Costs liability of non-lead plaintiffs and tutors

By Phillipa Alexander

The Supreme Court of NSW has recently determined two costs issues in *Al Mousawy bht Imelda Margaret Dodds v Howitt-Stevens Constructions Pty Limited & Ors (No 2)*.[1] First, whether non-lead plaintiffs should be jointly and severally liable for costs together with the lead plaintiff and, secondly, the extent of the lead plaintiff's two tutors' liability for costs.

The lead plaintiff had commenced proceedings in his own name in 2004 for personal injury damages resulting from the collapse of a ceiling at the Stonewall Hotel. Seven other plaintiffs also commenced similar proceedings. Directions were made in 2008, by consent, that the lead case was to be determined as to liability and damages; the balance of (non-lead) cases were to be determined as to liability only at the same time as the lead case; all plaintiffs to use the same counsel at the hearing of the lead case; and the plaintiffs were to serve a statement of claim common to all cases. The uniform statement of claim was filed in July 2009.

The plaintiffs variously failed on duty of care, breach of duty and/or causation and the defendants were entitled to orders for their costs of the proceedings. One of the defendants submitted that as from the time the uniform statement of claim was filed, the plaintiffs' liability for costs should be joint and several on the basis that the non-lead plaintiffs had agreed to be bound by the outcome as to liability of the lead plaintiff's case and had consented to use the same counsel at the hearing. The situation was distinguishable from a representative action in which the person named as plaintiff is a full party to the action and liable for costs, whereas the represented persons are bound by the decision but are not liable individually for the costs.[2]

Hoeben J rejected this argument and held that the consent of the non-lead plaintiffs to both matters did not result in the plaintiffs being joint and several plaintiffs in the same action, noting that each plaintiff had originally filed his or her separate statement of claim.

Orders were made that the lead plaintiff should pay any costs order made against him in relation to the conduct of the proceedings and, in particular, the hearing in February 2010. Each of the non-lead plaintiffs was ordered to pay his or her costs only to the extent that they were actually incurred in the conduct of his or her matter.

While, in this case, it does not appear that the lead plaintiff's costs were substantially increased as a result of proceeding as the lead case on liability and damages, practitioners acting for both a lead plaintiff and a non-lead plaintiff in similar circumstances may need to consider carefully the costs consequences of their consent to such an arrangement. If the lead plaintiff's costs were substantially increased, it would seem unreasonable that the lead plaintiff alone should have to bear such increase. When acting for a non-lead plaintiff, if successful, would such non-lead plaintiff be entitled to recover any of his or her costs of the trial, or would only the lead plaintiff have an entitlement to recover such costs from a defendant? Issues such as these may need to be negotiated and agreed in writing between the plaintiffs prior to consent being given.

Hoeben J also considered the extent of the liability of the tutors in the claim by the lead plaintiff. It is established law that any costs order made against a plaintiff can also be made against his or her tutor.[3] Difficulties arose in this case, however, because there had been two tutors during the course of the proceedings and also a period of 18 months with no appointed tutor, a not uncommon situation in lengthy proceedings.

Hoeben J queried whether there should be an apportionment between the plaintiff and the two tutors for the plaintiff's costs, while one of the defendants submitted that the last tutor should be responsible for the whole of the plaintiff's costs. Hoeben J noted the paucity of authority on the question, referring to *Bligh v Tredgett*,[4] in which the court held that the liability of a next friend was not limited to the time during which his name had been on the record.

His Honour also noted one of the primary bases for the appointment of a tutor is to ensure that there is a person available to bear the costs of a successful defendant. While not directly addressed in the judgment, it appears that the plaintiff and the first tutor may not have had the same capacity to meet the defendants' costs as the last tutor, Ms Dodds, a representative of the NSW Trustee and Guardian.

Counsel for Ms Dodds argued that the court had wider discretion as to costs than existed at the time of *Bligh's* case, and referred to *Fernando (by his tutor, John Ley) v Minister for Immigration and Citizenship (No. 9)*,[5] in which Siopis J had entertained an application by the tutor prior to the trial to limit his personal liability for costs. Hoeben J distinguished *Fernando* on its facts, and held that the principle in *Bligh's* case should be applied. Orders were made that Ms Dodds was personally responsible for the entire costs liability of the lead plaintiff.

When acting for a plaintiff requiring a tutor, practitioners should ensure that the tutor is fully aware that his or her potential liability for costs is not limited to the time during which the appointment is in effect. If the plaintiff is unsuccessful in the proceedings, the tutor may also be personally liable to meet the defendant's costs incurred prior to the tutor's appointment. ■

Notes: **1** [2010] NSWSC 1398 (6 December 2010). **2** See *Moon v Atherton* (1972) 2 QB 435. **3** See *Yakmor v Hamdoush (No. 2)* [2009] NSWCA 284 at 44-5. **4** (1852) 5 DE G and S M 73. **5** [2009] FCA 833.

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