



Equity Division Supreme Court New South Wales

Case Name: Mudgee Dolomite & Lime Pty Ltd v Robert Francis Murdoch
In the matter of Mudgee Dolomite & Lime Pty Ltd

Medium Neutral Citation: [2020] NSWSC 1675

Hearing Date(s): On the papers; last submissions 16 November 2020

Date of Decision: 24 November 2020

Jurisdiction: Equity - Corporations List

Before: Black J

Decision: In First Derivative Proceedings, First to Fourth Defendants to pay 30% of Plaintiff's costs, including costs of obtaining leave to bring derivative proceedings but excluding costs subject to other previous orders. In Second Derivative Proceedings, First and Second Plaintiffs to pay Defendants' and Third Plaintiff's costs. In Oppression Proceedings, Plaintiff to pay Defendants' costs. In Winding Up Proceedings, Second Defendant to pay the costs of the proceedings. Other orders made giving effect to primary judgment.

Catchwords: COSTS – Basis of quantification – Four separate proceedings heard together – Overlapping parties where Plaintiffs in certain proceedings were Defendants in others – Parties successful on certain claims and unsuccessful in others – Whether appropriate for no order as to costs across all proceedings – Where successful and unsuccessful claims within a proceeding.

Legislation Cited: - *Corporations Act 2001* (Cth), s 461(1)(k)
- *Uniform Civil Procedure Rules 2005* (NSW), r 42.1

Cases Cited: - *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304
- *Expense Reduction Analyst Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303

- *Pages Property Investments Pty Ltd v Boros* [2020] NSWSC 1474
- *Short v Crawley (No 40)* [2008] NSWSC 1302

Texts Cited:

Category: Costs

Parties:

Proceedings 2016/84283 (First Derivative Proceedings)

Mudgee Dolomite & Lime Pty Limited (Plaintiff)
Robert Francis Murdoch (First Defendant)
Stephen Murdoch (Second Defendant)
RK Murdoch Pty Limited (an Australian company) (Third Defendant)
Tilecote Farm Pty Limited (formerly known as Bright Pear Pty Limited) (Fourth Defendant)
Kurdeez Minerals Pty Limited (Fifth Defendant)

Proceedings 2016/271516 (Winding up proceedings)

Robert Francis Murdoch (Plaintiff)
Mudgee Dolomite & Lime Pty Limited (First Defendant)
Brian Murdoch (Second Defendant)

Proceedings 2016/355621 (Oppression Proceedings)

Brian Murdoch (Plaintiff)
Mudgee Dolomite & Lime Pty Ltd (First Defendant)
Robert Francis Murdoch (Second Defendant)

Proceedings 2017/377222 (Second Derivative Proceedings)

Robert Murdoch (First Plaintiff)
Stephen Murdoch (Second Plaintiff)
Mudgee Dolomite & Lime Pty Ltd (Third Plaintiff)
WJ Murdoch Pty Limited (Fourth Plaintiff)
Mudgee Stone Co Pty Ltd (Fifth Plaintiff)
Brian William Murdoch (First Defendant)
B Murdoch Pty Ltd (Second Defendant)
Scott Murdoch (Third Defendant)
Stoneco Pty Ltd (Fourth Defendant)

Representation:

Counsel:
V Bedrossian/M Jaireth (Brian Murdoch Interests)
J Kelly QC/H K Insall SC/Dr C Mantziaris (Robert Murdoch Interests)

Solicitors:
McPhee Kelshaw (Brian Murdoch Interests)
Hills Solicitors (Robert Murdoch Interests)

File Number(s): 2016/84283; 2016/271516; 2016/355621;
2017/377222

Publication Restriction:

