FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Rawson Finances Pty Ltd (Costs) [2024] FCA 19

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| File number(s): | NSD 1329 of 2014 |
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| Judgment of: | **PERRY J** |
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| Date of judgment: | 19 January 2024 |
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| Catchwords: | **COSTS** — application by **Commissioner** of Taxation for indemnity costs— where applicant wholly successful in setting aside judgment of the Full Court of the Federal Court for fraud —whether indemnity costs should be awarded having regard to the public interest in the Commissioner applying to set aside earlier Full Court decision obtained by fraud — where general principle is that indemnity costs can only be awarded on the basis of delinquency in the conduct of the present proceedings, not antecedent conduct — where contempt of court is an exception to the general principle based on the public interest in ensuring administration of justice and upholding rule of law — where analogous considerations apply in context of setting aside judgment obtained by fraud, given public interest— whether ***Clone*** *Pty Ltd v Players Pty Ltd (in Liquidation)* (2016) 127 SASR; [2016] SASFC 134 requires different outcome — where *Clone* distinguishable because it considered malpractice, not fraud — held: indemnity costs payable for entire proceeding, save for costs application  **COSTS** — alternatively, whether Rawson’s conduct in this proceeding warrants indemnity costs — where respondent did not admit fraud in circumstances where consent orders were made excusing respondent from pleading to the allegations of fraud against company officers and exempting respondent from disclosing documents — where respondent positively ran a knowingly false case that the loans the subject of the Full Court decision were genuine after late admission by the respondent of the existence of the back to back loans following the production of evidence from Israel irrefutably establishing their existence |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43  *Foreign Evidence Act 1994* (Cth) s 7 |
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| Cases cited: | *Ali v Collection Point Pty Ltd* [2011] FCAFC 87  *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* [1986] HCA 46; (1986) 161 CLR 98  *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* [1991] FCA 150  *Australian Guarantee Corporation Ltd v De Jager* [1984] VR 483  *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119  *Canada v Granitile Inc* [2008] OJ No 4934; (2008) 302 DLR (4th) 40  *Clone Pty Ltd v Players Pty Ltd (in Liquidation)* (2016) 127 SASR; [2016] SASFC 134  *Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)* (2018) 264 CLR 164; [2018] HCA 12  *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 801; (1993) 46 FCR 225  *Commissioner of Taxation v Rawson Finances Pty Ltd (No 2)* [2016] FCA 402  *Commissioner of Taxation v Rawson Finances Pty Ltd (No 4)* [2016] FCA 1436  *Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753  *Commissioner of Taxation v Rawson Finances Pty Ltd* [2023] FCA 617  *Deputy Commissioner of Taxation v Gashi (No 3)* [2011] VSC 448  *EMI Records Ltd v Ian Wallace Ltd* [1982] 2 All ER 980; [1983] 1 Ch 59  *GR Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263  *Hamod v New South Wales* [2002] FCA 424; (2002) 188 ALR 659  *Harrison v Schipp* [2001] NSWCA 13  *Henderson v Amadio Pty Ltd* [1996] FCA 184  *Hip Foong Hong v H Neotia & Co* [1918] AC 888  *Hypec Electronics Pty Limited (in liq) v Mead; BL & GY International v Hypec Electronics Pty Limited (in liq)* [2004] NSWSC 731; (2004) 61 NSWLR 169  *Infa-Secure Pty Ltd v Crocker (No 2)* (2016) 338 ALR 586; [2016] FCA 202  *Kazal v Thunder Studios Inc* (2017) 256 FCR 90; [2017] FCAFC 111  *Kazal v Thunder Studios Inc (California)* [2017] FCA 238  *McDonald v McDonald* [1965] HCA 45; (1965) 113 CLR 529  *NMFM Property Pty Ltd v Citibank Ltd (No 2)* [2001] FCA 480; (2001) 109 FCR 77  *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72  *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 506  *R v Witt* [2016] VSC 169  *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26; (2013) 133 ALD 39  *Rawson Finances Pty Ltd v Federal Commissioner of Taxation* [2016] FCAFC 95; (2016) 103 ATR 630  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 45)* [2023] FCA 1474  *Royal Bank of Scotland plc v Highland Financial Partners LP (Costs)* [2013] EWCA Civ 472  *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA 328  *Takhar v Gracefield Developments Ltd* [2019] UKSC 13; [2020] AC 450  *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* [1991] FCA 187  *Universal City Studios LLLP v Hoey t/as DVD Kingdom* (2007) 73 IPR 45; [2007] FCA 806  *Wills v Chief Executive Officer of the Australian Skills Quality Authority (Costs)* [2022] FCAFC 43  *Re Areffco and Commissioner of Taxation* [2011] AATA 628; (2011) 84 ATR 924 |
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ORDERS

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|  | | NSD 1329 of 2014 |
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| BETWEEN: | COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA  Applicant | |
| AND: | RAWSON FINANCES PTY LTD  Respondent | |

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| order made by: | perry j |
| DATE OF ORDER: | 19 January 2024 |

THE COURT ORDERS THAT:

1. Subject to order 2, the respondent is to pay the applicant’s costs of the proceedings, assessed on an indemnity basis and fixed in the sum of **$**3,557,400.00.

2. The respondent is to pay the applicant’s costs in relation to the application for indemnity costs on a party/party basis and fixed in the sum of $38,000.00.

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

REASONS FOR JUDGMENT

PERRY J:

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| 1 INTRODUCTION | [1] |
| 2 BACKGROUND | [8] |
| 3 GENERAL PRINCIPLES ON INDEMNITY COSTS | [11] |
| 4 GROUND ONE: THE PUBLIC INTEREST ARGUMENT | [14] |
| 4.1 The issue and the parties’ submissions | [14] |
| 4.2 Disposition of ground one | [16] |
| 5 GROUND TWO: RAWSON’S CONDUCT IN THE PRESENT PROCEEDING | [55] |
| 5.1 The issue | [55] |
| 5.2 Salient aspects of the chronology | [57] |
| 5.3 Disposition of ground two | [68] |
| 5.3.1 The period before the positive defence | [68] |
| 5.3.2 The period from the positive defence | [79] |
| 6 SHOULD COSTS BE AWARDED IN A LUMP SUM? | [87] |
| 7 CONCLUSION | [102] |

##### 1. INTRODUCTION

1 This case raises an important and apparently novel question concerning the award of indemnity costs in circumstances where an applicant has been successful in setting aside a judgment on the ground it was procured by a fraud on the Court.

2 The applicant, the **Commissioner** of Taxation, seeks indemnity costs against the respondent, **Rawson** Finances Pty Ltd, fixed in the amount of $3,557,432.89 following judgment on the substantive issues in which the Commissioner was wholly successful: *Commissioner of Taxation v Rawson Finances Pty Ltd* [2023] FCA 617 (***Rawson Primary Judgment***). By the *Rawson Primary Judgment*, the Court set aside orders made by the Full Court of the Federal Court in *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26; (2013) 133 ALD 39 (*Rawson FCAFC*), on the basis that the judgment was procured by fraud. The Court also held in the *Rawson Primary Judgment* that the related decision of the Administrative Appeals Tribunal (**AAT**) in *Re Areffco and Commissioner of Taxation* [2011] AATA 628; (2011) 84 ATR 924 (*Rawson (AAT)*) was similarly procured by fraud.

3 Given that the Commissioner was wholly successful, Rawson accepts that the Commissioner is entitled to his costs of this proceeding. However, Rawson opposes the application that costs be awarded on an indemnity basis. In the event that Rawson was unsuccessful in resisting the application for indemnity costs, it did not lead any evidence or make any submissions in opposition to the making of a lump sum costs order; nor did it put in issue the quantum of costs sought by the Commissioner.

4 The application for indemnity costs is made on two separate grounds.

(1) First, the Commissioner submits that he was acting in the public interest in taking steps to have the earlier Full Court decision set aside on the basis it was obtained by fraud, and therefore that he should be fully indemnified for his costs. Senior Counsel for the Commissioner explained that this was a “*completely standalone ground for indemnity costs … [which] is not affected by the conduct of the proceedings*”: T.10.33.

(2) Secondly and in the alternative, the Commissioner contends that Rawson’s conduct in the proceedings warrants an indemnity costs order. As to this ground, the Commissioner alleges that Rawson always knew the true position with respect to its fraudulent conduct; yet, far from admitting the fraud, Rawson defended its fraudulent conduct as genuine.

5 For the reasons I explain below, the Commissioner’s first ground should be upheld and indemnity costs should therefore be awarded in the exercise of discretion against Rawson for the entirety of the proceeding fixed in the amount sought by the Commissioner. I accept that the Commissioner should bear no part of its expenses in setting that judgment aside in circumstances where the public interest is heightened by the seriousness of the fraud perpetrated upon the Commissioner and the Full Court.

6 Given those findings, it is not strictly necessary to address the Commissioner’s alternative ground for seeking indemnity costs based on Rawson’s conduct in the proceeding. However, for the reasons also explained below, even if Rawson had successfully resisted an award of indemnity costs on the first ground, I would have held that Rawson’s conduct in the proceeding was such as to justify an order for indemnity costs, but only on and from 27 August 2020. This is because on that date Rawson filed written submissions in which it:

(1) admitted the existence of the back-to-back deposit accounts held in code names with Israeli banks for the first time following evidence having been obtained from Israel pursuant to letters of request which irrefutably established the existence of those accounts; but

(2) positively put forward a knowingly false case that the loans the subject of the Full Court decision were nonetheless genuine.

