Rowston v Dunstan [2011] NTSC 30

PARTIES:	GEOFFREY BRUCE ROWSTON
	v
	AIDA DUNSTAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	88 of 2009 (20920654)
DELIVERED:	14 APRIL 2011
HEARING DATES:	10 MARCH 2011
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Costs – Costs orders in applications for a property adjustment order under the De Facto Relationships Act – Costs in the discretion of the Court – Factors relevant to the exercise of the discretion – Effect of a party bettering a *Calderbank* offer.

Calderbank v Calderbank (1976) Fam LR 93.
Re The Minister for Immigration and Ethnic Affairs Ex parte Lai Qin (1997) 186 CLR 622.
Baker v Towle [2008] NSWCA 73.
Kardos v Sarbutt (No.2) (2006) DFC 95-337.
Dunstan v Rickwood (No.2) [2007] NSWCA 266.
Chanter v Catts (No.2) [2006] NSWCA 179

De Facto Relationships Act
Family Law Act (Cwth), s 117

Property (Relationships) Act (NSW)
Uniform Civil Procedure Rules (NSW), r 42.1

REPRESENTATION:

Counsel:

Plaintiff:	Ms Truman
Defendant:	Mr Black

Solicitors:

Plaintiff:	Marris & Co
Defendant:	Cecil Black Family Lawyer

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rowston v Dunstan [2011] NTSC 30
No. 88 of 2009 (20920654)

BETWEEN:

GEOFFREY BRUCE ROWSTON
Plaintiff

AND:

AIDA DUNSTAN
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 14 April 2011)

[1] On 3 February 2011 I published reasons in this matter and found in favour of the Plaintiff on his application for an adjustive property order pursuant to the *De Facto Relationships Act* ("the Act"). These reasons now deal with the question of costs.

[2] The Plaintiff seeks his costs of the proceedings including indemnity costs subsequent to an offer which the Plaintiff claims to have bettered. The Defendant argues that each party should bear their own costs.

[3] Findings I made in the reasons published 3 February 2011 which are relevant to the question of costs are as follows:-

1. Although there were aspects of both parties' evidence which lacked credit, it was significantly more so in the case of the Defendant.

2. The Defendant refused to make obvious concessions and maintained an untenable position in the face of contradictory documentary evidence.

3. The Defendant disputed virtually all claims of financial contribution by the Plaintiff and then largely only with bare denials; of those that she conceded, she demeaned their significance.

4. During cross-examination, the Defendant retracted her admission of the existence of a de facto relationship.

[4] Matters which are also relevant to the question of costs and which later emerged are:-

1. It was only shortly before the trial commenced that the Defendant specified the orders that she sought and that was simply the dismissal of the Plaintiff's application.

2. That was unrealistic given that on her best case the parties had been in a de facto relationship for nine years and, despite that the Plaintiff had made substantial financial contributions, he was left with virtually nothing but debt at the cessation of the relationship.

3. I found that the de facto relationship commenced on or about the date alleged by the Plaintiff resulting in a duration of approximately 19 years.

4. The Defendant filed her affidavits of evidence in chief late. The last of the affidavits were filed on 4 November 2010. On 5 November 2010 the Plaintiff submitted an offer in the form vernacularly referred to as a *Calderbank* letter.[1] That offer was for a distribution of property on the basis of 60/40 in favour of the Defendant which calculated at $274,000.00 in monetary terms and based on agreed values at that time. The trial commenced on 8 November 2010.

[5] I consider that it is also relevant to the question of costs that the conduct of the proceedings by the Defendant resulted in the proceedings being drawn out for a number of reasons. Firstly there was extensive cross-examination based on documents. This was necessitated in consequence firstly of the Defendant refusing to concede financial contributions made by the Plaintiff. Secondly, it followed from the Defendant's attempt to disguise the extent and significance of savings and payments off liabilities. This cross-examination was extremely effective and led me to conclude that the Defendant could only have achieved that as a result of the Plaintiff's significant financial contributions to the relationship, contributions which the Plaintiff denied.

[1] From *Calderbank v Calderbank* (1976) Fam LR 93

[6] Also, I was informed at the commencement of the trial that the parties had agreed the extent of assets and liabilities and appropriate values. For reasons which were not apparent, that concession in so far as it related to some of the assets at least, was withdrawn by the Defendant after the evidence commenced. Mr Black sought an adjournment for instructions and to arrange any necessary additional evidence. Additional costs were necessarily incurred as a result.

[7] With that background, I note that unlike section 117 of the *Family Law Act* which is a specific statement as to the starting point for costs in proceedings under that legislation, the Act does not contain any specific provisions as to costs in respect of applications under the Act. Costs are therefore regulated by the Supreme Court Rules. The starting point is rule 63.03(1) which provides that costs are in the discretion of the Court. The discretion referred to is a judicial discretion and as such must be properly exercised namely, in accordance with generally accepted principles. As a general rule, a successful party is entitled to an order for costs unless there are sufficient reasons to deprive that party of its costs. Success in the action or, in some cases, on a particular issue, is the factor that usually controls the exercise of the discretion and a successful party is prima facie entitled to costs.[2]

[8] The Act closely mirrors the New South Wales *Property (Relationships) Act* 1984 ("the NSW Act"). As a result, decisions made under the NSW Act have

[2] *Re The Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622

direct application in proceedings under the Act. I was referred to a number of New South Wales authorities in respect of the question of costs.

