FEDERAL COURT OF AUSTRALIA

Turner v MyBudget Pty Limited (No 2) [2018] FCA 1509

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| File number: |  |
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| Judge: | **LEE J** |
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| Date of judgment: | 8 October 2018 |
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| Catchwords: | **COSTS** – discussion of costs orders against representative applicant in a class action with a public interest dimension  **REPRESENTATIVE PROCEEDINGS** – discussion of importance of willingness for persons with claims to act in a representative capacity |
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| Legislation: | *Australian Consumer Law* ss 21, 23  *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 33V, 43(1A) |
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| Cases cited: | *LFDB v SM (No 2)* [2017] FCAFC 207  *QANTAS Airways Limited v Cameron (No 3)* (1996) 68 FCR 387  *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229  *Turner v MyBudget Pty Limited* [2018] FCA 1407 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 5 October 2018 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Number of paragraphs: | 16 |
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| Counsel for the Applicant: | Mr J C Kelly SC, Mr A Maroya, Mr D O’Connor |
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| Solicitor for the Applicant: | Financial Rights Legal Centre |
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| Counsel for the Respondent: | Mr D Sulan, Mr P J Strickland |
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| Solicitor for the Respondent: | Norton Rose Fulbright |

ORDERS

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|  | | NSD 297 of 2017 |
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| BETWEEN: | KELVIN TURNER  Applicant | |
| AND: | MYBUDGET PTY LIMITED ACN 82 093 118 597  Respondent | |

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| JUDGE: | LEE J |
| DATE OF ORDER: | 8 October 2018 |

THE COURT ORDERS THAT:

1. There be no order as to costs.

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

REASONS FOR JUDGMENT

LEE J:

1. In *Turner v MyBudget Pty Limited* [2018] FCA 1407 at [82], I noted that I would hear from the parties as to the details of any order they seek as to costs and provided for submissions to be filed. I further indicated that I would then deal with the issue of costs on the papers. Submissions were received by 5 October 2018.
2. MyBudget seeks an order that the applicant pay its costs of and incidental to the proceeding on a party and party basis up to 10 April 2018 and thereafter on an indemnity basis. Mr Turner seeks no order as to costs.
3. MyBudget advances two “key reasons” why the order it seeks should be made. They are as follows.
4. *First*, the Court has dismissed all of Mr Turner’s claims. MyBudget contends there are no special circumstances that would warrant departure from the “usual rule that costs follow the event”. In particular, MyBudget asserts that this is not public interest litigation given that Mr Turner (and group members) sought monetary remedies including equitable compensation and damages, and the proceeding “did not raise issues of broader public interest or significance”.
5. *Secondly*, on 20 March 2018, MyBudget offered to settle the litigation on the basis that the proceeding be dismissed with each party bearing its own costs incurred until that date. It also notified Mr Turner that MyBudget had incurred costs to that date in excess of $200,000 and that if the offer was not accepted that the making of the *Calderbank* offer would be relied upon.
6. For the reasons that follow I am not persuaded that I should make the order that MyBudget seeks and I propose to make no order as to costs.
7. MyBudget has submitted there is a “usual rule that costs follow the event”. This is somewhat of an oversimplification. As was noted by the Full Court (Besanko, Jagot and Lee JJ), in *LFDB v SM (No 2)* [2017] FCAFC 207 at [6]:

The presently relevant approach is as was explained by Gleeson CJ, Gummow, Hayne and Crennan JJ in *Foots v Southern Cross Mine Management Pty Ltd*[2007] HCA 56; (2007) 234 CLR 52 at 62-63 [25] that although there is “*no absolute rule*”, one of the “*general propositions*” regarding an award of costs is that “*the award is discretionary but generally that discretion is exercised in favour of the successful party*”: see also *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at 88-89 [40]-[41] per Gaudron and Gummow JJ.