7 As I reiterate below, in so finding no criticism is made of Rawson’s legal representatives who were, no doubt, acting on instructions.

##### 2. BACKGROUND

8 The key aspects of my decision in the *Rawson Primary Judgment* were summarised at [2]-[14], and are conveniently repeated here:

2. The applicant, the **Commissioner** of Taxation, seeks to set aside the decision of the Full Federal Court in *Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26; (2013) 133 ALD 39 (***Rawson (FCAFC)***)on the ground that it was procured by fraud. Further, or in the alternative, the Commissioner seeks to set aside on the same ground both the decisions in *Rawson (FCAFC)*and of the Administrative Appeals Tribunal (**Tribunal** or **AAT**) in *Re* *Areffco and Commissioner of Taxation* [2011] AATA 628; (2011) 84 ATR 924 (***Rawson (AAT)***). Areffco was the pseudonym used by the AAT for the respondent, **Rawson** Finances Pty Ltd, which was one of a number of entities owned and controlled by members of the Binetter family.

3. By way of overview, the decisions in *Rawson (AAT)* and *Rawson (FCAFC)* arose in context of Project Wickenby, a project by the Australian Taxation Office (**ATO**) which investigated whether Australian taxpayers were returning profits earned abroad to Australia disguised as “loans” from overseas banks. Following an audit commenced in July 2006, the Commissioner issued under s 167 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 36**) notices of assessment and amended assessment of the amount of taxable income of Rawson for the financial years ending 30 June 1997 to 30 June 2008 (the **relevant period**) and penalty assessments for the years ended 30 June 2001 to 30 June 2008 inclusive (the **taxation assessments** and the **penalty assessments** respectively). First, the Commissioner disallowed amounts which Rawson claimed for the relevant period were allowable deductions representing interest incurred by it on alleged loans from the Mercantile Discount Bank (**MDB**) in Israel to Rawson. Secondly, by assessments for the years of income ended 30 June 1997 and 1998, the Commissioner included in Rawson’s assessable income, amounts received by Rawson in Australia from MDB by way of purported loans. This resulted in the Commissioner assessing Rawson’s taxable income in the sum of $3,007,550.00 for the year ending 30 June 1998 and in the sum of $1,971,088 for the year ending 30 June 1999.

4. Rawson, however, contended that the amounts that the Commissioner had assessed as taxable income for the years ending 30 June 1998 and 1999 were loans made to it from MDB and claimed deductions over the relevant period for interest allegedly paid by Rawson on those loans. It lodged taxation objections to the taxation assessments (the **taxation objections**), and objections to the penalty assessments (the **penalty objections**) in September 2009.

5. Rawson’s taxation and penalty objections were disallowed by the Commissioner on 27 May 2010.

6. On 11 June 2010, Rawson commenced merits review proceedings against the Commissioner’s decision in the AAT under Part IVC of the *Taxation Administration Act 1953* (Cth)(**TAA 53**). The proceedings were heard from 9 to 13 May 2011, 8 to 10 June 2011, and on 17 June 2011. Section 14ZZK of the TAA 53 imposed the onus of proving that the Commissioner’s assessments were excessive upon Rawson.

7. In the course of the *Rawson (AAT)* proceedings, Rawson adduced evidence from several witnesses. Shortly stated, the effect of that evidence and Rawson’s submissions was as follows:

(1) the Binetter family had a business practice of setting up special purpose vehicles to take out loans from **Israeli banks**, being MDB, Israel Discount Bank (**IDB**) and Bank Hapoalim;

(2) Israeli banks operated differently from Australian banks because Israeli banks were willing to lend to foreign entities on the basis only of personal guarantees and relationships;

(3) members of the Binetter family, including the directors of Rawson, had direct involvement with Israeli banks through various entities including:

(a) **BCI** Finances Pty Ltd;

(b) ACN 078 272 867 Pty Limited, formerly **Advance** Finances Pty Ltd;

(c) ACN 087 623 541 Pty Limited, formerly **Civic** Finances Pty Ltd; and

(d) **EGL** Development (Canberra) Pty Ltd;

(4) BCI, Advance, Civic, and EGL, each received significant loans from Israeli banks which were not supported by any form of security, whether a back-to-back (abbreviated in some documents as **BTB**) cash deposit or any other form of security, but only by personal guarantees; and

(5) by inference, the Rawson loans were also not supported by any deposit or back-to-back arrangement, and MDB was willing to loan monies to Rawson on the strength of a personal guarantee from a former director of Rawson.

8. In *Rawson (AAT)*, the Tribunal accepted that Rawson had established that the taxation assessments were excessive. Accordingly, on 6 September 2011, the Tribunal set aside the Commissioner’s decisions insofar as the Commissioner had: (a) included in Rawson’s assessable income any part of the funds transferred from MDB; and (b) disallowed deductions for interest. As the Commissioner submitted, in so finding, the Tribunal accepted that:

Rawson, a recently incorporated Australian company with no net assets and issued share capital of $2 was able to obtain a loan for AUD4.75 million from a reputable Israeli bank whilst providing no security and was able to seemingly default on its interest payment obligations for lengthy periods of time without any recovery steps being taken, or without any apparent response from MDB.

(Applicant’s Outline of Submissions (**AS**) at [10].)

9. The Commissioner instituted an appeal against the AAT decision in the Federal Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). This was an appeal on a question of law only and not as to the merits of the AAT decision. In other words, as Jessup J held in *Rawson (FCAFC)* at [60], disagreement, or even strong disagreement, with the findings by the AAT would not suffice to establish a basis on which the Court could interfere with the AAT’s decision.

10. On 17 July 2012, Edmonds J allowed the Commissioner’s appeal on the ground that the AAT’s conclusion, that the Tribunal’s characterisation of Rawson’s funds received from MDB in 1997 as “loans”, was not open on the evidence, and Rawson had not therefore discharged its onus of proof under s 14ZZK(b)(i) of the TAA: *Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753; (2012) 89 ATR 357 (***Rawson (FCA)*** at [18]). Rawson then appealed from that decision to the Full Court, alleging that the primary judge had erred in failing to consider evidence which supported the inference that the 1997 transfers were by way of loans. On 5 March 2013, the Full Court in *Rawson (FCAFC)* allowed Rawson’s appeal, set aside the orders of the primary judge, and in lieu thereof, ordered that the application by way of appeal from the AAT be dismissed.

…

12. The Commissioner contends that he subsequently obtained a substantial body of new evidence since judgment in *Rawson (FCAFC).* The **new evidence** (which, together with the evidence and other documents pertaining to the *Rawson (AAT)* proceedings, comprised **56** volumes) includes the following:

(1) documents and translated transcripts of examinations of officers of Bank Hapoalim obtained pursuant to the letter of request in the **BCI proceedings** (*BCI Finances Pty Ltd v Commissioner of Taxation* [2012] FCA 855; (2012) 89 ATR 861) (**BCI letter of request**) (noting that leave was granted to use these documents in the present proceeding);

(2) documents produced by the liquidators of Advance and Civic in March and July 2015;

(3) documents produced on 2 February 2020 and 21 April 2020 in answer to the subpoena issued in these proceedings;

(4) translated transcripts of examinations of Messrs Zamir, Septon and Antebi conducted pursuant to the Rawson letters of request; and

(5) documents produced by MDB pursuant to the Rawson letters of request.

13. The Commissioner contends that the new evidence establishes ***first*** that the loans to BCI, Advance, Civic and EGL were in fact secured by secret cash deposits and described as back-to-back loans, and that these matters were known to witnesses who gave false or misleading evidence to the contrary on behalf of, and to the knowledge of, Rawson in the *Rawson (AAT)* proceedings. ***Secondly***, the Commissioner alleges that the new evidence establishes that the Rawson loans were supported by a secret linked deposit account in a code name and that Rawson’s case that they were secured only by personal guarantees was knowingly false. ***Thirdly***,and also based upon the new evidence, the Commissioner alleges that the decisions in *Rawson (AAT)* and *Rawson (FCAFC)* were obtained by fraud and that the fraud was material to the outcome of the *Rawson (AAT)* proceedings.

14. For the reasons given below, the new evidence overwhelmingly establishes that the decisions of the AAT and the FCAFC were obtained by fraud on the part of Rawson (but not on the part of the legal practitioners making submissions in the *Rawson (AAT)* and Federal Courtproceedings). ***First***, this is now established by direct evidence of Rawson’s loan arrangements with MDB and Rawson’s knowledge of the fraud through its director and company secretary, **Andrew** Binetter. ***Secondly***, the Commissioner also adduced new evidence in relation to other Binetter family entities (including BCI, Advance, Civic and EGL) because Rawson ran an inferential case before the AAT that it followed the same “*business practice*” as its related entities. Accordingly, the new evidence of the actual business practices of those entities was relied upon by the Commissioner in support of the alleged fraud perpetrated by Rawson. While, given direct evidence of the fraud, it might not be strictly necessary for me to make findings in relation to Rawson’s case in the AAT to the extent that it was based upon the alleged business practices of those related entities, I have nonetheless addressed that evidence. In particular, as trial judge, it is incumbent upon me to make findings with respect to all material issues. Furthermore, that evidence further strengthens the finding of fraud that I have made and exposes the extent of the fraud perpetrated by Rawson on the AAT and the Full Court. It also exposes the lengths to which Rawson went to conceal the back-to-back nature of its arrangement with MDB, seeking at every stage to conceal the fraud. ***Thirdly***, I have no doubt that the fraud was material to the outcome of the AAT and in turn to the decision of the Full Court.

