

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

HALL J

THURSDAY 7 MAY 2009

No 11294 of 2009

**MARGARET SIU-YING TUNG v HEALTH CARE
COMPLAINTS COMMISSION OF NEW SOUTH WALES &
ANOR**

JUDGMENT

- 1 **HIS HONOUR:** Judgment was delivered in this matter on 27 March 2009: [2009] NSWSC 204. I directed that the plaintiff have the opportunity to lodge written submissions on the question of costs orders if she so wished. Such submissions on behalf of the plaintiff, Ms Tung, the first defendant ("HCCC") and the second defendant ("*Medical Board*") have been lodged with my associate.
- 2 The plaintiff, by amended summons dated 16 March 2009, sought orders, inter alia, concerning an order made by the Chairperson of the Medical Tribunal pursuant to s.63(3) of the *Medical Practice Act 1992* which provided for the plaintiff's removal from the medical register.
- 3 The plaintiff sought an order staying the order of the Chairperson of the Medical Tribunal of 4 February 2009, and an order that the Registrar of the

Medical Board (second defendant) reinstate the plaintiff's registration pending determination of the plaintiff's appeal to the Medical Tribunal.

- 4 The "*Grounds*" identified in the amended summons were that the plaintiff was misled by the legal advice of the second defendant that she had no right of appeal against the findings and determination of the Professional Standards Committee until the Chairperson had made an order for her deregistration.
- 5 The proceedings were determined in favour of the defendants. The amended summons was dismissed.

Plaintiff's submissions on costs

- 6 The plaintiff submitted that the general rule that costs follow the event (UCPR, Rule 42.1) should not be applied in this case.
- 7 This submission is primarily premised on the fact that the second defendant's legal officer, Ms Azad, misled the plaintiff as to the rights of her appeal.
- 8 The plaintiff contended that the PSC inquiry was not conducted on the basis that the practitioner was exposed to any substantial risk of deregistration. It is claimed that the PSC recommended deregistration after it had received the plaintiff's submissions. This contention relies on the breach of the requirements of procedural fairness before the PSC.
- 9 Reliance is also placed on the decision of **CSR v Eddy** [2005] HCA 64; (2005) 222 ALR 1 in which the High Court held that it may be appropriate to award costs in favour of an unsuccessful party where a frequent litigant is likely to be substantially advantaged by the favourable resolution of the proceedings. The defendant statutory bodies in this case are, according to the plaintiff, frequent litigants.

10 An order that each party pay her and its own costs is sought.

Defendants' submissions on costs

11 As successful parties, the first and second defendants submitted that the general order that costs follow the event should be made (UCPR rule 42.1). Focus was directed to the compensatory rather than punitive nature of the entitlement to costs arising from the successful claim: **Ohn v Walton** (1995) 36 NSWLR 77 at 79.

12 The defendants replied to the submissions of the plaintiff requesting this Court depart from the general rule.

13 First, the plaintiff's submissions rely upon the effect of the incorrect advice given to the plaintiff by the second defendant. The defendants contended that this submission failed to take into account the fact that the plaintiff was legally represented at that time, and that I made a finding in my judgment that the plaintiff was not denied procedural fairness even if she was misled on the question as to the time for the lodging of an appeal.

14 Second, the plaintiff made reference to an allegation of denial of procedural fairness before the PSC. The defendants identified the following paragraph from my judgment in respect of this point:-

"74. Accordingly, no question has been raised in the present proceedings of a denial of procedural fairness before the Committee on the question as to what, if any, recommendation the Committee should or might make. That matter was directly in issue and the plaintiff was provided with the opportunity of dealing with it."

15 The defendants contended that as this matter was not raised in the proceedings, it cannot be considered as a ground for an alternative costs order.

- 16 Third, the defendants submitted that the decision of **CSR v Eddy** (*supra*) is not analogous to the present case and is therefore not applicable. No proper comparison can be made, on the defendants' submission, between the defendants in that case, companies engaged in the manufacture of asbestos which caused disease in employees, and two statutory authorities operating within a protective jurisdiction.
- 17 The defendants submitted that there no general advantage will be gained by either defendant from the outcome of these proceedings, nor have either defendant prevented an appeal being lodged out of time.

