

6-1-2006

# Hard bargainers beware! Cost traps for lawyers

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## Recommended Citation

Cavanagh, Patrick and Zegenhagen, Yvette (2006) "Hard bargainers beware! Cost traps for lawyers," *ADR Bulletin*: Vol. 8: No. 9, Article 3.

Available at: <http://epublications.bond.edu.au/adr/vol8/iss9/3>

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## Recent developments — payment of legal costs

# Hard bargainers beware! Cost traps for lawyers

Patrick Cavanagh and Yvette Zegenhagen

The pursuit of hopeless cases, and practitioners making extreme pre-trial demands, may prove to be personally expensive for lawyers. Most legal practitioners are aware of the fact that they could be liable for costs incurred by a successful defendant when the court finds that the plaintiff pursued a civil action that lacked 'bona fides'. However courts may find it difficult to establish 'clear cases' where solicitors should be liable to pay costs personally due to lawyer/client privilege.

Nevertheless, two recent court decisions in different mid-level courts extend this principle in favour of self-represented clients and the plaintiff. Both cases involved national law firms.

The first case involved the firm Corrs Chambers Westgarth.<sup>1</sup> The Melbourne firm was acting for Louis Vuitton and successfully pursued an infringement action against the defendants in the Melbourne Federal Court. The defendants (a company and an individual) had acted in contravention of the original consent orders (under which they agreed not to sell counterfeit goods) and were found to be in contempt of court. Despite the success of Louis Vuitton, Justice Ron Merkel was critical

of the firm's conduct in its pre-trial correspondence and the demands it made of the self-represented second defendant in regard to possible settlement for the contempt of court charges. In essence the judge penalised the solicitors for making indefensible demands to the non-represented party and stated that 'an aggrieved party and its solicitors should exercise prudence and caution when offering to settle claims arising out of the contravening conduct.'<sup>2</sup> His Honour said

penalties 'no less' than \$250,000 for a claimed breach of the court orders. Merkel J found such demands 'unreasonable'<sup>3</sup> and going 'far beyond the demands [the plaintiff] had a legal right to make.'<sup>4</sup> Furthermore, he stated that the demands were 'far beyond any remedy known to law'<sup>5</sup> and that the threat itself 'may amount to improper pressure, duress or even extortion.'<sup>6</sup> Unusually, to 'express its disapproval'<sup>7</sup> of the conduct of the plaintiff, the Court

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this was particularly important when they are dealing with a litigant in person. Corrs had written and threatened contempt proceedings and financial

ordered the successful plaintiff to bear their own legal costs as well as the costs of the pro bono counsel who acted for the second defendant.



The second case again involved a national law firm Abbot Tout who acted for an unsuccessful plaintiff in a liquidation case involving The Black Stump group of restaurants.<sup>8</sup> The Abbot Tout solicitor was required under statute<sup>9</sup> to appear before the NSW Court of Appeal to show cause as to why he should not be made to pay the entire costs of the applicant and the appeal personally. Although the Court was unanimous in its decision that there should be no order for the solicitor to pay costs, Chief Justice Peter Young of the New South Wales Supreme Court (Equity Division) was extremely critical of the pursuit of the matter by the solicitors, given his finding that the case 'was doomed to fail' as 'a sufficient examination of the law and circumstances had not taken place.'

Chief Justice Young commented:

If, in a future case the facts clearly showed that a solicitor had given very bad advice to an unsophisticated client, who accepted it without question, with the result that the company [plaintiff] had incurred substantial legal costs, that may well be a case where the court would ... make an order that the solicitor pay the costs personally.<sup>10</sup>

In this case the judge accepted that because the above criteria were not met, principally because the plaintiff clients were professional liquidators who held substantial experience in civil proceedings, the solicitor could not be expected to pay costs. Additionally, the solicitor, Mr Rosenblatt prompted the Court to consider *Lemoto v Able Technical Pty Ltd*,<sup>11</sup> particularly noting McColl JA who stated:

... the jurisdiction to order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services must be exercised 'with care and discretion and only in clear cases' ...<sup>12</sup>

As such, the Court conceded it 'just does not know'<sup>13</sup> whether the solicitor brought the appeal based on his own advice or whether the client had insisted on the appeal. Consequently the solicitor could not be expected to pay costs. However Young CJ did warn that the mere fact that the solicitor was made to show cause should 'serve as a red light warning to the profession.'<sup>14</sup>

The effect of these decisions would be that plaintiffs, defendants and in particular unrepresented clients may all be able to pursue the solicitors for the plaintiff for pre-trial demands, the pursuit of cases where they are doomed to fail or where the necessary bona fides are not present. This is good news for clients, bad news for lawyers pursuing non-meritorious claims and lawyers playing the role of hard bargainers with the usual strategy of making extreme demands and claims.

However difficulties arise when trying to make an assessment as to whether the solicitor or client is the real cause of the problem. This was acknowledged in *The Black Stump Enterprises* case when Young CJ identified that:

... this is exacerbated in that legal professional privilege may prevent the lawyer from informing the court of what truly happened. Without the clients' release, the lawyer may well be unable to give the court full information.<sup>15</sup>

This factor could diminish the ability for courts to punish lawyers they believe have pursued hopeless cases as it may prove very difficult to demonstrate 'clear cases' where the solicitor is at fault.

Finally, given the recent comments by some state Attorneys-General and their Federal counterpart concerning the possible abolition, in whole or in part, of legal immunity in court proceedings, we can expect further common law and statutory inroads to outdated and discriminatory protections of the legal profession. ●

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## Endnotes

1. *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* [2006] FCA 83 (14 February 2006).
2. At [44].
3. At [57].
4. At [55].
5. At [55].
6. At [44].
7. At [58].
8. *Re The Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60.
9. *Uniform Civil Procedure Act 2005* (NSW), s 99.
10. *Re The Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60 at [14].
11. *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153.
12. At [92].
13. *Re The Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60 at [11].
14. At [14].
15. At [10]; see also *Kumar v MIMIA* (2004) 133 FCR 582.

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