1. Although the fact that MyBudget has been successful in resisting the claim by Mr Turner is a very powerful discretionary factor militating in favour of an award of costs, it is not necessarily determinative. While the discretion as to costs is a very broad one, it is restrained in the case of representative proceedings by the prohibition on making an award for costs against group members except in defined circumstances: see s 43(1A) of the *Federal Court of Australia Act 1976* (Cth). Although this provision is not directly relevant in the case of costs sought against a representative party, it recognises the reality that the questions determined in representative proceedings have a public dimension which transcends ordinary *inter partes* litigation and the rights of the parties to the litigation *inter se*.
2. The case brought by Mr Turner is an exemplar of the type of proceeding that the Australian Law Reform Commission had in mind when, in 1988, it first recommended the introduction of a class action regime in ALRC Report 46. Here, a very large number of persons were affected by a common issue of law (in this case being the proper construction of the Interest Provision). It would have made no sense whatsoever for any individual litigant to have commenced a proceeding seeking clarification of this issue given the very small amount of money at stake for any individual litigant. The benefit of a grouping of claims by a Part IVA proceeding could only be achieved in the event that one person was prepared to come forward and act as the representative applicant. Unless Mr Turner had been prepared to bring the claim (assisted by the Financial Rights Legal Centre (formerly Consumer Credit Law Centre NSW), a community legal centre specialising in financial services), uncertainty would have continued to exist relating to the true effect of the Interest Provision. Although I have reached a view that the proper construction is as MyBudget contended, the arguments advanced by Mr Turner were far from being unarguable and, if I may say so, were advanced in an efficient and comprehensive manner by Counsel for the applicant, and in a way which was consistent with the overarching purpose.
3. This is a world away from a commercial class action, where the applicant is part of some form of common enterprise which seeks to use the Court’s processes not only for the vindication of the applicant’s personal claim but also as a means by which a managed investment scheme is seeking to derive a significant financial advantage for the participants in the scheme including a litigation funder.
4. MyBudget recognises the fact that a proceeding brought in the “public interest” may be a basis, at least in some circumstances, for not awarding against an unsuccessful applicant: see *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229. It asserts, however, that there is no general principle that the usual “costs rule” should not apply if the subject matter of litigation is a matter of public importance. It also points to *QANTAS Airways Limited v Cameron (No 3)* (1996) 68 FCR 387, a case which involved the question as to whether an unsuccessful applicant in a class action should be ordered to pay costs. *QANTAS Airways* was a case brought to vindicate mixed public and private interests: see at 390. Lindgren and Lehane JJ considered that the litigation served the “public interest” to the extent that it elucidated the duty of care owed by international airlines to passengers in relation to environmental tobacco smoke and that this should be given some weight, but damages were claimed and it was “impossible to view the proceedings as having been brought and pursued purely in the public interest”: see 389-390. In those circumstances, the applicant was ordered to pay some costs.
5. Similarly, it is submitted, Mr Turner sought monetary relief and hence “his case cannot be viewed as having been pursued purely in the public interest”.
6. It may be accepted that this was not a “pure” public interest claim, but a striking feature of this case was that any claim of Mr Turner (or any group member) was very modest, yet the collective benefit was potentially large. Although the class action did seek to vindicate Mr Turner’s claim, it had a very significant benefit transcending the parties relative to the stake of the personal financial claim of the applicant. 24,222 others have obtained certainty as to their position. This number includes, it is safe to infer, many persons likely to have some financial vulnerability.
7. Although I do take into account the important consideration that Mr Turner’s individual case has failed, he (together with his lawyers) has performed a valuable service for the benefit of others. In all the circumstances, while taking fully into account that the costs discretion is generally to be exercised in favour of the successful party, my view is that no order for costs should be made. Although on one level this might be thought to operate unfairly on MyBudget which has incurred not insignificant costs, it must be recalled that it has now received the benefit of quelling the controversy relating to the operation of the Interest Provision not only in relation to Mr Turner, but with regard to all group members. Costs applications are not determined solely by identifying who was responsible for the litigation, but by a broad assessment as to whether the order does occasion an injustice, it should be borne in mind that the genesis of this dispute was a clause which even MyBudget accepted at the hearing was not drafted adroitly (as a comparison with the previous version of the Interest Provision demonstrates).
8. In the light of the above it is unnecessary for me to deal with two matters. *First*, the claim for indemnity costs said to arise by reason of the *Calderbank* offer made to Mr Turner. It suffices to note that even if I had been persuaded to make an order for costs, I would not have made a special costs order in the light of the *Calderbank* offer. The reason is a simple one. If I had been asked to make an order under s 33V of the *Federal Court of Australia Act 1976* (Cth) approving a settlement on the basis that each party walk away, I very much doubt that I would have given approval. It is difficult for me to see why the acceptance by Mr Turner of the offer made would have been a fair and reasonable settlement in the interests of the 24,222 group members as a whole. There was a not insubstantial prospect of success, and the incremental costs associated with the finalisation of the proceeding from the date of the offer would likely not have justified settling on such a basis.
9. *Secondly*, it is unnecessary for me to form a view on the quantum of fees incurred by MyBudget prior to an initial trial on issues which were *necessary* to be resolved at that initial trial. Even if I had been persuaded to make an order for costs, I would have made a lump sum costs order after receiving further material.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee. |

Associate:

Dated: 8 October 2018