduct of their veterinary practice. The personal costs application was made in respect of the defendants' applications to amend their defence. There were five iterations of the defence and in respect of each the plaintiffs' solicitors contended that it was liable to be struck out and that they intended to seek a personal costs order against the defendants' solicitor. In support of the applications for a personal costs order, the plaintiffs' representatives raised issues as to the defendants' solicitors' conduct in other cases (including a previous personal costs orders made against the principal) and as to whether another solicitor had wrongly held himself out to be a barrister.

The applications for leave to amend the defence and for personal costs orders were adjourned several times. One of the reasons for the repeated adjournments was the grant of repeated opportunities to replead, another was the primary judge's concern that there was a conflict of interest between the defendants and their solicitors as a result of the personal costs application. The personal costs application occupied five hearing days (by contrast, the two contested amendment applications occupied a few hours of hearing time). The hearing involved cross-examination of the defendants and the plaintiffs' and defendants' representatives, admission of previous cases in which the defendants' lawyers were criticised as tendency evidence, and adverse credit findings being made against the defendants' lawyer.

The primary judge ordered that the defendants' solicitors pay the plaintiffs' costs of both applications, on the indemnity basis and forthwith, and referred the papers to the Legal Services Commissioner to determine whether the representatives had engaged in unsatisfactory professional conduct or professional misconduct in relation to a number of matters concerning their representation of the defendants. The plaintiffs sought leave to discontinue their claim shortly after the judgment but maintained the right to enforce the personal costs order. The costs claimed by the plaintiffs were in the order of $200,000.

On appeal the personal costs order was set aside. Brereton JA gave the leading judgment, with which Macfarlan and Leeming JJA agreed, with Leeming JA giving short separate reasons. Brereton JA gave the following reasons for setting aside the personal costs order.

First, Brereton JA held that there was no reason to depart from the usual rule that personal costs applications should be made and determined at the conclusion of the final hearing, because it is only at that point that it can be determined whether the steps taken in the proceedings were reasonable, and because the application disrupts the relationship between the lawyer and the client, compromising the lawyer's independence and creating the risks that the lawyer may decide to cease acting, thus depriving the client of their chosen representative. There was nothing about the present case that departed from this rule (at [45]–[49]). Indeed, the timing of the application created issues concerning a potential conflict of interest that occupied time at the hearing and were not relevant to the question of whether the deficiencies in the defence warranted a personal costs order (at [66]–[67], Leeming JA agreeing at [5] and holding that this was the basis for his judgment that the costs order should be set aside).

Second, Brereton JA found that the primary judge erred in taking into account a number of matters that were irrelevant and prejudicial, including the conduct of the application by the defendants' representatives, their conduct in previous unrelated cases, and conclusions drawn from the lawyers' time sheets (at [55]). As to each of these matters:

(a) The representatives' conduct of the hearing could have no bearing on whether the costs the subject of the application were improperly occasioned, though they might be relevant to the costs of the application (at [60]–[61]);

(b) The conduct of the defendants' lawyers in other unrelated proceedings had no bearing on whether the deficiencies in the pleadings in this case were a product of serious incompetence, and the fact that the lawyers had been criticised, and subjected to personal costs orders, in other cases was insufficiently probative to justify their admission as tendency evidence (at [72]–[73]).

(c) The time spent by the defendants' lawyers on the defences, and which of the lawyers were responsible for drafting them, had no bearing on whether they caused the plaintiffs to incur unnecessary costs (at [76]).

Brereton JA concluded that the discretion to make the personal costs order miscarried as a result of these errors, and that the court should exercise the discretion afresh (at [77]–[78]). Leeming JA refrained from expressing a view as to the relevance of considerations other than the pleadings to the application (at [6]).

Third, as to the issue of the deficiencies in the pleading of the defence, Brereton JA observed that s 99 is engaged by egregious conduct, and mere neglect, incompetence or misconduct is insufficient to attract the operation of the section (at [45]). His Honour expressed the view that two unsuccessful attempts to amend a pleading and two additional superseded drafts did not indicate serious incompetence (at [82]). Moreover, the defects identified in the pleading were not so grave that the substance of the defence (which appeared to be justification) was unclear to the plaintiffs and did not evidence serious incompetence (at [83]–[86], Leeming JA agreeing at [5]).

Fourth, Brereton JA was heavily critical of the plaintiffs' solicitors' conduct of the application, in particular the fact that the prospect of a personal costs order was raised at the outset, before any wasted costs could have been occasioned, and that the tendency issue and the issue of whether one of the defendants' solicitors held himself out as a barrister, were raised and pursued in such a way as to cause embarrassment to the defendants' lawyers and impact on their relationship with their clients. From this Brereton J drew two conclusions: that the application was foreshadowed and pursued for the collateral purpose of separating the defendants from their lawyers, and that because the proceedings were ultimately discontinued, the wasted costs order benefited no-one but the plaintiffs' solicitors (at [87]–[103]). His Honour observed at [101]:

> There was no need for this application to be made, let alone determined, when it was. It could at least have awaited the outcome of the applications for leave to amend the statement of claim, and should probably have awaited the outcome of the substantive proceedings. In that way, the risk of embarrassment, conflict of interest, and satellite proceedings, could have been avoided, and the court would have been better positioned to determine whether the appellants' conduct warranted the making of the order. The timing is eloquent of collateral purpose.

Fifth, Brereton JA observed that the proper convention when a judge proposes to refer the papers to the Legal Services Commissioner for consideration of a lawyer's conduct is to afford the practitioner an opportunity to show cause why there should not be a referral. This is because the referral constitutes a formal decision recorded in a published judgment to refer a practitioner to a regulatory authority for disciplinary investigation, which of itself has serious potential reputational consequences for a practitioner. Brereton JA considered it appropriate to make a declaration that the referral of the papers in the present case involved a denial of procedural fairness (at [106]–[107]). BN