JUDGMENT

Background

- 1 On 28 October 2020, after a lengthy hearing in August and September 2020, I delivered judgment (“Primary Judgment”) in *Re Mudgee Dolomite & Lime Pty Ltd* [2020] NSWSC 1510, dealing with four separate proceedings between overlapping parties.
- 2 The first proceeding (“First Derivative Proceedings”) was a derivative action brought by Mr Brian Murdoch (to whom I will refer, without disrespect, as “Brian”) on behalf of Mudgee Dolomite & Lime Pty Ltd (“MDL”) against Mr Robert Murdoch (to whom I will refer, without disrespect, as “Robert”) and others. I held that MDL had established its claim in respect of work undertaken by the Robert Murdoch Interests in respect of the Cadia mine and that MDL, by the liquidator who would be appointed to it pursuant to orders made in other proceedings, would be entitled to elect whether to pursue a claim for compensation (the quantum of which it had not established) or an account of profits in respect of that claim. I also held that MDL had not established its claim in respect of the Timboon quarry, which was a substantial aspect of the First Derivative Proceedings.
- 3 The second proceedings (“Second Derivative Proceedings”) were brought by Robert and Mr Stephen Murdoch (to whom I will refer, without disrespect as Stephen) on behalf of MDL and two other companies in the Murdoch Group against Brian and Mr Scott Murdoch (to whom I will refer, without disrespect as Scott) and companies associated with them. The claims made in those proceedings were not established.

- 4 Brian also brought proceedings (“Oppression Proceedings”) in which he originally sought an order under s 233 of the *Corporations Act* that Robert sell the entirety of his shareholding in MDL to Brian at fair value and that Robert resign as a director of MDL or alternatively a winding up order in respect of MDL. It emerged in Brian’s cross-examination that he could not afford to acquire Robert’s shares in MDL and, in closing submissions, Brian abandoned the claim to an order that Robert sell his shares in MDL to him and then sought the winding up order, which Robert had also sought in the fourth proceedings (“Winding Up Proceedings”), a winding up application brought by Robert in respect of MDL on the just and equitable ground.
- 5 I expressed the view, in paragraph 300 of the Primary Judgment that, subject to hearing from the parties, each of them had only partial success and my preliminary view was that there should be no order as to the costs of the proceedings. I directed the parties to bring in agreed short minutes of order to give effect to the judgment, including as to costs, within 14 days, or, if there was no agreement, their respective draft short minutes of order and short submissions as to the differences between them.
- 6 The parties then submitted their respective draft orders and submissions as to the differences between them. There is a substantial degree of agreement as to the majority of the orders which should be made, and the only issues which remain between the parties then related to whether two or three persons should be appointed as liquidators to MDL and as to costs. After receipt of those submissions, my Associate emailed the parties at my request to invite further costs submissions as follows:

“His Honour thanks the parties for their respective submissions as to costs which he has reviewed. His Honour considers that he should allow the parties an opportunity to make submissions as to two further matters which he would likely address in any costs judgment, by 4pm on Monday 16 November 2020:

1. If his Honour were to accept Mr Bedrossian’s submission that the Robert Murdoch Interests should pay a portion (including a lesser portion) of the costs of the First Derivative Proceedings and the costs of the Second Derivative Proceedings, then his Honour would likely need to make an order that Brian pay the costs of the Oppression

Proceedings and the Winding Up Proceedings, as to which the Robert Murdoch Interests succeeded.

2. There seems to his Honour to be a real risk that, if such an order were made, the parties would be no better off, after incurring significant costs in an assessment, including the costs of attributing costs to particular proceedings, than with no order as to costs, although his Honour recognises that that may be a practical rather than a legal concern.”

The parties then made short further submissions as to that issue.