[9] There is an essential difference in relation to costs under the NSW Act by application of the relevant rules of court, namely the *Uniform Civil Procedure Rules 2005* ("the NSW Rules"). Rule 42.1 of those Rules provides that costs are to follow the event unless the Court considers that some other order is appropriate. Although a broad discretion is still vested in the Court, the mandated starting point is that costs follow the event, which seems to simply give statutory force to the general rule referred to in paragraph 7 above.

[10] Many of the New South Wales authorities go on to discuss what precisely is the "event" referred to in rule 42.1 of the NSW Rules. The most recent New South Wales decision on point is *Baker v Towle*[3] ("*Baker*"). Preceding that case, *Kardos v Sarbutt (No 2)*[4] ("*Kardos*") held that a starting position in applications for adjustment of property interests in de facto relationships matters should be that each party should bear their own costs. That seems to directly contradict rule 42.1 of the NSW Rules. Not surprisingly, later cases such as *Dunstan v Rickwood (No 2)*[5] and *Baker* have rejected that as a general principle. In *Baker* however the Court agreed that the starting position set out in *Kardos* could still apply to cases *"..where it could not be said that either party had been "wholly or substantially successful" or had*

[3] [2008] NSWCA 73
[4] (2006) DFC 95-337
[5] [2007] NSWCA 266

bettered his or her offer of compromise".[6] This was said to be justified on the basis that in de facto property settlement matters, determination of the "event" for the purposes of rule 42.1 might involve consideration of factors which do not apply to other forms of litigation.

[11] The factors referred to appear to be the four considerations discussed by Brereton J in *Kardos*, where his Honour said that whether or not a costs order will be made in de facto property cases will be influenced by factors which do not typically arise in ordinary civil litigation. The first of these considerations was the quantum of the adjustive order, the concern being to ensure that costs would not be disproportionate to the result.

[12] In *Kardos* his Honour said:-

> "There are many reasons why the Court might "otherwise order". The amount of an adjustment ultimately ordered may not bear any relationship to the extent of the pool of property in issue in the case; a large pool of property, which involves complex valuation issues, may nonetheless ultimately produce only a small adjustment."[7]

[13] The second consideration was something that his Honour considered applied by analogy with matrimonial proceedings under the Family Law Act. He noted that in such proceedings the starting point was that each party bear his or her own costs given that was mandated by section 117 of that Act. Noting however that the New South Wales Legislature did not see fit to incorporate a similar provision in the NSW Act, his Honour went on to say:-

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[6] [2008] NSWCA 73 at para 82
[7] (2006) DFC 95-337 at para 26

> "However, the costs of adjusting property interests consequent upon the failure of a domestic relationship are an instant of the failure of the joint relationship, usually without attributable fault.……In this type of litigation, it is artificial to resolve liability for costs according to the accident of who is plaintiff and who is defendant, so as to leave a plaintiff free to litigate confident that he will receive costs however unreasonable his claim, unless the defendant betters her offer. There is no reason why the defendant should bear the risks of costs to the exclusion of the plaintiff when neither makes a realistic offer."[8]

[14] The third consideration identified by Brereton J was the extent to which any party had been wholly or substantially successful or had bettered an offer of compromise. His Honour approved of *Chanter v Catts (No.2)*[9] to the effect that there may be a costs entitlement on the basis of "substantial success" notwithstanding that less than the initial amount claimed was achieved. In this context Brereton J elaborated and said:-

> "For this purpose, "substantial success" is not to be judged merely by the circumstance that a plaintiff obtains an adjustment order in his or her favour. It involves an evaluation of the outcome, in light of the forensic and negotiating positions of the parties, such that it can be said that one party has been clearly more successful than the other, to the extent that the costs of the proceeding can be seen to be attributable to the unsuccessful party's opposition, rather than to matters referred to by Hisolp J in *Vollmer* – including, in particular, the necessity for both parties that their property interests be separated, and the failure of both parties to adopt a realistic position."[10]

[15] The last consideration identified by Brereton J was the conduct of the parties in the proceedings and in particular the extent to which one party has been disproportionately responsible for incurring of costs as a result of that

[8] (2006) DFC 95-337 at paras 28-29
[9] [2006] NSWCA 179
[10] (2006) DFC 95-337 at para 31

party's conduct of the proceedings. Relevant here are the factors set out in paragraphs 4 and 5 above.

[16] In my view, irrespective of the extent to which the authorities on costs under the NSW Act apply in the Northern Territory in consequence of rule 42.1 of the NSW Rules, the considerations identified by Brereton J in *Kardos* are appropriate matters to take into account in the exercise of this Court's discretion as to the costs of these proceedings.

