

**FEDERAL COURT
OF AUSTRALIA****FEDERAL COURT OF AUSTRALIA****McVeigh v Retail Employees Superannuation Pty Ltd [2019] FCA 14**

File number: NSD 1333 of 2018

Judge: **PERRAM J**

Date of judgment: 17 January 2019

Catchwords: **PRACTICE AND PROCEDURE** – application for maximum costs order pursuant to r 40.51 of *Federal Court Rules 2011* (Cth) – whether maximum costs order should be made – whether proceedings in public interest – whether application premature – where Applicant claims breaches of statutory and equitable duties of superannuation trustee regarding climate change risks – where Applicant indemnified by third party to a maximum amount

Legislation: *Corporations Act 2001* (Cth) s 1017C
Federal Court Rules 2011 (Cth) r 40.51

Cases cited: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864
Haraksin v Murrays Australia Ltd [2010] FCA 1133; 275 ALR 520

Date of hearing: 28 November 2018

Registry: New South Wales

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 20

Counsel for the Applicant: M Green SC with J Mack

Solicitor for the Applicant: Environmental Justice Australia

Counsel for the Respondent: J Lockhart SC with A Byrne

Solicitor for the Respondent: Allens

ORDERS

NSD 1333 of 2018

BETWEEN: **MARK MCVEIGH**
Applicant

AND: **RETAIL EMPLOYEES SUPERANNUATION PTY LTD ACN 001 987**
739
Respondent

JUDGE: **PERRAM J**

DATE OF ORDER: 17 JANUARY 2019

THE COURT ORDERS THAT:

1. The application for a maximum costs order be dismissed.
2. Costs reserved.
3. The matter be listed for a case management hearing on 6 February 2019.

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

REASONS FOR JUDGMENT

PERRAM J:

1 This is an application for a maximum costs order in the sum of \$310,450 pursuant to *Federal Court Rules 2011* (Cth) ('FCR') r 40.51. It provides:

‘40.51 Maximum costs in a proceeding

(1) A party may apply to the Court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding.

Note: Costs as between party and party is defined in the Dictionary.

(2) An order made under subrule (1) will not include an amount that a party is ordered to pay because the party:

- (a) has failed to comply with an order or with these Rules; or

- (b) has sought leave to amend pleadings or particulars; or
- (c) has sought an extension of time for complying with an order or with any of these Rules;
or
- (d) has not conducted the proceeding in a manner to facilitate a just resolution as quickly, inexpensively and efficiently as possible, and another party has been caused to incur costs as a result.’

2 The Applicant has obtained an indemnity from Friends of the Earth Australia Inc (‘FOE’) for that sum in the event of an adverse costs order. The Applicant’s principal argument for why an order should be made under FCR 40.51 is that his suit raises questions involving the public interest. The public interest nature of a suit is relevant to the issue of whether a maximum costs order should be made although there are other factors too: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (‘*Corcoran*’) at [6] per Bennett J; *Haraksin v Murrays Australia Ltd* [2010] FCA 1133; 275 ALR 520 at 522 [8] per Nicholas J.

3 The Respondent disputes that the proceeding is a public interest proceeding. The Applicant’s suit against the Respondent is straightforward. The Respondent is the trustee of a well-known superannuation fund called the Retail Employees Superannuation Trust (‘REST’). The Applicant has been member of the REST Fund since 2013 and has made contributions to his REST account including by way of the 9.5% employer-contributed sums prescribed by s 19 of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

4 The Applicant’s case has developed in two phases. In the first phase, he alleged that s 1017C of the *Corporations Act 2001* (Cth) requires the Respondent to provide to him, as a fund member, information which, *inter alia*, would allow him to make an informed judgment about the management and financial condition of his REST product and about its investment performance. Omitting the notes to the provision and various irrelevant subsections s 1017C provides:

‘1017C Information for existing holders of superannuation products and RSA products

Application

(1) This section applies to the issuer of a financial product if the product is:

- (a) a superannuation product; or
- (b) an RSA product.