Costs

- 7 Mr Bedrossian, who appears for the Brian Murdoch Interests, submits that orders should be made in respect of the costs of the separate proceedings, rather than adopting the approach that I foreshadowed in paragraph 300 of the Primary Judgment. He submits that, in the First Derivative Proceedings, except so far as costs were the subject of previous costs orders, the Defendants, Robert, Stephen and the companies associated with them, RK Murdoch Pty Ltd (“RKM”) and Tilecote Farm Pty Ltd (previously known as Bright Pear Pty Ltd) (“BPPL”) should pay, jointly and severally, 70% of Brian’s costs of the First Derivative Proceedings (including in respect of his application for leave to bring the First Derivative Proceedings) as agreed or as assessed, on the ordinary basis. Mr Kelly, who appears for the Robert Murdoch Interests, resists that order and submits that the order foreshadowed in paragraph 300 of the Primary Judgment, namely that there should be no order as to the costs of these proceedings, should be made.
- 8 Mr Bedrossian refers to the observations of White J in *Short v Crawley (No 40)* [2008] NSWSC 1302 at [25]-[33] that a costs order can be modified to accommodate the extent to which a successful party has not succeeded on all issues raised, and points to the order there made by White J (at [83]) that the defendants should pay two-thirds of the plaintiff’s costs, although there were distinct portions of the proceedings in respect of which the defendants had succeeded and upon which there would ordinarily have been a costs order against the plaintiff. Mr Bedrossian also refers to the observations of the Court of Appeal in *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA

304 at [38], which recognised that a costs order may be made “to reflect the time taken in dealing with a particular issue in which the successful party ... did not succeed”. I accept that the Court can make an order of that character, and I reviewed the relevant principles in *Pages Property Investments Pty Ltd v Boros* [2020] NSWSC 1474 at [13]-[14], to which both parties refer.

- 9 Mr Bedrossian submits, in respect of the First Derivative Proceedings, that the claim brought by Brian on behalf of MDL comprised two primary components, relating to the Cadia work and the Timboon quarry, and he notes that other aspects of that claim were ultimately not pursued, although I bear in mind that costs would likely have been incurred in respect of the preparation of those issues for hearing. Mr Bedrossian submits that the claim in respect of the Cadia work was successful (Primary Judgment [190]) and submits that this is a claim for an amount of approximately \$4.135 million, not including interest (although, as I noted above, MDL had not established the amount of compensation that would be recoverable, as distinct from an account of profits). Mr Bedrossian pointed out that the Robert Murdoch Interests had advanced a range of defences to the claim, as to which they were unsuccessful, and that they also did not succeed in their claim for allowances for skill and effort to reduce the amount of any profits for which they would be liable to account.
- 10 Mr Bedrossian submits that there would be injustice in not allowing Brian reimbursement of his costs associated with pursuit of that significant claim, where Brian had pursued that claim in the interests of MDL, in which Robert had a 50% shareholding. Mr Bedrossian also submits that Robert had not made any attempt to compensate MDL for its loss arising from the diversion of work in respect of the Cadia mine. He accepted that a costs order in favour of Brian in respect of the First Derivative Proceedings ought to be discounted to reflect MDL’s lack of success in respect of the Timboon quarry claim, and presumably the several other claims that MDL did not press at the hearing, although he submits that factual issues in respect of the Timboon quarry claim overlapped with those raised in respect of the Cadia claim and that the costs incurred would be less than half of those incurred in respect of the First

Derivative Proceedings. On that basis, Mr Bedrossian submits that Brian should have an order for costs in his favour, as against Robert, Stephen, RKM and BPPL for 70% of his costs, although he also submits that that would leave Brian bearing a significant proportion of his own costs of the First Derivative Proceedings.