9 One further aspect of the *Rawson Primary Judgment* proceeding should be emphasised at the outset. The *Rawson Primary Judgment* concerned an application to set aside a judgment for fraud. Importantly, a “*cause of action to set aside a judgment for fraud is independent of the cause of action asserted in the earlier proceeding*”: ***Takhar*** *v Gracefield Developments Ltd* [2019] UKSC 13; [2020] AC 450 at [61] (Lord Sumption, with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed). The Commissioner did not therefore seek to re-open the earlier Full Court proceeding to set aside the orders that had been obtained by fraud. Rather, in accordance with well-established authority as explained in the *Rawson Primary Judgment* at [62], the Commissioner instituted fresh proceedings based on a distinct and separate cause of action in fraud.

10 As I later explain, this feature of the proceedings before me is significant in terms of assessing whether indemnity costs should be awarded in this proceeding. For present purposes, it suffices to note that the application for indemnity costs as pressed relates only to the costs of the *Rawson Primary Judgment*, and not the costs of the earlier Federal Court proceedings. In this respect, I note that the orders made in *Rawson Primary Judgment* set aside the Full Court’s orders in *Rawson FCAFC*. The Full Court orders had allowed Rawson’s appeal from, and set aside the orders of, Edmonds J in *Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753 (***Rawson FCA***), and also awarded Rawson its costs against the Commissioner in the Full Court. The orders made in the *Rawson Primary Judgment* therefore resulted in the orders made by Edmonds J in *Rawson FCA* being reinstated, including the orders awarding the Commissioner his costs in that proceeding: *Rawson Primary Judgment* at [654]. While the originating application filed in this proceeding sought an order among other things that Rawson pay the costs of the proceedings in the Full Federal Court on an indemnity basis, no submissions were made by the Commissioner in support of this order; nor was any evidence specifically on this issue led such as evidence as to quantum. Furthermore, the interlocutory application filed by the Commissioner on 21 July 2023 following judgment on the substantive issues (and following the Commissioner’s request to be heard on costs) did not raise the question of any orders with respect to the costs incurred in the Full Court proceedings. In those circumstances, I have assumed that the Commissioner did not press this aspect of the relief sought in the originating application.

##### 3. GENERAL PRINCIPLES ON INDEMNITY COSTS

11 This Court has a broad discretion to order costs under s 43 of the *Federal Court of Australia Act 1976* (Cth): *Wills v Chief Executive Officer of the Australian Skills Quality Authority (Costs)* [2022] FCAFC 43 at [20] (Logan, Griffiths and Perry JJ). That discretion includes power to order that costs be paid on an indemnity, rather than a party/party, basis: ***Colgate-Palmolive*** *Co v Cussons Pty Ltd* [1993] FCA 801; (1993) 46 FCR 225 at 232–233 (Sheppard J).

12 The ordinary rule is that a party is entitled to costs on a party/party basis only. However, the ordinary rule may be departed from where there is “*some special or unusual feature in the case to justify the Court in departing from the ordinary practice*”: *Colgate-Palmolive* at 233 (Sheppard J). That said, as the applicant submits, references in the cases to general rules or ordinary practices for the award of costs should not be understood as fettering the discretionary nature of such decision*s*: *GR Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 at [20] Bryson JA at [20] (with whose reasons Hodgson and Santow JA agreed at [1] and [2]). Thus, the “*categories in which the discretion may be exercised are not closed*”: *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* [1991] FCA 187 at [8] (French J). “*The question*”, as Sheppard J explained in *Colgate-Palmolive* at 234, “*must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis*”.

13 It is also well-established that “*costs are awarded to indemnify a successful party in litigation, not by way of punishment*”: ***Oshlack*** *v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at [1] (Brennan CJ). As Gray J helpfully explained in *Hamod v New South Wales* [2002] FCA 424; (2002) 188 ALR 659 at [20] (Carr J at [26] and Goldberg J at [27] agreeing):

Indemnity costs are not designed to punish a party for persisting with a case that turns out to fail. They are not awarded as a means of deterring litigants from putting forward arguments that might be attended by uncertainty. Rather, they serve the purpose of compensating a party fully for costs incurred, as a normal costs order could not be expected to do, when the Court takes the view that it was unreasonable for the party against whom the order is made to have subjected the innocent party to the expenditure of costs.

##### 4. GROUND ONE: THE PUBLIC INTEREST ARGUMENT

###### 4.1 The issue and the parties’ submissions

14 By his first ground, the Commissioner submits that, having regard to the significant public interest in ensuring that judgments obtained by fraud are set aside, it would be inappropriate for the Commissioner to be left to meet any part of his costs for its application in this case. Rather in these circumstances, the Commissioner submits that he should be fully indemnified in relation to any expense incurred in seeking to set aside the fraudulently procured judgment.

15 Rawson, however, submits that indemnity costs can be awarded only on the basis of delinquency in the conduct of the present proceedings. In Rawson’s submission, even where a party’s immoral or unethical conduct in the past has given rise to the proceeding, that past conduct alone cannot justify the making of an indemnity costs order. On that basis, Rawson submits that the Commissioner’s public interest argument — in seeking indemnity costs which arise from the nature of the antecedent conduct giving rise to proceedings — provides no basis for the award of indemnity costs. Importantly in this respect, senior counsel for the Commissioner explained that ground one of the interlocutory application is a “*completely standalone ground for indemnity costs … it is* ***not*** *affected by the conduct of [this] proceeding*”: T.10.33 (emphasis added).

###### 4.2 Disposition of ground one

16 In my view, the Commissioner should not be left to bear any part of his costs in applying successfully to set aside the Full Court’s judgment on the ground that it was procured by fraud for the following reasons.

17 ***First***, as a matter of legal principle, it is correct to say that indemnity costs can ordinarily be awarded only on the basis of a party having engaged in “*delinquency* ***in the conduct of the proceedings***”: ***Harrison*** *v Schipp* [2001] NSWCA 13 at [136] (emphasis added) (Giles JA, Handley JA agreeing at [1]). Similarly, in ***Henderson*** *v Amadio Pty Ltd* [1996] FCA 184 at [42], Heerey J held that:

the improper conduct of an unsuccessful party which will lead to an award of indemnity costs is ***usually*** related to the way the litigation is conducted, rather than the inherent badness of the conduct which gave rise to the litigation. ***This is not universally true***; for example contempt of court usually attracts costs on an indemnity basis. Nevertheless, it seems to be rare that findings of serious misconduct such as fraud of itself gives rise to an order for costs on an indemnity basis.

(Emphasis added.)

18 This ordinary rule applies equally in the context of actions in fraud where, in general, a party who has perpetrated a fraud on another party will not, by reason of that antecedent conduct alone, be rendered liable for indemnity costs. Hence, for example, in***NMFM*** *Property Pty Ltd v Citibank Ltd (No 2)* [2001] FCA 480; (2001) 109 FCR 77 at [56], Lindgren J held that:

The ordinary rule is that an award of costs is on the party and party basis, and that it is only in a special case that the discretion to depart from that rule will be properly exercised … there is no counterpart ordinary rule that in the absence of special circumstances indemnity costs will be ordered where the losing party was guilty of ethical or moral delinquency in the antecedent facts which have given rise to the litigation. ***Even in a proved case of fraud***, for example, in my opinion the presumption is that a costs order against the fraudulent party will be on the party and party basis. The conduct of a party that is relevant to the issue of indemnity costs is the party’s conduct as litigant. But, as noted below, the knowledge that a party has, including knowledge of his or her past conduct, may be relevant to an assessment of his or her conduct as litigant.

(Citations omitted, emphasis added.)

19 This approach to the award of indemnity costs is well-established in Australian law: see, for example, *Hypec Electronics Pty Limited (in liq) v Mead; BL & GY International v Hypec Electronics Pty Limited (in liq)* [2004] NSWSC 731; (2004) 61 NSWLR 169 at [46] Campbell J (overturned on appeal, although on a different issue).

20 Two further comments should be made. First, these authorities did not consider whether the ordinary rule applied in circumstances where the antecedent fraudulent conduct giving rise to the proceeding was perpetrated on the Court itself. Nor, when asked by the Court, were the parties able to identify any Australian or other authority directly on this point.

21 Secondly, the principle that indemnity costs are awarded only on the basis of delinquency in the subject proceedings is not described as an absolute rule; rather, it reflects the ordinary costs position. Hence, it will be recalled that Lindgren J in *NMFM* described the principle that costs are awarded against the fraudulent party on a party/party basis as a “*presumption*”: at [56]. Justice Heerey in *Henderson* similarly observed that, whilst the “*inherent badness*” of the conduct giving rise to litigation will not “*usually*” justify an award of indemnity costs, “*this is not universally true*”: at [42]. It cannot therefore be said that there is a strict rule that antecedent delinquent conduct can never give rise to indemnity costs.

22 ***Secondly***, one well-established and critical exception to the principle that indemnity costs are awarded only on the basis of conduct in the subject proceedings is in the context of proceedings for contempt of court: *Henderson* at [42]. Indeed, in Australia, it has been held that orders requiring a contemnor to pay their costs on an indemnity basis, while discretionary, are “*not uncommon*”, are the “*common or usual practice*”, or is the “*usual order*”: ***Infa-Secure*** *Pty Ltd v Crocker (No 2)* (2016) 338 ALR 586; [2016] FCA 202 at [44] (Reeves J); *Kazal v Thunder Studios Inc (California)* [2017] FCA 238 at [90] (Katzmann J), cited with approval by *Kazal v Thunder Studios Inc* (2017) 256 FCR 90; [2017] FCAFC 111 at [192] (the Court); *Deputy Commissioner of Taxation v* ***Gashi*** *(No 3)* [2011] VSC 448 at [20] (Dixon J).