Information for concerned person related to a superannuation product

(2) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:

- (a) understanding any benefit entitlements that the concerned person may have, has or used to have under the superannuation product; or
- (b) understanding the main features of:
 - (i) the relevant sub-plan; or
 - (ii) if there is no relevant sub-plan—the superannuation entity; or
- (c) making an informed judgment about the management and financial condition of:

- (i) the superannuation entity; and
 - (ii) the relevant sub-plan (if any); or
- (d) making an informed judgment about the investment performance of:
- (i) the relevant sub-plan; or
 - (ii) if there is no relevant sub-plan—the superannuation entity; or
- (e) understanding the particular investments of:
- (i) the superannuation entity; and
 - (ii) the relevant sub-plan (if any).

The information must be given in accordance with the other requirements of this section.

...

...

Exceptions

- (4) This section does not require (and does not, by implication, authorise) the disclosure of:
- (a) internal working documents of the issuer; or
 - (b) information or documents that would disclose, or tend to disclose:
 - (i) personal information of another person if, in the circumstances, the disclosure would be unreasonable; or
 - (ii) trade secrets or other information having a commercial value that would be reduced or destroyed by the disclosure; or
 - (c) information or documents in relation to which the issuer owes to another person a duty of non-disclosure.

...?

5 The Applicant and his lawyers have engaged in correspondence with the Respondent and its lawyers in which the Applicant has sought information as to what actions the Respondent is taking regarding the financial risks posed to his superannuation by climate change. The Respondent for its part has pointed to publicly available information on its website in which it says (paraphrasing) that it takes environmental risks seriously and has also told the Applicant that it acknowledges that climate change is a relevant consideration in the context of fund investment and management. It has also told him that its expert investment managers are required to consider a full range of factors in making investment decisions including issues relating to the environment and sustainability. It has declined, however, to give any information more specific than that.

6 In this original form of his case, the issue was therefore not whether the Respondent was obliged to take into account environmental issues including climate change. Rather, the issue was whether s 1017C required it to tell the Applicant any more than it already has. Presumably, the Applicant would like to know matters such as

whether the Respondent invests in businesses with large carbon footprints. Presumably, in due course, the Respondent will argue that whether it does or not is not germane to the financial performance of the fund to which he will respond that the fund will not perform very well if its investments are under water. The Respondent may also rely on s 1017C(4). The lines of battle on this issue are clear.

7 Subsequently, the Applicant amended his case also to allege that the Respondent breached its duties as a trustee by not having a more developed climate change policy than it had indicated. This is a more complex case and will go to the duties of the Respondent as a trustee. Breaches of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*'), *inter alia*, are alleged.

8 There is, I suspect, an element of strategic manoeuvring in the way the case is currently put in the sense that in defending itself against the allegations that it has acted imprudently as a trustee it is likely that the Respondent may disgorge more material about what it has done in relation to climate change than it has up and until now. On the other hand, the Respondent may take the position that the Applicant has insufficient material to launch such a case at this stage. At that point, no doubt, the issue of discovery will loom into view.

9 All of that is by the by for current purposes. Although it is possible that one could characterise this case as one involving the proper construction of s 1017C and the *SIS Act* together with some issues about the duties of trustees and hence as being a dry Chancery suit, I do not think that would be a fair characterisation. The case appears to raise a socially significant issue about the role of superannuation trusts and trustees in the current public controversy about climate change. It is legitimate to describe the Applicant's litigation as being of a public interest nature.

10 The Respondent advanced a number of reasons why a maximum costs order should, nevertheless, not be made, most of which I would reject. I do not think the Applicant is to be criticised for the timing of the application. Indeed, there is much to be said for the view that bringing the application at the earliest time, as the Applicant has done, allows the parties to know in advance of their preparations for trial what the costs situation actually is and to trim their sails (or perhaps unfurl their spinnakers) accordingly. That is not to say that timing is irrelevant. The very same reasoning supports a curial disinclination to make such an order later in proceedings when too much water may already have gone under the bridge: *Corcoran* at [15]-[17].

11 Likewise, whilst it is true that the full nature of the issues in this case has not yet totally crystallised, nevertheless, the general lie of the land is clear enough to know that this is a moderately complex case about the duties of superannuation trustees in relation to climate change and their obligation to provide information about the same to their members. That is, I think, sufficient to allow one to gauge the reasonableness of the proposed cap. I thus do not find especially persuasive the detailed criticisms which the Respondent made of various alleged pleading deficiencies in the Applicant's case. Accepting for the sake of argument that some or all of them are well-founded, they do not impede the Court's ability to assess the reasonableness of the proposed cap.