- 11 In his further submissions, Mr Bedrossian accepts that, if costs orders are made in favour of the Brian Murdoch Interests in the First Derivative Proceedings and the Second Derivative Proceedings, then separate cost orders would also need to be made as to the Winding Up Proceedings and the Oppression Proceedings.
- 12 Mr Kelly responds that the appropriate exercise of discretion is that there should be no order as to costs in the First Derivative Proceedings, consistent with the preliminary view expressed in paragraph 300 of the Primary Judgment. He submits that several issues fell away during the hearing and he refers to MDL's abandonment of claims in respect of the "swamped crushers" and the Buckaroo Road property, which were initially brought by MDL in the First Derivative Proceedings but ultimately only pursued in the Oppression Claim. He also submits that success and failure was equally divided in respect of the Cadia claim and the Timboon quarry claim and that each of those claims took up substantial Court time and generated substantial costs. He submits that a claim by the Brian Murdoch Interests for 70% of the costs of the First Derivative Proceedings and all of the costs of the Second Derivative Proceedings does not fairly reflect the result in the four matters as a whole.
- 13 In his further submissions, Mr Kelly accepts that, if I were to order that they pay a portion of the costs of the First Derivative Proceedings instead of making an order that each party pay their own costs, then specific costs orders would need to be made in relation to all four proceedings. Mr Kelly points to a problem that would likely then arise, namely how to deal with common issues including in the First Derivative Proceedings and the Oppression Proceedings. I accept that that problem is likely to give rise to

significant practical difficulty and wasted costs in an assessment. Mr Kelly relies on that practical difficulty to reiterate the submission that the preliminary view expressed in paragraph 300 of the Primary Judgment, that each party pay their own costs, is the preferable order.

14 In his further submissions, Mr Kelly submits that there is a real risk that the parties may be worse off if percentage costs orders were to be made, even if the costs orders were (as they will be) addressed to a percentage of the costs of the First Derivative Proceedings and all of the costs of the Second Derivative Proceedings, the Oppression and Winding Up Proceedings. Mr Kelly submits, and I accept, that substantial costs would be incurred in assessment, including attribution of costs to particular proceedings. Mr Kelly submits that that raises a legal and not merely a practical concern and is properly taken into account in exercise of the Court's discretion as to costs, because it bears on the just, quick and cheap resolution of the real issues in relation to costs. He refers to the observation of the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [56]-[57] in that respect. I have had regard to those principles, and to the difficulties which I accept are likely to arise in an assessment directed to specific costs orders across four overlapping proceedings.

15 On balance, it seems to me that the view I had taken in paragraph 300 of the Primary Judgment, that there should be no order as to the costs of the proceedings, is unduly broad, and that I cannot make that order where the parties have not agreed that position between themselves, despite its potential benefits in saving costs of an assessment. I accept that the costs referable to MDL's claim in respect of the Cadia mine are likely to have exceeded the costs referable to the claim in respect of the Timboon quarry in the First Derivative Proceedings, given the comparative scale and complexity of the two claims. I am not persuaded that an order could fairly be made that the Robert Murdoch Interests pay 70% of Brian's costs of the First Derivative Proceedings, where relevant matters include MDL's success in respect of the claim that it advanced in relation to the Cadia mine; the Robert Murdoch

Interest's failure in respect of the substantive defences which they advanced in respect of that claim; Brian's failure in respect of the Timboon quarry claim; and Brian's abandonment of other claims, including in respect of the "swamped crushers" and the Buckaroo Road property in these proceedings, which would necessarily have generated costs in the preparation of evidence, including expert evidence. It seems to me that, if Brian had brought only the claim in respect of the Cadia mine, he would have been allowed the entirety of the costs of that claim; but the costs ordered in his favour must now be discounted to reflect the costs incurred by the Robert Murdoch Interests in defending the Timboon quarry claim and the claims for the swamped crushers and the Buckaroo Road property which were not pursued in the First Derivative Proceedings.

16 In principle, the amount of costs recoverable by Brian on that basis would be the excess of the costs which he incurred in pursuing the Cadia claim over the costs which the Robert Murdoch Interests incurred in defending the Timboon quarry claim and a portion of the costs of preparing evidence to defend the claims in respect of the swamped crushers and the Buckaroo Road property, reflecting the fact that they were pressed in the Oppression Proceedings but not the First Derivative Proceedings. While it is not possible to assess those costs with mathematical certainty, it seems to me that Brian Murdoch's costs incurred in that respect would exceed the Robert Murdoch Interest's costs, but not by a sufficient margin to warrant an order that the Robert Murdoch Interests pay 70% of Brian's costs of the Derivative Proceedings. On balance, and doing the best I can, I would order that the Robert Murdoch Interests pay 30% of Brian Murdoch's costs of the First Derivative Proceedings, as agreed or as assessed, subject to the matter noted in paragraph # below.