23 The rationale for this approach was explained by Megarry VC in *EMI Records Ltd v Ian Wallace Ltd* [1982] 2 All ER 980; [1983] 1 Ch 59. That case concerned applications for review of taxations of costs on two orders for costs, awarded on an indemnity basis, made on successive motions for contempt in the same case. Megarry VC relevantly upheld the power of the Court to make an order for indemnity costs and said (at 76, in the context of pointing to the need for the rules to properly define *inter partes* orders for costs on an indemnity basis):

In particular, it [a proper definition in the rules] is needed in cases of contempt. In such cases*,* ***nothing*** should be done to deter a person from bringing a contempt to the notice of the court; and the risk of having to bear any of the costs will often be a real deterrent: see *Morgan v. Carmarthen Corporation* [1957] Ch. 455, particularly at 474 … for [indemnity] orders in cases of contempt are being made all the time, and they ought not be left in any state of doubt.

(Emphasis added.)

24 Thus, it is the public interest in ensuring that contempts of court are prosecuted which explains the common or ordinary practice of awarding indemnity costs in such cases. For example, the Full Court in ***Ali*** *v Collection Point Pty Ltd* [2011] FCAFC 87 at [80], stated as follows:

As the authorities reveal, indemnity costs are not infrequently awarded where an applicant successfully prosecutes a charge of contempt. In that context, it may be relevant that, as Tracey J stated in *Bovis Lend Lease Pty Ltd v Construction Forestry Mining and Energy Union (No 2)* [2009] FCA 650 at [45], “the applicant has not been seeking any remedy on its own behalf but rather has been ***upholding the various public interests which are served by prosecutions for contempt of court***”.

(Emphasis added.)

25 Similarly, in ***Universal City Studios*** *LLLP v Hoey t/as DVD Kingdom* (2007) 73 IPR 45; [2007] FCA 806, Buchannan J held at [102] that:

an order for the payment of indemnity costs, where it is made, recognises both the public interest in ensuring that orders of the Court are complied with and the equity in ensuring, as far as possible, that the applicant required to take the further step of contempt proceedings should be protected by an appropriate costs order.

26 Two further examples suffice to reinforce the point. First, Reeves J in *Infa-Secure* at [44] explained that *“[t]he reason for this approach is that the applicant is performing* ***both a private and a public service*** *in prosecuting charges of contempt*”: (emphasis added). Similarly, in *Gashi* at [20], Dixon J explained that the rationale for ordering indemnity costs in cases of contempt is that “***one reason*** *the plaintiff is bringing proceedings is to vindicate the public interest in upholding the rule of law*”(emphasis added). As these further examples make clear, indemnity costs may still be considered appropriate in proceedings for contempt of court, even where other reasons or interests, in addition to the public interest, are furthered in pursuing those proceedings.

27 The application of those principles has been held to justify the award of indemnity costs in many cases, including where the moving party is a government party: see, eg, *Gashi (No 3)* at [20]-[21] (where the moving party was the Deputy Commissioner of Taxation); *R v Witt* [2016] VSC 169 at [23] (J Forrest J); see generally GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, 4th edition, 2018) at 16.72.

28 ***Thirdly***, in my view, the rationale for holding that an award of indemnity costs may be made in contempt cases applies equally in circumstances in which a party has successfully brought proceedings to set aside a judgment obtained through fraud. Adapting the language and reasoning of Buchannan J in *Universal City Studios*, an order for indemnity costs made in such circumstances recognises the public interest in ensuring that judgments of the Court are not obtained through fraud. Further, the award of indemnity costs in such cases promotes equity in ensuring that the applicant who has been required to take the further step of instituting fresh proceedings to set aside the fraudulently obtained judgment is not deterred from so doing by the prospect that she or he may ultimately be “out of pocket”.

29 In this respect, there can be no doubt that setting aside fraudulently obtained judgments serves a paramount public interest. In Australia and Canada, the Court’s power to set aside a judgment obtained by fraud has been described as occupying a “*special place*”: *Takhar* at [48] (Lord Kerr, with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed). As Lord Buckmaster said in *Hip Foong Hong v H Neotia & Co* [1918] AC 888 at 894 in a passage approved, for example, by Menzies J in *McDonald v McDonald* [1965] HCA 45; (1965) 113 CLR 529 at 541, “*[a] judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole* ***must*** *fail*” (emphasis added).

30 That special place reflects the fact that a judgment obtained by fraud undermines the integrity of the judicial process and the rule of law. As Lord Kerr also said in *Takhar* at [52]-[53] in holding that there is no requirement that an action to set aside a judgment on the ground of fraud be based on new evidence which could not reasonably have been discovered in the earlier proceedings:

The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining a judgment, has perpetrated a deception not only on their opponent and the court ***but on the rule of law***.

Newey J [in *Takhar* at first instance [2015] EWHC 1276 (Ch)] put it well when he said, at para 37 of his judgment:

Supposing that a party to a case in which judgment had been given against him could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even if the fraud could reasonably have been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.

I agree with all of that. It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming.

(Emphasis added.)

31 Similarly, in *Canada v Granitile Inc* [2008] OJ No 4934; (2008) 302 DLR (4th) 40 at [303], Lederer J of the Ontario Superior Court of Justice held that “*[w]here fraud is present, finality will give way to the responsibility of the court to protect its process ‘so as to ensure that litigants do not profit from their improper conduct’*” (quoted with approval by Lord Kerr in *Takhar* at [51]).

32 As the example given by Newey J in *Takhar* aptly illustrates, to permit judgments obtained by fraud to stand would also undermine public confidence in the judiciary.

33 Litigation to set aside a judgment obtained by fraud thus serves a vital public interest. As with contempt of court cases, nothing should be done to deter a person from bringing that fraudulently obtained judgment to the attention of the Court. An indemnity costs order, in those circumstances, recognises the “*special or unusual feature in the case to justify the Court in departing from the ordinary practice*”: *Colgate-Palmolive* at 233 (Sheppard J).

34 Given, therefore, the seriousness of the fraud perpetrated upon the Commissioner and Full Court in *Rawson (FCAFC)*, and the public interest in setting aside the Full Court judgment on the grounds it was obtained by fraud both generally and by reason of the fraud it perpetrated upon the public revenue, in my view Rawson should be required in the exercise of discretion to pay indemnity costs for the entirety of this proceeding save for the costs of this application.

35 To that conclusion, the following comments should be added.

36 ***First***, in support of its submission, the Commissioner referred to two decisions: *Australian Federation of Consumer Organisations Inc v* ***Tobacco Institute*** *of Australia Ltd* [1991] FCA 150 and *Royal Bank of Scotland plc v* ***Highland Financial*** *Partners LP (****Costs****)* [2013] EWCA Civ 472 (read with *Royal Bank of Scotland plc v* ***Highland Financial*** *Partners LP* [2013] EWCA 328). With respect, however, I do not consider that those decisions ultimately assisted the Commissioner.

37 As for *Tobacco Institute*, I consider that case to be distinguishable from the present proceeding. *Tobacco Institute*was a successful “*test case*” concerning the respondent’s misleading and deceptive representations as to whether “*passive smoking is a hazard to the health of non-smokers*”: at [18] (Morling J). Justice Morling awarded indemnity costs, amongst other things, because of the “*public interest*” in prosecuting that case. However, as Rawson submits, the order in *Tobacco Institute* was made in circumstances where not only had a *private* individual sought relief in the public interest, but the Court held that the respondent’s conduct in the litigation had caused considerable expense in vindicating the public interest in the subject matter of the proceeding.

38 The relevance of the *Highland Financial* cases involves more complex issues. Those cases are lengthy, and it is not necessary to repeat the detail of the judgments here. In essence, the primary judge (Burton J) granted judgment in favour of the Royal Bank of Scotland (the **liability judgment**): *Highland Financial* at [2]. Following subsequent related litigation, the respondents cross-appealed the liability judgment on the ground (amongst others) that it had been procured by fraud. In essence, the respondent alleged that the Royal Bank of Scotland had fraudulently suppressed certain critical facts during the liability trial.

39 The Court of Appeal accepted that the fraud had been established. The essential conclusion in that case, as articulated in *Highland Financial* by Lord Justice Aikens at [179] (with whose reasons Lord Justice Toulson at [181] and Lord Justice Maurice Kay at [182] agreed), was as follows:

[T]he Liability judgment was obtained by the fraud of [the Royal Bank of Scotland] through the deliberate and dishonest misstatement and concealment of facts by [a witness]. I would therefore allow the cross-appeal of Highland from Burton J’s May 2012 judgment on that issue. The Liability judgment, the Court of Appeal’s judgment on Liability and the Quantum judgment must therefore all be set aside.

40 The respondents then sought, and the Court of Appeal awarded, indemnity costs. The reasons for considering that orders to that effect were appropriate were expressed in the following terms by Lord Justice Aitkins *Highland Financial (Costs)* at [14]:

Given the judge’s findings against RBS on the misconduct of SG, not only in 2008/9 but also in the Quantum and 2012 trials, we have no hesitation in saying that the conduct of RBS (through SG) takes this case out of the norm. This court should mark its disapproval of the conduct of SG, for which we have decided that RBS must be held responsible, by ordering that all Highland’s costs be paid on an indemnity basis.

