Indemnity Costs Awarded

Brian Donovan QC, NSW

On 1 November 1994 Mr Justice Badgery-Parker considered an application for indemnity costs in a matter of *Rouse v Shepherd* (No. 10707 of 1991). Previously his Honour had given a verdict for the plaintiff. Prior to the hearing, the plaintiff's solicitor had written to the two solicitors for the various defendants requesting them to either admit liability or agree to a shortening of the evidence on liability by tender of the transcript and exhibits before the coroner. The defendants had not taken up this offer. The first and second defendants admitted liability during the adjournment on the first day of the trial and the third defendant admitted liability on the second day. The plaintiff asserted that she should be entitled to indemnity costs on the issues of liability because there was never, so it was claimed, any real prospect of the defendants succeeding on liability and the plaintiff had been forced to spend considerable time and effort in preparing the case on liability, including conferences for senior counsel in the country with the various liability witnesses. The defendants submitted that the matter was no different to an ordinary motor vehicle claim where the defendants deny liability but either during the course of the hearing liability is admitted or, alternatively, a verdict is found for the plaintiff.

Costs are payable pursuant to s.76 of the Supreme Court Act. Part 52 of the rules sets out two express situations where the costs may be awarded on an indemnity basis. Rule 14 deals with circumstances where a Notice to Admit Facts is served and disputed. Where the Notice to Admit Facts is served and the fact is subsequently proved or admitted, the costs are under the rules awarded on an indemnity basis in relation to that issue. Rule 17 provides for indemnity costs where there has been an offer of compromise. The rules are apparently otherwise silent as to particular circumstances where indemnity costs are awarded. Indemnity costs have been awarded from time to time in commercial proceedings but generally apart from those two rules they have not been awarded in personal injury matters. See *Segenhoe Ltd v Atkins* (1990) 29 NSWLR 569; *Baillieu Knight Frank (NSW) Pty Ltd v Ted Mann v Real Estate Pty Ltd* (1992) 30 NSWLR 359 (commercial and equity type proceedings).

During the course of argument, reference was made to s.82 of the Supreme Court Act which permits the court to dispense with the rules of evidence before proving any matter which is not bona fide in dispute. Section 82 is a most important provision and application can be made prior to the hearing for orders under s.82 which would avoid the need for strict proof of matters not bona fide in dispute. Although similar provisions in England have been held to apply only to proof of peripheral matters and the Courts have said that the power should not be exercised so as to permit informal proof of critical issues, in New South Wales there has been held to be a wide discretion to use the power when it would advance the interests of justice. See Coopers Brewery *Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 and cases cited in *Ritchie's Supreme Court Procedure*, s.82.

On 23 November 1994, Mr Justice Badgery-Parker handed down his judgment in which he awarded indemnity costs to the plaintiff. His Honour said that the circumstances did not fall within the two recognised provisions under the Rules and:

> "so recourse must be had to the inherent jurisdictionof this court to award payment of costs on an indemnity basis and the bounds within which this discretion may be exercised."

His Honour examined the analysis of Sheppard J in *Colgate Palmolive Co & Ors v Cussons* (1993) 118 ALR 248 at 256. He also examined *Fountain Selected Meats (Sales) Ptv Limited v International Produce Merchants Pty Limited* (1988) 81 ALR 397 at 401 per Woodward J where Woodward J said that indemnity costs could be awarded where an action had been commenced or continued in circumstances:

> "where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law."

Badgery-Parker J also referred to *Baillieu Knight Frank v Ted Manny Real Estate* (1992) 30 NSWLR 359 at 362, *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534, *Blackburn v State of New South Wales* (NSWSC, unreported, 9 August, 1991, Hunt J), *Ragata Developments Pty Limited v Westpac Banking Corporation & Anor* (Federal Court, unreported, 5 March,

1993 per Davies J at pp.8-9) and *Maitland Hospital v Fisher (No. 2)* (1992) 27 NSWLR 721.

Badgery-Parker J found that the defendants had maintained a denial of liability up to the date of hearing (with minor exceptions). He held that they changed their stance on the second day and said that this:

> "...indicates either that the plaintiff's case, as it was revealed on the first day of the hearing, was so overwhelming (and unexpectedly so) that the defendants suddenly decided they had no possible chance of success, or that the defendants had some ulterior motive in delaying the admission of liability until that stage. In all probability, the latter reason would appear the most cogent for the defendants' sudden late admission of liability. There are several reasons for this conclusion:
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> "1. The defendants had ready access to the material presented at and the conclusions of the coronial inquest.
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> "2. The defendants have not denied that the admission of liability depended upon the resolution between themselves of their respective contribution of fault and indeed, judging by the first and second defendants' letter of 10 March 1994, were labouring under a misapprehension as to the plaintiff needing to agree to any apportionment arrangement. This is opposed to the clearly established law that a plaintiff is entitled to judgment as against each defendant proved to be a joint tortfeasor.
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> "Inability to agree between themselves as to contribution does not always justify refusal to admit liability. It may do so where putting the plaintiff to proof is necessary to clarify matters of fact upon which the question of apportionment may depend, but this was not such a case, having regard to the full explanation of the circumstances before the coroner."

His Honour found that the defendants' refusal to admit liability was "unreasonable in the circumstances" and awarded indemnity costs.

Industrial Law - Termination Of Employment

Narelle Nones v.-Armas Nominees Pty Limited t/as Network Rent A Car

Frank Hicks, NSW

Under the changes to the *Industrial Relations Act* 1988 *(C'wealth)* (as amended) which came into force on 28 March 1994, an employee is entitled to remedies in the form of either reinstatement or compensation or both, if the termination of the employment is found to have breached the new provisions of the Act.

A breach of the Act will occur if either:

1. The employer did not have a valid reason for the termination of the employment.

2. The termination was "harsh, unreasonable and unjust".

The above represents a two stage test applied to the circumstances surrounding the termination of an employee's employment. It is for the employer to prove that a valid reason existed for the termination of employment, and it is for the employee to prove that the termination was nonetheless "harsh, unreasonable and unjust".

Should reinstatement be an impractical option in the circumstances, damages may then be awarded. These damages are designed to compensate the employee for the loss of wages that would have been earnt but for the wrongful action of the employer in terminating his/her employment.

The maximum damages available under the Industrial Relations Act are six months wages or earnings and include the total of the package, e.g. if a car allowance was to be provided and was provided as part of the employment package, these monies are also claimable.

The plaintiff in these cases is under the usual obligation to mitigate any loss suffered as a result of the