

Introduction

Civil litigation can be expensive. While participants usually understand that, if they are successful, they could be awarded costs, they frequently fail to consider the factors that might impact the prospects of obtaining this award beyond “succeeding”. This article explores the often glossed over issue that how a case is run may have a significant impact on the quantum of costs a party might recover.

The level of legal costs is often carefully considered in commencing or maintaining a legal action. Legal costs also factor significantly in settlement considerations. However, separate to the level of costs incurred, the actual recoverability of legal costs can be overlooked in the preliminary stages of litigation when legal arguments are developed, pleadings are settled and forensic decisions are made in relation to the evidence to support a party’s case. This is a mistake, as careful consideration of these issues can have a significant impact on the level of costs that can be recovered, if any, and, in an exceptional case, could even see a “successful” party paying some costs of an unsuccessful party.

The recent NSW Supreme Court decision by Justice Black in *Warburton v County Construction (NSW) Pty Ltd (No 3)* [2022] NSWSC 1563 (*Warburton*) provides a salient reminder of the factors considered by the court when departing from the general rule that costs follow the event, and of the inherent dangers of adopting a “kitchen sink” approach to the claims pursued and the evidence tendered in support of those claims.

Costs Recap

- Ordinarily, a successful party in litigation will be entitled to be paid their “party to party” legal costs of the proceeding on a standard basis (Rule 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR)). This general rule, referred to as costs “following the event”, founds a reasonable expectation on the part of a successful party of being awarded costs against the unsuccessful party.
- If considering a departure from the ordinary rule, the court should have regard to the purpose, rationale and principles of fairness that inform the general rule, in particular that the award of costs should reflect the relative responsibilities of the parties for the incurring of costs.
- Circumstances that may influence a court to depart from the general rule that costs follow the event include disentitling conduct on the part of the successful party. Disentitling conduct, in this context, may be constituted by any conduct “calculated to occasion unnecessary expense” and need not amount to “misconduct”.

- Where the litigation involves multiple issues, the ultimately successful party may have failed on one or a number of the issues in the trial. Where the ultimately unsuccessful party has succeeded (and, as a corollary, the successful party has failed) on one or more substantial issues, the question often arises whether there should be a departure from the general rule, given that “the event” is not necessarily limited to the final overall outcome, but can include individual issues in the proceedings.
- The court must strike a balance between permitting litigants to canvass all issues, while not rewarding them for unreasonable conduct or encouraging the agitation of unnecessary issues.

Warburton v County Construction (NSW) Pty Ltd (No 3)

1. In *Warburton*, the plaintiffs entered into a written contract with the defendant builder to carry out the demolition of an existing dwelling and the construction of a new residence (the Project). Various disputes between the plaintiffs and the defendant arose in relation to delays and mounting costs, so the parties entered into a second agreement that significantly narrowed the defendant’s obligations in relation to the Project.¹
2. Relations between the parties deteriorated further and culminated in the plaintiff’s commencing proceedings against the defendant and the project manager in relation to numerous alleged defects with the construction works. The plaintiffs sought damages for each category of defect on the basis of breach of contract and breach of implied statutory warranties.
3. The court ultimately dismissed the majority of the plaintiffs’ claims; however, it did award damages against the defendant in relation to some minor defects that had occupied little time at the hearing. In addition, the following occurred, which increased the costs of the parties:
 - a. The plaintiffs discontinued their claim against the project manager at the commencement of the hearing.
 - b. Extensive pleadings were filed, supported by voluminous lay and expert evidence; however, much of this was in inadmissible form and was subsequently abandoned at the hearing.
 - c. The plaintiffs then raised further claims for rectification, unilateral mistake and relief under the applicable home building legislation, each of which was unsuccessful.
 - d. The defendant abandoned one of its defences at the start of the proceedings.

¹ See *Ibid* [22] – [30].

Costs of the Proceedings

- In his decision, Justice Black noted that, given the outcome, costs had become an issue of some importance, as the costs borne by both parties was likely to exceed the amount recovered by the plaintiffs to a significant degree.
- With reference to Rule 42.1 of the UCPR, Justice Black observed that the general rule that costs follow the event and any departure from that rule is based on notions of fairness, "having regard to what the court considers to be the responsibility of each party for the incurring of the costs".² His Honour noted that a departure from the general rule may be necessary "to reflect a party's failure on particular issues if those issues were clearly dominant or separable or took up a significant part of the trial".³
- His Honour found that an order that the defendant pay the plaintiff's costs of the proceedings (i.e. the usual order) would be wholly unjust, given the history of the proceedings, the substantial amount of inadmissible evidence on which the plaintiffs relied, the abandonment of the claims against the project manager, and the extent to which the costs of the proceedings would exceed the plaintiffs' recovery in them. His Honour also found that the plaintiffs had prolonged the hearing by litigating at length on issues and claims of relatively small value.⁴
- However, his Honour also found no basis on which the court could fairly order that the plaintiffs pay all of the defendant's costs of the proceedings, as was pressed by the defendant. This was because the defendant's conduct had also increased costs by maintaining a defence that was abandoned at the commencement of the hearing.⁵ On balance, Justice Black determined that the appropriate outcome was that no party should have a costs order made in their favour.

Key Takeaways

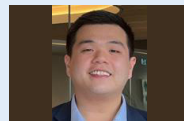
- This decision reminds parties involved in litigation that, just because a potential argument exists, it does not mean that it should be run. Parties should proceed with caution before adopting a kitchen-sink approach to litigation. Not only will a party incur additional costs running many additional (and likely unnecessary claims), but they will also threaten the prospect of recovering costs for the successful claims.
- A party which runs a "successful" claim along with a number of other unmeritorious claims may lead the judge to exercise their discretion to make costs orders that account for the winning party's unnecessary protraction of the proceedings by either denying them an award of costs or even potentially requiring them to pay some or all of the unsuccessful party's costs.
- Litigating parties should also exercise judgment in the preparation of evidence to minimise the costs incurred in addressing issues that may ultimately be irrelevant to the resolution of the proceedings. Certainly, care should be taken to ensure one's evidence is in admissible form.
- Further, where there are multiple claims or causes of action that can or have been included in the proceedings, there should be careful consideration of the real prospects of including the weaker claims and the risk of incurring an adverse costs outcome. Sometimes this only becomes clear once discovery occurs, but often it is possible to undertake this analysis at the start of proceedings. *Warburton* reminds us that parties should consider costs outcomes carefully, both at the outset of a case and as evidence is gathered, when developing legal arguments, settling pleadings and in making forensic decisions in relation to the evidence to support a party's case.

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² *Commonwealth of Australia v Gretton* [2008] NSWCA 117, quoted in *Warburton v County Construction (NSW) Pty Ltd (No 3)* [2022] NSWSC 1563, [12].

³ *Warburton v County Construction (NSW) Pty Ltd (No 3)* [2022] NSWSC 1563, [27].

⁴ *Ibid* [17].

⁵ *Ibid* [37].