[17] Mr Black also submitted that the effect of a costs order in favour of the Plaintiff is to skew the adjusting order. Mr Black has estimated the total costs will be of the order of $80,000.00 compared to the net assets of approximately $700,000.00. An order for costs in favour of the Plaintiff would effectively mean that the large part of the entire costs will be paid by the Defendant which will corrupt the adjustment that I ordered. Mr Black submitted that orders under the Act are made based on what is just and equitable and he argued that the end result would not be just and equitable if the Defendant was ordered to pay costs. He submitted that I should add costs back in and thereafter determine a just and equitable adjustment. He further submitted that it is appropriate to take this approach because the case concludes after costs are determined and not just when a decision is made on the substantive issues.

[18] I do not agree. Costs are always treated separately. There is no scope for figuring in the costs in the determination of what is just and equitable. That

is not provided for in the Act. The effect of accepting Mr Black's submission would be to elevate the cost consideration to the status of a factor to be taken into account in the making of the adjusting order. Clearly, the Act does not provide for that.

[19] Mr Black's submission also has insufficient regard for the way that his client's case was conducted. The Defendant essentially had all the assets following the cessation of the relationship and the Plaintiff was left with all of the debts. The Defendant was not prepared to make any significant concessions and indeed as late as at the commencement of the trial, the order that she sought was simply a dismissal of the Plaintiff's claim. The Plaintiff therefore had no alternative but to commence proceedings given that position. Moreover if I were to accept Mr Black's proposition that costs should be added back in that would unfairly favour the very party who adopted the unrealistic position throughout the proceedings.

[20] With that background, in my view the appropriate order for costs in this matter is that the Plaintiff have the costs of the proceedings. In coming to that conclusion, I consider relevant factors are firstly, the position adopted by the Defendant meant that the Plaintiff had no choice but to issue proceedings. The Defendant did not make any offer despite that on her best case, there was a relationship of nine years duration. The Defendant's position was that the Plaintiff's application should be dismissed. That was despite that the Defendant had the bulk of the assets after the separation and the Plaintiff was left with virtually nothing but substantial debts.

[21] Secondly, and also relevant to the question of indemnity costs, the Plaintiff bettered his *Calderbank* offer. I disagree with Mr Black's submission that as the betterment was only 8% it was not a significant or substantial betterment. The offer provided for both a percentage adjustment and a monetary amount. Both aspects need to be considered from the point of view of determining the extent of the betterment. In monetary terms, the offer was $274,000.00 and the award was $385,600.00, albeit with a slight adjustment made by me to the property pool. Mr Black also submitted that despite the proportion in the *Calderbank* offer being 60/40, at the start of the Plaintiff's case the Plaintiff adopted a 50/50 percentage. I do not see why that should make any difference. Once an offer is made, which remains open for acceptance, a party is entitled to pursue the initial claim. That is not uncommon whenever an offer is made. The *Calderbank* letter recited that a compromise was contained within the offer. Although the Plaintiff sought a prompt response, the offer remained open for acceptance at any time thereafter.

[22] In any event I am of the view, consistent with *Kardos*, that the question of substantial betterment is not confined solely to the betterment of an offer. It is also measured in terms of the substantial success in obtaining the order sought. An award of $385,600.00 compared to the Defendant's position that the application should be dismissed is a dramatic betterment. It needs also to be looked at in light of the Defendant's unrealistic position which left the Plaintiff with no choice other than to commence proceedings.

[23] That then leaves the question of indemnity costs. As McColl JA said in *Dunstan v Rickwood (No.2)*[11] the bettering an offer in a *Calderbank* letter is a way of establishing a prima facie entitlement to indemnity costs.

[24] I consider that the only factor which might count against an order for indemnity costs is that the offer was made late i.e., on 5 November 2010 and just three days before the commencement of the trial. The Plaintiff asserts that it was made then as, despite being in default of Court orders in respect of the filing of affidavits of evidence in chief, the Defendant's affidavits were only then provided. However the Defendant's own affidavit was filed on 27 October 2010. There were two further affidavits, both of which were comparatively brief, which were filed on 4 November 2010. One was of Nia Sturgess who was not called in the end, a matter which was the subject of an adverse inference as a result. It is not clear to me as to why the offer could not have been made after the Defendant's own affidavit was served as the Defendant's affidavit was the most significant of the three from that point of view.

[25] Nonetheless the offer was made and it was not accepted by the Defendant. Despite the lateness of the offer I consider that the Defendant had time to consider same and if she thought fit, to accept it before the commencement of the trial. A significant part of costs would therefore have been saved.

[11] [2007] NSWCA 266

[26] In my view an order for indemnity costs is appropriate. Indemnity costs ought to run from the commencement of the trial namely, 8 November 2010.

[27] For these reasons I order the Defendant to pay the Plaintiff's costs of the proceedings assessed on the standard basis up to 8 November 2010 and assessed on an indemnity basis from and including that date.