41 While not necessary to decide the point, the decision in *Highland Financial (Costs)* ultimately lends little assistance to the Commissioner’s case for indemnity costs to be awarded on the basis of public interest considerations. In *Highland Finance (Costs)*, the Court was concerned with an appeal on the ground that the primary liability judgment had been obtained by fraud. Thus, the deliberate concealment of facts by the Royal Bank of Scotland through its witness which justified the grant of indemnity costs was conduct in the same proceeding, that is, it was “*conduct* ***in the litigation*** *of the party against which … an order [for indemnity costs] is made*”: *Highland Financial (Costs)* at [10] (Lord Justice Aitkins) (emphasis added). By contrast, as I have explained, the *Rawson Primary Judgment* was a separate proceeding based upon a separate and distinct action alleging fraud in the conduct of a different proceeding.

42 In any event, the statement that a Court should “*mark its disapproval of the conduct*” of the defrauding party is not directly apposite to Australian law where, as earlier explained, the focus of an indemnity costs order is on “*indemnify[ing] a successful party in litigation, not … punishment*”: *Oshlack* at [1] (Brennan CJ).

43 ***Secondly***, in submissions, Rawson relied on *Clone Pty Ltd v Players Pty Ltd (in Liquidation)* (2016) 127 SASR; [2016] SASFC 134 (***Clone SASFC***). Again, I consider that case to be distinguishable from the present proceedings.

44 *Clone* *SASFC* also involved litigation of considerable complexity, and it is again not necessary to repeat the detail of that decision. A helpful summary is provided by the High Court in *Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)* (2018) 264 CLR 164; [2018] HCA 12 (***Clone HCA***) at [4]-[40].

45 In essence, in *Clone*, the parties entered into a lease with respect to certain properties: *Clone HCA* at [4]. A dispute subsequently arose with respect to those premises: ibid at [11]-[12]. Clone, at trial, successfully brought proceedings against the first respondent with respect to those premises: ibid at [24]-[25].

46 After the conclusion of the trial and a Full Court appeal, certain copies of the agreement to lease were discovered: ibid at [30]-[31] (described as the “*third lease agreement*”). A fresh application to set aside the judgment was made by ***Players*** *Pty Ltd*: ibid at [32]. Players alleged that the judgment could be set aside on the basis of Clone’s malpractice, including because Clone had breached certain obligations to discover the third lease agreement: ibid at [33].

47 The primary judge agreed, accepting Player’s case for setting aside the judgment on the basis of Clone’s malpractice. The primary judge upheld the allegation of a failure to disclose on the basis that the third lease agreement was within Clone’s power, and the failure by Clone to disclose it constituted serious malpractice, albeit not intentionally so: *Clone HCA* at [34]; *Clone SASFC* at [186]. On appeal, the Full Court by majority accepted that the failure to disclose the relevant lease document constituted serious malpractice, and also accepted the allegation of misconduct by Clone misleading the trial judge. The majority further held that the misconduct was sufficient to enliven the discretionary power of the Court to set aside the earlier judgment at trial: *Clone HCA* at [34]-[35].

48 Relevantly for present purposes, the trial judge in *Clone* ordered that Clone pay the costs of the application to set aside the earlier judgment on an indemnity basis. The Full Court of the Supreme Court of South Australia set aside that order, and ordered instead that Clone pay costs on a party/party basis. In so holding and in a passage relied upon by Rawson, Blue J held at [407] (Stanley J agreeing at [420]):

Given the nature of a set aside application, ordinarily the conduct of the opponent amounting to malpractice should be regarded as relevantly falling on the subject matter of the new action side of the line rather than being part of the conduct in or immediately preceding the new action or application. It follows that the exercise by the Judge of the costs discretion miscarried.

49 Justice Blue had also, relevantly, held that the “*conduct of a party prior to the litigation commencing, and which is a direct cause of it*” is not ordinarily one of the “*circumstances warranting an indemnity costs order*”: at [404], citing the authorities outlined above.

50 Subsequently, the Full Court’s decision in *Clone SASFC* was overturned on appeal by a unanimous High Court in *Clone HCA*. By that decision, the High Court held that “*the general power of a court to set aside its perfected judgments requires actual fraud*”: at [2]. The High Court rejected the proposition that any lesser allegation could provide a basis on which to set aside a judgment: *Clone HCA* at [55]-[62]. In other words, the power to set aside a judgment obtained by fraud was not to be “*diluted to allow, for instance, the judgment to be set aside for misconduct, accident, surprise or mistake*”: *Clone HCA* at [55].

51 I do not consider that the decision in *Clone SASFC* necessitates any different outcome in this case. The Full Court in *Clone SASFC* did not decide the question before this Court of whether, exceptionally, indemnity costs can be awarded in circumstances where a judgment is set aside on the basis of fraud. It was concerned with an application to set aside an earlier judgment on lesser grounds of malpractice or misconduct, being causes of action which the High Court held on appeal were misconceived.

52 Further, an action to set aside a judgment procured by fraud is of an entirely different nature and quality from a judgment affected by malpractice and misconduct, and vindicates public interest considerations of the highest order, as I have explained. It is necessary in an action to set aside a judgment for fraud to establish “*actual fraud … the person chargeable with it … acting in order to take an undue advantage of some other person* ***for the purpose of actually and knowingly defrauding him***”: *Clone HCA* at [55], citing ***Patch*** *v Ward* (1867) LR 3 Ch App 203 at 207 (Lord Cairns) (emphasis added). Mere mistakes, accidents or misconduct are not sufficient; only “*positive and actual fraud*” in the sense of “*a mediated and intentional contrivance to keep the parties and the Court in ignorance of the real facts*” will suffice to set aside the earlier judgment: ibid, citing *Patch* at 212-213 (Lord Cairns); see generally the *Rawson Primary Judgment* at [57]-[78], especially [63]-[64].

53 In those circumstances, and in the context of awarding indemnity costs, I do not consider there to be any relevant analogy between judgments obtained through fraud, and judgments obtained through malpractice. Rather, as I have explained above, the relevant analogy lies with contempt of court. As with fraud, contempt of court hinges upon the intentionality of the relevant misconduct: *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 506 at [23] (McLellan J). Likewise, as with the Court’s power to set aside fraud, the underlying rationale of every exercise of the contempt of court power is the necessity to “*uphold and protect the effective administration of justice*”: *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* [1986] HCA 46; (1986) 161 CLR 98 at 107 (Gibbs CJ, Mason, Wilson and Deane JJ).

54 For those reasons, I consider that indemnity costs should be awarded for the entirety of the proceedings (save for the costs application). The remainder of these reasons address the Commissioner’s alternative ground in the event that I am wrong in upholding the Commissioner’s first ground.

##### 5. GROUND TWO: RAWSON’S CONDUCT IN THE PRESENT PROCEEDING

###### 5.1 The issue

55 The second ground on which the Commissioner seeks indemnity costs is that Rawson’s conduct in the proceedings was so delinquent as to warrant an indemnity costs order for the entirety of the proceedings. The Commissioner relied on two features of Rawson’s conduct in support of this ground:

(1) Rawson’s failure to admit the underlying fraudulent conduct, and its positive defence of that conduct as genuine, despite Rawson having full knowledge of that fraud;

(2) Rawson’s conduct in “*vigorously contest[ing] … in Australia and Israel*” proceedings relating to the disclosure of evidence pertaining to the fraud: *Rawson Primary Judgment* at [623].

56 For the reasons set out below, if I had not allowed indemnity costs on ground one, I would have ordered that Rawson pay indemnity costs from the date on which it *positively* defended the back-to-back loans, being 27 August 2020. However, I would have declined to award indemnity costs prior to that date. To explain why I would have exercised my discretion in this way, it is necessary first to outline certain salient aspects of the chronology in the *Rawson Primary Judgment* proceedings.

###### 5.2 Salient aspects of the chronology

57 Following the *Rawson (FCAFC)* decision, the Commissioner obtained a substantial body of new evidence which proved that the Full Court decision was obtained by fraud. This involved taking a number of steps in this proceeding.

58 ***First***, by an interlocutory application filed on 12 February 2016, the Commissioner sought orders pursuant to s 7 of the ***Foreign Evidence Act*** *1994* (Cth) for a letter of request to be sent to the judicial authorities of Israel to take the evidence of Ms Lilach Asher-Topilsky, Chairwoman of the Board of the Mercantile Discount Bank (**MDB**), and to have Ms Asher-Topilsky produce nominated documents “*in aid of and ancillary to the examination*”: *Commissioner of Taxation v Rawson Finances Pty Ltd (No 2)* [2016] FCA 402 at [2] (***Rawson (No 2)***). That order was resisted by Rawson. I granted that order, but Rawson succeeded in setting aside that decision on appeal: *Rawson Finances Pty Ltd v Federal Commissioner of Taxation* [2016] FCAFC 95; (2016) 103 ATR 630 (***Rawson (No 2) FCAFC***).

59 ***Second***, as explained at [2] and [52] in *Rawson (No 2)*, the Commissioner also sought orders to the following effect to facilitate compliance with the letter of request:

To facilitate compliance with [the notice to produce], a mandatory injunction is also sought requiring Rawson to provide to the Court a document signed by or on behalf of Rawson consenting to MDB producing nominated documents and waiving unconditionally any rights of secrecy, privacy or confidentiality in respect of the documents sought in aid of Ms Asher-Topilsky’s examination (**Order 2**). In the alternative, the Commissioner seeks an order that Rawson provide to the Commissioner (or his duly appointed agent) any signature, document, permission or authority (including a power of attorney or other authority) required by MDB and any assistance reasonably required by the Commissioner or MDB in order for MDB to release to the Commissioner or his agent, for production to the Court, any documents that fall within nominated categories of documents (**Order 3**).