17 In respect of the Second Derivative Proceedings, Mr Bedrossian submits that those proceedings raised factual and legal issues going beyond those arising in the First Derivative Proceedings, and that the Robert Murdoch Interests joined Scott Murdoch and StoneCo Pty Ltd, who were not otherwise involved in the proceedings, as Defendants in those proceedings. Mr Bedrossian

submits that the costs of the Second Derivative Proceedings ought to follow the event, in line with ordinary costs principles reflected in r 42.1 of the Uniform Civil Procedure Rules. Once the Court departs from an order that there be no order as to the costs of the proceedings generally, then I accept that submission. The Robert Murdoch Interests should be also be ordered to pay the costs of the Second Derivative Proceedings, consistent with the orders sought by the Brian Murdoch Interests, where they were wholly unsuccessful in their pursuit of those proceedings.

18 Mr Bedrossian initially submitted that the Brian Murdoch Interests did not seek any costs orders in respect of either the Oppression Proceedings brought by Brian or the Winding Up Proceedings brought by Robert and that the determination of those proceedings was not ultimately the subject of significant contest or that the parties may both be viewed as having achieved a measure of success. I do not accept the latter submission, where Brian failed in obtaining the primary relief that he sought in the Oppression Proceedings, namely a buyout order of Robert's shares, because he could not have afforded to buy those shares. That is a significant failure, which resulted in Brian's then accepting the winding up order sought by Robert.

19 In his further submissions, Mr Bedrossian submits that, if separate orders are made to the costs of the several proceedings, then the appropriate order in the Oppression Proceedings is that Brian pay half of Robert's costs of the Oppression Proceedings. He submits that the Court had determined that Brian would have succeeded in establishing that some of the matters relied on constituted oppression. While I accept that submission, it seems to me that establishing that matter was of no practical benefit to Brian where the Oppression Proceedings were only pursued, in practical terms, in sought to obtain a buy-out order rather than a winding up order (for which Robert already contended) and that order was not feasible, because Brian could not afford to buy out Robert's shares.

20 It seems to me that the Brian Murdoch Interests must be ordered to pay the costs of the Oppression Proceedings they brought, although neither party

initially contended for that result, since those proceedings could not and did not succeed in obtaining any useful relief, beyond the winding up order already sought by Robert, where Brian could not afford to acquire Robert's shares in MDL.

21 In his further submissions, Mr Bedrossian submits that the costs of the Winding Up Proceedings should be costs in the winding up of MDL, where Robert had sought that order in the Originating Process filed in the proceeding, and that would prevent Brian from recouping his costs in respect of the Winding Up Proceedings. It does not seem to me that that result would do justice to the Robert Murdoch Interests, where they were put to the costs of their pursuit of the Winding Up Proceedings, because Brian sought to establish a buy-out that could not be implemented, and the order sought by Brian would leave them to bear half of those costs referable to their interest in MDL. Brian should be ordered to pay the costs of the Winding Up Proceedings brought by Robert, which he contested only because of the alternate relief which he sought but could not have obtained in the Oppression Proceedings.

22 I will therefore adopt the approach of ordering costs in respect of the several proceedings, as set out above, since that will better reflect the result of those proceedings that the order that I initially foreshadowed in paragraph 300 of the Primary Judgment. However, I continue to have real reservations as to whether any party will benefit economically from that approach, after incurring the significant costs that are likely to be incurred, including in distinguishing between costs of the different proceedings heard together, in an assessment in order to seek to identify costs which are properly recoverable by them. It will not, of course, be necessary for the parties to insist on proceeding to an assessment in that manner, if they are able to resolve the issues between themselves.

