

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION**

McCLELLAN CJ at CL

THURSDAY 21 OCTOBER 2010

**2009/297559 DYE v COMMONWEALTH BANK OF
 AUSTRALIA**

JUDGMENT

- 1 **HIS HONOUR:** This matter was before me last week when I determined that the plaintiff's application to have the defamation proceedings transferred to the Federal Court should be granted. However, I made plain at the time that I would only make such an order if I could appropriately provide for the costs which had been wasted by the bringing and maintaining of defamation proceedings in this court. My judgment last week set out the factual matrix of the problem, and I invited the parties to bring forward evidence in dealing with the question of costs. That evidence is now before me. There has been debate this morning as to the course which I should take in resolving the matter.

- 2 The evidence of the defendant indicates that it has so far spent, through its solicitors who are acting in the defamation proceedings, a sum in excess of \$1.1m in professional costs. It cannot be suggested that all of those costs, or indeed the majority of those costs, have been wasted. But I am satisfied that a significant proportion of the costs which have been spent on discovery, subpoenas and the proofing of witnesses have been wasted. I have reached that conclusion after consideration of the evidence of the solicitor acting in the matter, Ms Noe, who has deposed to the fact that by reason of the bringing of separate proceedings in the

two courts, issues related to categories of discovery and the provision of the discovered documents has been repeated. So much is obvious from the fact that the factual matrix underlying the proceedings in the Federal Court and those relating to the truth defence in the defamation proceedings are the same. It is for that reason that I ultimately decided that the defamation proceedings should be transferred. But it is plain that in so doing almost the entirety of the costs spent in the defamation proceedings on discovery will be a mere repetition of the work that was undertaken for the Federal Court proceedings.

- 3 There is also some significant overlap in relation to the issue of subpoenas where there has been a repetition of the issue of subpoenas and response to them in both courts.
- 4 There has also been inevitably a significant repetition of the proofing of witnesses who will be witnesses in both of the proceedings.
- 5 It seems to me that the plaintiff has been poorly advised in bringing and maintaining defamation proceedings in this court. I say that only to mark out the fact that, as I understand the provisions of section 32 of the Federal Court Act, having commenced the Federal Court proceedings, even without the amendment to plead injurious falsehood because the defamation proceedings raise factual issues central to both the original Federal Court proceedings and the defamation proceedings, the defamation could have been pleaded in the Federal Court. They clearly relate to the same "matter." However, the plaintiff chose to commence proceedings in this Court and then maintain them until recently with, as a consequence, a wastage of expenditure by the defendant. The interests of justice demand that the defendant be appropriately recompensed for that wastage. It is not sufficient for the plaintiff to submit, as was done on her behalf, that she only commenced the proceedings in this Court because that was the advice she was given. The defendant cannot be visited with the wasted costs of the advice given to the plaintiff.

- 6 It is also plain to me that if I now made an order for costs but provided for those costs to be assessed, I would inevitably be imposing upon these parties a further round of very significant litigation. It is impossible for me to identify the ultimate cost of those separate proceedings. But on any view, they would have to exceed \$100,000 and I suspect would be substantially greater.
- 7 These parties have already been engaged in litigation over a number of years and on a number of fronts. As is plain from the solicitor/client costs that the defendant has incurred to date, the costs of the proceedings appear even now to be out of all proportion to the financial consequences of the issues at stake.
- 8 I do not believe it would be in the interests of justice for me to now make orders which would require these parties to engage in yet further complex litigation.
- 9 I am therefore satisfied that I should make an order in a quantified sum and do the best I can having regard to my experience in these matters and the evidence which has been placed before me and quantify the costs which the plaintiff must pay by reason of the transfer of the defamation proceedings to the Federal Court.
- 10 In her affidavit Ms Noe identified nine items in respect of which in part or whole it was suggested that costs had been wasted. I am only sufficiently confident that costs have been wasted in relation to items B, F, and H to make orders in a quantified sum in relation to those matters. It may be quite likely that the defendant will accordingly not receive an order which would meet the entirety of wasted costs but given the need to make an assessment at this point without further litigation, that must be accepted.
- 11 The amount claimed in relation to discovery is in excess of \$363,000. I am not persuaded that party/party costs would be of that order. However, having regard to the evidence which Ms Noe has given as to the nature

and complexity of the discovery issues and the many thousands of documents which have been involved, all of which would be repetitive of the matters to be discovered in the Federal Court proceedings, I have determined that it is appropriate to assess the costs thrown away in relation to discovery of \$200,000.

- 12 In relation to subpoenas, the claim is \$112,000. I am not persuaded that a sum of that order should be awarded. However, it is plain that there has been duplication, and that duplication is of significance. Doing the best I can, I determine that sum in the amount of \$20,000.
- 13 Finally, in relation to the proofing of witnesses, the claim is for a sum in excess of \$74,000. Again, I do not believe it appropriate to include a sum of that magnitude. But again doing the best I can, I am satisfied that there has been significant duplication, and I would determine the appropriate sum to be \$30,000.
- 14 I accept that there will be wastage in relation to various directions hearings, briefing of counsel, and probably in relation to interrogatories. However, as I have indicated, I am not confident that I could do justice in awarding a specific sum in relation to those matters and I leave them out of account. The consequence is that I will order the transfer of the defamation proceedings to the Federal Court, the proceedings being number 297559/2009. I order the transfer of those proceedings to the Federal Court.
- 15 I order the plaintiff to pay the defendants' costs being costs of the defamation proceedings which have been wasted in the sum of \$250,000. I direct that that order for costs cannot be enforced until after the conclusion of the proceedings in the Federal Court. I further order the plaintiff to pay the defendants' costs of the stay application which was made on 8 April 2010 in the sum of \$15,000.
- 16 In relation to costs of the motion to transfer the proceedings to the Federal

Court, the plaintiff has of course succeeded. However, a large part of the debate in relation to that motion before me has been in respect of the matter of costs where the defendant has been successful, the plaintiff taking the position that no order should be made. In those circumstances, it seems to me appropriate that I make no order for either parties' costs of the motion and I so order.

- 17 I reserve liberty to apply but not in relation to the matter of costs; otherwise liberty to apply is reserved. I note that these proceedings will remain on foot in this court to enable the resolution of outstanding subpoenas which are returnable on 22 and 29 October 2010.