…

[I]n substance Orders 2 and 3 would compel Andrew and Margaret Binetter, as the directors of Rawson, to “consent” to or authorise disclosure of the documents sought by the Commissioner. On this basis, Rawson contends that these orders should be refused for the reason that they would infringe Andrew and Margaret Binetter’s privilege against self-incrimination.

60 I dismissed the Commissioner’s application for orders to this effect, accepting Rawson’s submission that the orders would infringe Andrew and Margaret Binetter’s privilege against self-incrimination: at [56]. In so holding, among other things I referred to the Commissioner’s pleadings in its further amended statement of claim which relevantly alleged that Andrew and Margaret Binetter, to their knowledge and the knowledge of Rawson, gave false and misleading evidence in the AAT proceedings (at [57]) and held that (at [58]-[60]):

[E]ven though a corporation has no privilege against self-incrimination, a company can act only through its officers, and the state of mind of the company is (generally) that of the director. In this regard, Rawson accepts in its written submissions that:

In the present case the only directing minds and will of Rawson during the conduct of the AAT and Federal Court proceedings were Andrew and Margaret Binetter.

Consequently, the allegations of Rawson’s knowledge and conduct adverted to above are in substance allegations against the individual directors. This is particularly the case in respect of the allegation that Andrew Binetter’s evidence was false or materially misleading.

… [T]he allegations in the [Commissioner’s statement of claim], if proved to the criminal standard, would be likely to constitute one or more dishonesty offences under the Criminal Code in the *Criminal Code Act 1995* (Cth). As Rawson contends, ss 134 and 135 of the Criminal Code are of particular relevance potentially, providing that a person is guilty of an offence if a person does anything with the intention of dishonestly obtaining a gain from, or causing a loss to, a Commonwealth entity (s 135), or dishonestly obtaining a financial advantage from a Commonwealth entity (s 134).

… the evidence and documents which the Commissioner seeks are self-evidently sought because the Commissioner considers that they are likely to assist him in establishing these allegations.  It can also properly be inferred from the evidence relied upon by the Commissioner in support of the interlocutory application and surrounding circumstances that, if produced, the documents sought in the request may tend to incriminate Andrew and Margaret Binetter.

61 The Commissioner did not seek leave to appeal against that part of my decision and did not do so despite Rawson seeking leave to appeal against my decision insofar as I granted orders for the letter of request to issue: *Rawson (No 2) FCAFC* at [13].

62 ***Third***, following the Full Court’s decision in *Rawson (No 2)*, the Commissioner sought alternative orders for certain letters of request to be sent to Israeli judicial authorities to take the evidence of various former employees of the MDB, and to have officers of the MDB produce certain categories of documents. Rawson did not oppose that application. On 30 November, I made orders that the letters of request be sent to the judicial authorities of Israel to take, or cause to be taken, evidence from three former employees of the MDB: *Commissioner of Taxation v Rawson Finances Pty Ltd (No 4)* [2016] FCA 1436 (***Rawson No (4)***).

63 ***Fourth***, in furtherance of those letters of request, the Magistrates Court in Tel Aviv issued a subpoena to the MDB for documents falling within the categories of documents mentioned in the letters of request: *Rawson Primary Judgment* at [440]. Notwithstanding those requests, the MDB resisted handing over the documents and sought to set aside the subpoena request in the Israeli Magistrates Court, the Israeli District Court, and the Israeli Supreme Court. All of those applications were unsuccessful: *Rawson Primary Judgment* at [440]-[441]. The Israeli courts were highly critical of the MDB’s conduct in seeking to keep the requested documents secret, describing the MDB’s applications as “*[not] legitimate*”, “*detrimental to the investigation of the truth, constitut[ing] bad faith … [and] futile*”: ibid. Ultimately, in answer to the subpoena, the MDB produced approximately 2000 pages of material in two tranches which were translated from Hebrew to English where necessary: *Rawson Primary Judgment* at [443]. A further examination of three former MDB employees also occurred in answer to that subpoena: ibid.

64 ***Fifth***, once that information had been obtained, orders were made by consent which excused Rawson from pleading to certain allegations which lay at the heart of the Commissioner’s fraud case on the basis that the directors of Rawson, Margaret and Andrew Binetter, asserted the privilege against self-incrimination: *Rawson Primary Judgment* at [96]. I summarised the effect of those orders at *Rawson Primary Judgment* at [96] as follows:

Rawson was not required to plead, and did not plead, to the following parts of the [Second Further Amended Statement of Claim or **2FASOC**] by orders made by consent on 29 April 2015 and 3 September 2020:

(1) as to Rawson’s and Andrew’s alleged knowledge that the evidence of its expert (Mr Etzion and Mr Zamir) and lay (Emil, Margaret and Andrew) witnesses in the AAT were false or materially misleading (2FASOC and Def at [14], [14.2], [16], [18], [20], [22], [22.2], [24], [24.2A], [24.2B], and [24.6], as well as [28] to the extent it alleged evidence was false and misleading);

(2) as to Rawson’s alleged knowledge of Andrew’s involvement in finalising Mr Etzion’s statutory declaration (2FASOC and Def at [12.1] and [12.2]);

(3) as to Rawson’s (and other Binetter family entities’) alleged knowledge that Binqld, BCI, EGL, Ligon 268, Advance and Civic conducted their Part IVC proceeding on the false basis that the monies transferred were not connected with cash deposits (2FASOC and Def at [24.17(b)]);

(4) that the Commissioner subsequently obtained material establishing that the evidence in the *Rawson (AAT)* proceedings was false or materially misleading with respect to the true arrangements between BCI and Bank Hapoalim, MDB and Advance, and IDB and Civic and EGL (2FASOC and Def at [24.18]);

(5) as to Rawson’s alleged knowledge (but not to the knowledge of the legal practitioners making those submissions) that Rawson’s submissions in the AAT were based on evidence which was false or materially misleading (2FASOC and Def at [26]);

(6) that the Rawson “loans” were supported by deposits (2FASOC and Def at [29(c)]) (albeit, as I have earlier explained, that Rawson in its written submission admitted for the first time that the Rawson “loans” were supported by deposits); and

(7) that Rawson did not disclose to the Court on the s 44 appeal or to the Full Court that the evidence adduced by it in the AAT was false or materially misleading (but not to the knowledge of the legal practitioners making the submissions) (2FASOC and Def at [31] and [33]).

65 In the event, Rawson did not plead to those paragraphs in its defence and did not plead a positive defence.

66 ***Sixth***, the central issue in *Rawson (AAT)* was whether the Rawson loans were supported by a back-to-back cash deposit, or personal guarantees. I found in the *Rawson Primary Judgment* that the Rawson loans were in fact secured by a secret linked deposit account held in a code name, “Arthur Belan”, (the **Arthur Belan deposit account**) and were therefore what is commonly described as back-to-back loans. The existence of this back-to-back arrangement was knowingly concealed from the AAT in *Rawson (AAT)* and *Rawson (FCAFC)*: *Rawson Primary Judgment* at [13]-[14]. However, in the face of overwhelming evidence obtained from Israel pursuant to the letters of request as to the true nature of the arrangements with the MDB, Rawson finally admitted the existence of the back-to-back loans in its written submissions in chief in this proceeding: *Rawson Primary Judgment* at [51] and [623]. That admission was made in Rawson’s written submissions, dated 27 August 2020, filed before the trial.

67 In the ***seventh*** place, notwithstanding that admission, Rawson continued to resist the Commissioner’s application to set aside the *Rawson (FCAFC)* decision. In broad terms, Rawson advanced two primary arguments in support of its case. The first was to dispute that the new evidence, including the admission of the back-to-back loan, proved the alleged fraud. As part of this argument, Rawson ran a ***positive*** defence, contending that the new evidence in fact strengthened its case that the Rawson “loans” were genuine: see the “*Rawson Genuine Loans Submission*” at *Rawson Primary Judgment* 10.4.4. Various arguments were advanced in support of this contention, including that:

(1) the MDB and Rawson described the transactions as a ‘loan’ (at [650]);

(2) any concealment of the evidence of the Arthur Belan account could only have undermined Rawson’s case in the AAT (at [649]); and

(3) the non-disclosure of the Arthur Belan deposit account “*was to protect the owner of the deposit (Michael Binetter) from being assessed by the Commissioner on what he describes the ‘unexplained’ cash deposit. It is beyond dispute that this cash was never Rawson’s and could never form a basis of an assessment against it*” (at [628] (quoting Rawson’s written submissions in opening at [77])).

I refer to these as the **positive defence arguments**.

68 The second argument advanced was that, even if a fraud did occur, the decision in *Rawson (FCAFC)* should not be set aside. Two primary arguments were made in support of this argument, being that:

(1) the fraud could not affect the issues before the Full Court, given the limited nature of an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (at [584]); and

(2) the fraud was not material to the decisions reached by the AAT and the Full Court (at [594]).

I refer to these as the **materiality and judicial review arguments**.

###### 5.3 Disposition of ground two

5.3.1 The period before the positive defence

69 If the issues on the application for indemnity costs fell to be determined on the basis of ground 2, I would not have accepted that Rawson’s conduct in this proceeding before filing its written submissions warranted the making of an indemnity costs order.

70 ***First***, the Commissioner submits that Rawson’s relevant delinquency was its failure to admit the underlying fraudulent conduct in these proceedings. In the Commissioner’s submission:

Rawson, having always known the true position of its fraud, declined to plead to matters that concerned its knowledge of false or materially misleading evidence … [T]he fact that it declined to plead to matters of central importance which were within its knowledge, instigated the lengthy and costly process of the Commissioner, in these proceedings, setting out to prove the extent of Rawson’s fraud. What Rawson did was prolong its existing concerted effort to keep its knowledge of its true conduct from the Court, for as long as possible.