12 In that regard, the Applicant proposes a cap of \$310,450 and it may safely be said that this will be well south of what the Respondent's taxed costs will be if it succeeds at what is likely to be a 3 day, largely documentary, trial involving as it will extensive preparation. The issues for the Respondent are serious too (bearing in mind that there are always two sides to every story) and it may be expected that it will defend itself, as it is entitled to do, vigorously. The nature of the Respondent's legal team as evident on this application well shows that its defence of this matter will be thorough and searching.

13 The pleading issues could, in theory, show that the case brought by the Applicant lacked merit and that would be relevant to whether the costs capping order should be made at all. However, I do not think that the points made by the Respondent detract from the basic structure of the Applicant's case which is relatively straightforward and which I would characterise as not hopeless. Thus, for example, I do not think that it would be especially helpful to inquire on the present application, as the Respondent suggested I should, what kind of climate change impacts the Applicant has in mind or whether the Respondent is to be boxed into a corner on the issue of whether it disputes the consensus on climate change. I do not say that to put at naught the Respondent's concerns about these matters but rather merely to say that I am not going to entertain what is essentially a backdoor strike out application. If the Respondent chooses to try and put the Applicant's pleadings on the

breaking wheel those issues can be dealt with then. The point for present purposes is that these contentions do not speak loudly on the current application.

14 If the matter rested there I would make the order sought. However, they do not so rest because I do accept three other submissions made by the Respondent. *First*, the Applicant has not unequivocally said that unless the order is made he will abandon the proceeding. What he has said is this: ‘If the Maximum Costs Order Application is unsuccessful, my intention is not to continue to prosecute this proceeding if it could result in costs orders that pose a financial risk to me’. This is an example of equivocation in which the speaker appears to be saying one thing whilst perhaps actually saying something else altogether. I do not say that the Applicant must necessarily say, as the inevitable price for obtaining a maximum costs order, that without it he will give up his proceeding. But having at least chanced the field on this topic the Court needs something a little less obscure from him than his current Delphic utterance.

15 *Secondly*, and allied to that point, the Applicant has not told the Court anything about his own financial position. It is likely, given that he is a 23 year old ecological landscaper, that he is not Richie Rich. However, if the Court does not know what his asset position actually is then it has no way of gauging whether a costs capping order is necessary or at what level it should be set.

16 *Thirdly*, it is also unclear how FOE raised these funds or whether it could raise more. Is the \$310,450 all the money it raised or half of it? Is FOE doing its best to put up as much as it can or has it put some away for a rainy day? These are all, I think, fair questions.

17 There may well be answers to these problems but these answers are not presently apparent and in that circumstance I do not accept that the Court is sufficiently informed at this stage to make a maximum costs order.

18 For completeness, I record the submission of the Respondent that it is relevant that the indemnity proffered by FOE is not secured. The Respondent submitted that this is relevant to the question of whether a maximum costs order should be made because it may ultimately transpire that FOE will not be able to meet its obligations to the Applicant under the indemnity. Although FOE has raised the sum of \$310,450 there is nothing in place to prevent it disbursing that money on other expenses, for example, the Applicant’s own legal costs.

19 There are some potentially difficult issues about this submission. There may well be force in the contention that whether the indemnity is secured or not should be irrelevant since the purpose of a maximum costs order is not to provide a Respondent with security. On the other hand, the extent of an Applicant’s assets is certainly relevant to determining the appropriate level of a maximum costs order and an extension of that reasoning may justify the conclusion that the value of an indemnity is a relevant matter just as the value of the Applicant’s personal assets is a relevant matter. Where assets are demonstrated in the hands of the party proffering an indemnity (as here) there may be a further issue as to whether it is necessary for a Respondent to point to a real risk of asset dissipation by the indemnifier or whether a merely theoretical risk will suffice. There is another potential issue concerning the relationship between FCR 40.51 and the rules concerning security for costs and whether the existence of the latter affects the content of the former. Given that it is not necessary for the purposes of determining the present application to reach a concluded view on any of these potentially difficult matters I will refrain from doing so.

20 It will be apparent from what I have said that I am not against the making of a maximum costs order in principle but the short of the matter is that some of the Respondent’s criticisms are, indeed, valid. The Applicant’s claim for a maximum costs order contained in his amended originating application is therefore dismissed. I will reserve the issue of costs at this stage.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram .

Associate:

Dated: 17 January 2019