Consideration

- 18 The powers of the Court in relation to costs are to be found in s.98 of the *Civil Procedure Act 2005* and Part 42 of the UCPR.
- 19 The general rule is that costs follow the event (UCPR, Rule 42.1) and are to be assessed on the ordinary basis: UCPR, Rule 42.2.
- 20 In its discretion, the Court may make an order other than costs to be assessed on an ordinary basis: UCPR, Rule 42.1 and 42.2. However, the Court must be satisfied that it is appropriate to do so in the particular circumstances: **Donald Campbell & Co Ltd v Pollak** [1927] AC 732.
- 21 I did not find in my judgment that a denial of procedural fairness had arisen from either the second defendant's erroneous advice or the plaintiff's appearance before the PSC (at [74] and [78]). Accordingly, I do not consider the plaintiff's submission in relation to these matters to be relevant to the making of costs orders.
- 22 The decision in **CSR v Eddy** (*supra*), which was relied upon by the plaintiff, can be distinguished from the present case. The appellants in that case admitted liability for negligently exposing the plaintiff to asbestos and thereby causing him to contract mesothelioma. The appellants

appealed to the Court of Appeal and the High Court and challenged the correctness of the award of *Sullivan v Gordon* damages. The appellants succeeded in their challenge and sought the costs of the Court of Appeal and High Court appeals.

- 23 On the question of costs, the majority of the High Court (Gleeson CJ, Gummow and Heydon JJ) stated:-

"80. *It is notorious that over many years the first appellant and other members of the group of companies to which it belongs mined asbestos, and manufactured and supplied asbestos-based products. Very large numbers of their employees have been exposed to asbestos; many of them have contracted asbestosis and mesothelioma as a result; many admissions or findings that these diseases were caused by their negligence in this respect have been made; many will be made in future. The appellants challenged Sullivan v Gordon below, applied for special leave to appeal, and prosecuted the appeals, in order to vindicate their long-term commercial interests, for success will unquestionably tend to reduce the quantum of damages payable by them in asbestos-related litigation, of which, unfortunately, there appears likely to be a large quantity in future years.*

81. *In contrast, the plaintiff had no interest in the legal position beyond this particular litigation ..."*

- 24 The first defendant, the Health Care Complaints Commission, was established under the *Health Care Complaints Act 1993* to protect public health and safety by resolving, investigating and prosecuting complaints about health care.

- 25 The second defendant, the Medical Board of New South Wales, is a statutory authority established under the *Medical Practice Act*. Its main function is to protect the health and safety of the public by providing mechanisms to ensure that medical practitioners are fit to practise medicine. One aspect of this objective is to ensure that registered doctors maintain proper standards of conduct and competence.

- 26 Accordingly, the defendants are often involved in litigation as a result of the discharge of these powers and obligations. As such, they obtain no real advantage from the outcome in the present proceedings. The appellants in **CSR v Eddy** (supra), on the other hand, were concerned with protecting their commercial interests, and had an additional interest in the outcome of the proceedings in relation to future litigation. The nature of the defendants is therefore a differentiating feature in the present case.
- 27 Although the defendants did not oppose an appeal being lodged out of time, and in fact supported the expedition of such an appeal, the plaintiff maintained its claim. Aside from the incorrect advice given by the second defendant as discussed above, it cannot be said that the defendants were guilty of any misconduct in relation to the proceedings.
- 28 For the above reasons, I consider that the plaintiff's application for costs should be dismissed and the general rule that costs follow the event (UCPR 42.1) should apply.
- 29 Accordingly, I order that the plaintiff pay the first and second defendants' costs.

I CERTIFY THAT THIS AND THE.....⁵.....
PRECEDING PAGES ARE A TRUE COPY
OF THE REASONS FOR JUDGMENT HEREIN
OF THE HONOURABLE JUSTICE HALL

Date.....7.5.09.....

Associate.....*G. Brette Bar*.....