(Outline of Applicant’s Submissions in Reply at [6]-[7]; emphasis in original.)

71 The difficulty with those submissions, however, is that they overlook a key component of the chronology outlined above, namely, the consent orders made on 29 April 2015 and 3 September 2020. By those consent orders, Rawson was expressly exempted from pleading to central elements of the Commissioner’s fraud case.

72 It is true, as the Commissioner submits, that those orders did not *prevent* Rawson from admitting the fraud. Rawson “*at any time could have chosen to do something different*”, as the Commissioner submitted: T39.27. However, the Commissioner cannot criticise Rawson conducting its defence in reliance on orders to which the Commissioner consented. In so saying, I should make it clear that I am not intending in any way to criticise the Commissioner for having consented to the orders.

73 ***Secondly***, the Commissioner also submits that Rawson’s resistance to producing documents in this proceeding — particularly its “*vigorous*” contestation to the letters of request in both Australian and Israeli proceedings (*Rawson Primary Judgment* at [623]) — warrants indemnity costs. I do not agree.

74 The Commissioner made two interlocutory applications in this Court for letters of request be sent to the judicial authorities in Israel. Rawson opposed the first application. Rawson successfully appealed my decision ordering the issue of the letter of request, primarily on the ground that the evidence did not establish that Ms Asher-Topilsky would be able to give evidence material to any issue to be tried in the proceeding, being a matter to which regard must be had under s 7(2) of the *Foreign Evidence Act*: *Rawson (No 2) FCAFC* at [4]. Rawson did not, however, oppose the Commissioner’s second application for the issue of letters of request. Rawson’s conduct with respect to those applications — succeeding on one application on appeal and taking no position with respect to the other application — therefore demonstrates no delinquency.

75 The Commissioner also submits that Rawson impermissibly resisted the disclosure of certain documents through the various challenges in the Israeli Courts. There are two difficulties with that submission.

76 The first is that the notice to produce was not resisted (directly at least) by Rawson in the Israeli proceedings because the MDB was the only active respondent to the Israeli proceedings. Faced with that difficulty, the Commissioner submits that Rawson was likely the cause of the MDB’s resistance in the Israeli proceedings. That argument, however, suffers from an absence of proof. In this proceeding, there has been no evidence as to why the MDB resisted the Israeli proceeding, and no proof that the MDB resisted the Israeli proceedings on Rawson’s instructions. Whether the MDB’s conduct was based on Rawson’s instructions, or whether the MDB had internal reasons for opposing that disclosure, has not been proved.

77 Secondly, it is true to say that the proceedings against the MDB were rendered necessary at least in part by Rawson’s conduct insofar as it was open to Rawson at any time to have instructed the MDB to produce the documents. As I found in the *Rawson Primary Judgment*, “*while MDB would have produced all of the documents held by it with respect to the Rawson loan and the back-to-back deposit account if requested by Rawson, it was never asked to do so*”: at [605]; see also [555] and [648]. Further, no doubt, Rawson’s failure to ask for the documents stemmed from its motivation to conceal this evidence, given that it would disclose the existence of the Arthur Belan deposit account thereby disclosing the fraud. These matters notwithstanding, it has never been suggested that Rawson was under an ***obligation*** to produce those documents in this proceeding. There was, for example, no court order requiring Rawson to produce the documents sought by the Commissioner ultimately via the letters of request and related proceedings in Israel. To the contrary, as outlined above, in *Rawson (No 2)* I rejected orders sought by the Commissioner which would have required Rawson to assist in obtaining those documents, on the basis that orders to that effect would infringe Andrew and Margaret Binetter’s privilege against self-incrimination: at *Rawson (No 2)* [56].

78 In post-hearing submissions, the Commissioner contended that the basis on which I rejected those orders in *Rawson (No 2)* at [56] was incorrect. Ultimately, however, it is not necessary to decide that issue. The short point is that the Commissioner did not apply for leave to appeal against the Court orders dismissing the Commissioner’s application for Rawson to assist in obtaining nominated documents from the MDB for the reasons given at [56] of *Rawson (No 2)*: see *Rawson (No 2) FCAFC* at [13].

79 In these circumstances, the Commissioner has not established that Rawson’s conduct prior to the filing of its written submissions in chief justifies the making of an indemnity costs order.

5.3.2 The period from the positive defence

80 On the alternative hypothesis that ground 1 was not upheld, I would, however, have held that Rawson should pay indemnity costs from the date on which it filed written submissions in chief, in which it advanced for the first time a positive defence of its conduct.

81 ***First***, as a matter of principle, it is well-established that a party’s knowledge of any underlying wrongdoing may be relevant to an assessment of their conduct in the present proceeding. As Lindgren J in *NMFM* held (at [56]) (in a passage that bears repeating), the “*knowledge a party has, including knowledge of his or her past conduct, may be relevant to an assessment of his or her conduct* ***as litigant***” (emphasis added). In support of that proposition, Lindgren J cited the decision in *Australian Guarantee Corporation Ltd v* ***De Jager*** [1984] VR 483. In that case, an action for possession by the applicant, Australian Guarantee Corporation (**AGC**), was dismissed. Critically, AGC had forwarded a mortgage for registration, knowing that the signature of the respondent (the wife-mortgagor) had not been attested, despite the document purporting to state that it had been. While AGC did not then know that the wife’s signature had in fact been forged, its employees were aware that her signature had not been attested. In those circumstances, Tadgell J held that the applicant was guilty of fraud for the purposes of s 42 of the *Transfer of Land Act 1958* in forwarding the instrument for registration despite knowing that it falsely purported to satisfy the legislative requirement of attestation. With respect to costs, Tadgell J held (at 502) that the applicant having “*pursued the action with the knowledge that it had, and failed,”* the Court *“ought to do what [it] can to ensure that [the respondent] is not out of pocket over it*”. Thus, in considering that case, Lindgren J in *NMFM* (at [58]) held:

In my opinion it was AGC’s conduct “as litigant” that attracted the award of indemnity costs against it. It sought to enforce the mortgage against [the respondent] whose signature, it always knew, had not been attested, and therefore might or might not have been forged. ***As litigant, it assumed the role of an innocent mortgagee, knowing it had something to hide and hoping it would not be found out.***

(Emphasis added.)

82 Similarly, in the *Rawson (Primary Judgment)*, I found that Rawson knew the true nature of the fraud but intentionally sought to conceal the true nature of its arrangements with the MDB, being fully aware of the significance of disclosing the true arrangements to the Commissioner’s case that the AAT and Full Court decisions had been obtained by fraud: see e.g. *Rawson (Primary Judgment)* at [575]-[576] and [648].

83 Accordingly, the findings in *NMFM* and *De Jager* are equally apt to describe Rawson’s conduct in the present case, following the filing of its written submissions in chief. Rawson knew that it had committed a fraud on the AAT and the Full Court in contending that the MDB loans were genuine. That notwithstanding, Rawson put forward a *positive* defence to this effect which it knew to be false. To borrow from the language of Tadgell J, Rawson “*pursued*” a positive defence “*with the knowledge*” that its underlying conduct was in fact fraudulent.

84 That is not to say that Rawson was required to concede these proceedings. As the Commissioner submits (Applicant’s Reply Submissions at [7]):

Rawson could have argued its case … that establishing the relevant fraud was not enough, it had to be material to the impugned decision … and have admitted the underlying fraudulent conduct.

85 Rawson, however, chose not to pursue this course. Instead, it chose to positively defend that conduct, despite knowing that its underlying conduct was fraudulent. In those circumstances, it is appropriate to order indemnity costs on and from 27 August 2020. In so doing, I would emphasise the distinction between Rawson’s knowledge and conduct, on the one hand, and the conduct of the legal practitioners making submissions in this proceeding acting on instructions from Rawson, on the other hand. No criticism is intended of the legal practitioners in putting Rawson’s positive case in this proceeding.

86 ***Finally***, to these conclusions, one further comment should be added. It is not to the point, as Rawson appears to submit, that the positive defence arguments were made by “*eminent senior counsel*”: Respondent’s Submissions at [9]. Nor does the fact that Rawson’s positive defence of its underlying conduct might have been tenable on an ***objective*** construction of the evidence, meet the critical point: that Rawson was well aware that its positive defence was false. As Besanko J recently held in ***Roberts-Smith*** *v Fairfax Media Publications Pty Limited (No 45)* [2023] FCA 1474 at [21]:

[T]he relevant question is not whether there was some prospect of success by reason of there being some prospect of persuading the Court to accept facts known to be false … Furthermore, the applicant’s submissions that he has not engaged in any conduct which has prolonged the proceedings fails to recognise the fundamental point that he knew from the commencement of the proceedings that the most serious imputations were substantially true**.**

(Emphasis added.)

87 In *Roberts-Smith*, the applicant’s denying of certain imputations, when he knew those imputations to be true, provided the basis for an indemnity costs order. So too would Rawson’s positive defence in this proceeding of its conduct as genuine, in circumstances where it knew that conduct was fraudulent, warrant an order for indemnity costs from the date on which that positive defence was made, if I had not in any event upheld ground one of the application for indemnity costs.