Appointment of liquidators

23 The parties initially disagreed as to a remaining issue which was in very narrow scope. The Brian Murdoch Interests initially proposed the appointment of Ms Nettleton, Mr Langdon and Mr Goyal as joint and several liquidators of MDL. It seems to me that those persons are amply qualified for appointment as liquidators of MDL, having regard to the observation that I made in paragraph 298 of the Primary Judgment that:

“I recognise that a winding up of MDL could give rise to detriment to either shareholder, if the assets or business of MDL was sold by a liquidator to the other shareholder, other family members or their associated companies without a full sale process or in a manner that did not maximise the sale proceeds. In order to mitigate that risk, I have in mind appointing a liquidator from a national firm who will have the resources to conduct a national sale campaign in respect of the business if appropriate.”

24 The Robert Murdoch Interests do not take issue with the identity of the three proposed liquidators, but submit that the appointment of two liquidators would be sufficient and that any two of the three nominated persons would be acceptable to them. The Brian Murdoch Interests now support the appointment of Ms Nettleton and Mr Goyal as liquidators of MDL, they have consented to that appointment and I will make that appointment.

Orders

25 I therefore make the following orders:

In the Winding Up Proceedings: (2016/271516)

1. Mudgee Dolomite & Lime Pty Limited ACN 076 313 034 (Company) be wound up pursuant to section 461(1)(k) of the *Corporations Act* 2001.
2. Jennifer Nettleton and Rahul Goyal be appointed joint and several liquidators of the Company.
3. The Second Defendant, Brian Murdoch, pay the costs of the proceedings as agreed or as assessed, on the ordinary basis.
4. Stay Orders 1 and 2 for 14 days from the date of making these orders.

5. Grant liberty generally to the liquidators of the Company to apply.

In the First Derivative Proceedings: (2016/84283)

6. Declare that, at the election of the Company, by its liquidators, the Company is entitled as against RK Murdoch Pty Limited (**RKM**) and Tilecote Farm Pty Limited (previously known as Bright Pear Pty Limited) (**BPPL**) to:
 - (a) an account of the profits earned by RKM and BPPL from the work done by those companies at the Cadia mine, as that term is used in the judgment dated 28 October 2020 (**Cadia Work**);
or
 - (b) compensation for any loss by reason of the Cadia Work.
7. Declare that the Company is entitled as against Robert Murdoch and Stephen Murdoch to compensation in a sum equal to the account of profits in Order 6(a) or the compensation in Order 6(b), according to the election in Order 6 to the intent that RKM, BPPL, Robert Murdoch and Stephen Murdoch shall be jointly and severally liable for the same sum.
8. Grant liberty to the Company, by its liquidators, to apply generally, including in relation to any claim for interest and the entry of judgment pursuant to Orders 6 and 7.
9. Otherwise dismiss the First Derivative Proceedings.
10. Except so far as costs are the subject of previous costs orders (save for the costs order made on a preliminary basis in respect of Brian Murdoch obtaining leave to bring the First Derivative Proceedings), RKM, BPPL, Robert Murdoch and Stephen Murdoch pay, jointly and severally, 30% of the costs of the Company and Brian Murdoch of the First Derivative Proceedings (including in respect of his application for leave to bring the First Derivative Proceedings), as agreed or assessed, on the ordinary basis.

11. Grant liberty to the liquidators of the Company to apply, including in respect of the question of any election between remedies and in respect of interest.

In the Second Derivative Proceedings: (2017/377222)

12. The Second Derivative Proceedings be dismissed.
13. Robert Murdoch and Stephen Murdoch pay the Defendants' and Third Plaintiff's costs of the Second Derivative Proceedings, as agreed or assessed, on the ordinary basis.

In the Oppression Proceedings: (2016/355621)

14. The Oppression Proceedings be dismissed.
15. Brian Murdoch, pay the Defendants' costs of the Oppression Proceedings as agreed or as assessed, on the ordinary basis.

*I certify that this and the preceding 13 pages
are a true copy of the reasons for judgment herein
of his Honour Justice Black,*

MB

Associate

Date: 24 November 2020