##### 6. SHOULD COSTS BE AWARDED IN A LUMP SUM?

88 As earlier mentioned, the Commissioner seeks indemnity costs in a lump sum in the amount of $3,557,432.89 exclusive of goods and services tax (**GST**). That application is supported by the affidavit of Rebecca Djittakasem Clarke, solicitor, affirmed on 21 July 2023 (the **first Clarke affidavit**). In the event that it was unsuccessful in resisting the application for indemnity costs, Rawson did not lead any evidence or make any submissions in opposition to the making of a lump sum costs order; nor did it put in issue the quantum of costs sought by the Commissioner. Nonetheless, I have briefly considered the appropriateness of exercising my discretion to award lump sum costs in the amount sought, given that no express concession was made and given the quantum of costs sought.

89 The discretion to order costs as a lump sum must be exercised judicially and only after giving the parties an adequate opportunity to make submissions on the matter: ***Beach Petroleum*** *NL v Johnson (No 2)* (1995) 57 FCR 119 at 120 (von Doussa J);***Julien*** *v Secretary, Department of Employment and Workplace Relations (No 2)* [2009] FCA 1259 at [9] (Spender J).

90 The Federal Court’s preference to avoid potentially expensive and lengthy taxation costs hearings and to utilise lump-sum costs orders was explained by Davies J in *Royal v Eli Ali (No. 3)* [2016] FCA 1573 at [10]:

Whilst the Court has a broad discretion to award costs orders, the Court’s preference, wherever it is practicable and appropriate to do so, is to make a lump-sum costs order in order to finalise the costs issue and avoid, where possible, potentially expensive and lengthy taxation of costs hearings: Federal Court of Australia Practice Notes, Costs Practice Note (GPN-COSTS) 25 October 2016, at [3.3] and [4.1]. The expense, time and delay involved in a taxation of costs are all matters to take into consideration in determining whether to fix costs, bearing in mind s 37M of the *Federal Court of Australia Act 197*6 (Cth) and the objective of facilitating the just resolution of disputes as quickly, inexpensively and efficiently as possible. The financial capacity of the party liable to pay the costs is also a consideration where the successful party is already likely to be out of pocket in respect of costs and taxation would add an additional unrecoverable cost. There is no particular characteristic of a case though which must exist before a gross sum costs order can be made: *Australasian Performing Rights Association Ltd v Marlin* [1999] FCA 1006. The power may be exercised whenever the particular circumstances of the case warrant it: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119 (“Beach Petroleum v Johnson”) at 122 123. If a lump-sum costs order is to be made, the Court should be confident that the approach taken to the estimate of costs is logical, fair and reasonable. The Court should be astute to avoid both overestimating the recoverable costs and underestimating the appropriate amount, for example by applying an arbitrary discount to the amounts claimed: *Beach Petroleum v Johnson* at 123.

91 The principles with respect to the quantification of a lump-sum costs order are well-settled and were summarised by the Commissioner as follows (Applicant’s Submissions at [16]):

(a) Specification of a lump-sum costs order is not the result of a process of assessment of costs; rather, the lump-sum can only be fixed broadly having regard to the information before the court [see also *Harrison v Schipp* [2002] NSWCA 213; (2002) 54 NSWLR 738 at [22] (Giles JA) and *Beach Petroleum* at 124)];

(b) The assessment of any lump-sum to be awarded must represent a review of the successful party's costs by reference to the circumstances of the case, including the pleadings and complexity of the issues raised, interlocutory processes, preparation for the hearing, etc;

(c) The costs ordered should be based on an informed assessment of the actual costs incurred by the party having regard to the information before the court; and

(d) The approach taken to estimate the costs to be ordered must be logical, fair and reasonable. However, the court may adopt a "*broad brush approach*": *Chaina* at [51].

See also *Chaina v Presbyterian Church (NSW) Property Trust (No 26)* [2014] NSWSC 1009 at [43]-[44], [50]-[51] (by analogy); ***Hamod*** *v State of New South Wales* [2011] NSWCA 375 at [819]-[820] (Beazley JA, with whom Giles and Whealy JJA agreed); and ***Soden*** *v Croker (No. 3*) [2016] FCA 249 at [7]-[10] (Perry J).

92 Examples of circumstances resulting an award of lump sum costs, as explained in *Soden* at [10] include:

Where a taxation process was expected to be particularly complex (eg *Beach Petroleum*);

…

Where a taxation process would be disproportionately expensive to the award of costs (*Cameron v Secretary, Department of Human Services (No 2)* [2015] FCA 1201); and

Where the financial circumstances of the parties would lead one to conclude that the costs were unlikely to be recovered (*Julien; Hadid v Lenfest Communication Inc* [2000] FCA 481 [at [14]]).

93 In her affidavit dated 21 July 2023, Ms Clarke summarised the total costs incurred by the Commissioner (aside from costs of the indemnity costs application) as follows:

|  |  |
| --- | --- |
| **Description** | **Costs incurred (ex. GST)** |
| **Professional fees** | **$1,787,498** |
| **Counsel fees** | **$506,915** |
| **Total Disbursements:** | **$1,469,471** |
| Consultant Fees – Legal -Heskia Hacmum Law Firm | $992,470 |
| Translator Fees | $33,507 |
| Investigator Fee - Heskia Hacmum Law Firm | $277,304 |
| Other Disbursements | $699,435 |
| **Total Costs (ex. GST)** | **$3,763,885** |

94 Ms Clarke explained in summary (at [11] of her affidavit) that these costs related to work in the proceeding since its commencement, including applications for letters of request sent to judicial authorities in Israel and other interlocutory applications, attendances generally relating to the conduct of the proceeding from time to time, examinations in Israel of each of the persons named in the letters of request, and attendance at the final hearing including associated preparation. The total was calculated based on a summary of total fees and disbursements recorded by solicitors for the applicant, and annexed to Ms Clarke’s affidavit.

95 At [15]-[17], Ms Clarke explains that the costs of certain interlocutory applications were then subtracted from the total amount of the Commissioner’s costs, namely, where orders had been made on those applications that there be no order as to costs or where costs were awarded against the Commissioner. As a result, the total amount of indemnity costs sought by the Commissioner was in the sum of $3,557,432.89 (ex GST).

96 In my view and applying a broad brush approach to the calculation of costs, I am satisfied that this is an appropriate case for the award of indemnity costs to be in the fixed sum sought by the Commissioner rounded down to the nearest one hundred dollars.

97 ***First***, plainly the fixed sum award of indemnity costs sought is considerable. However, the matter was lengthy and complex. Some indication of the scale and complexity of the task of proving the fraud is apparent from my description at [32]-[35] of the *Rawson Primary Judgment* of the volume of the evidence on which the Commissioner relied to prove the fraud, being comprised of an 8 volume key documents bundle, a 38 volume court book of documents in chronological order, and the 10 volume supplementary court book comprising the evidence obtained from Israel. The Commissioner’s written submissions also exceeded 120 pages, its written reply submissions spanned over 25 pages, whilst the joint chronology spanned over 50 pages.

98 ***Secondly***, in her first affidavit, it was Ms Clarke’s unchallenged opinion based on her involvement in the proceeding and the volume of material in the matter, that the taxation process would take approximately 12 to 18 months to complete at a cost to the Commissioner in the range of appropriately $350,000-$450,000 (ex GST).

99 ***Thirdly***, no issue was taken with the Commissioner’s contention in submissions that Rawson is likely to be impecunious. That being so, this is also a factor weighing in favour of awarding indemnity costs. In this regard, as Lehane J held in ***Hadid*** *v Lenfest Communication Inc* [2000] FCA 481 at [14]:

Where the amount of costs likely to be payable is very substantial and where, in any event, taxation is likely to be drawn-out, burdensome and expensive, the burden borne by the successful party is aggravated if it appears that, in any event, the party obliged to pay costs may not be able to meet a liability of the order likely to be involved. For that reason, in my view, in a case where the liability for costs may be expected to be large and a taxation complex and expensive the financial position of the party liable is a matter relevant to be taken into account in exercising the discretion.

100 ***Fourthly***, the proceedings have been on foot for a lengthy period of time. As such, it is desirable for them to be brought to a close as soon practicable and for any additional costs to be minimised: s 37M of the *Federal Court of Australia Act 1976* (Cth).

101 ***Finally***, in the event that Rawson was unsuccessful on the application for indemnity costs, it did not challenge that evidence or submit that orders fixing costs in those amounts should not be made.

102 In addition, the Commissioner seeks an order that for party/party costs in the sum of $38,048.66 on the application for indemnity costs (the **interlocutory application**). This application is supported by the affidavit of Ms Clarke affirmed on 1 September 2023 (the **second Clarke affidavit**), using a similar methodology to that described in relation to Ms Clarke’s first affidavit. Rawson did not challenge the appropriateness of a fixed sum award of costs on the interlocutory application for indemnity costs in the event that it did not successfully resist the orders sought. Both parties also accepted that any costs for this interlocutory application should be awarded on a party/party basis. In all of the circumstances outlined above, and having regard to the desirability of finalising the proceedings and Rawson’s likely impecuniosity, I also agree that an order fixing cost of the interlocutory application in the amounts sought is appropriate.

##### 7. CONCLUSION

103 For those reasons, Rawson is to pay the Commissioner’s costs for the entirety of the proceeding on an indemnity basis fixed in the sum of $3,557,400.00 (ex GST), save for the costs of the indemnity costs application.

104 As the application for indemnity costs has been successful, it is appropriate that the Commissioner be awarded their costs in relation to the application for indemnity costs. Those costs should be paid on a party/party basis fixed in the sum of $38,000.00 rounded down to the nearest one hundred dollars. I will make orders in those terms.

|  |
| --- |
| I certify that the preceding one hundred and four (104) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perry . |

Associate:

Dated: 19 January 2024