Court of Appeal
Supreme Court

New South Wales

Case Name:	Walton v Commonwealth Bank of Australia
Medium Neutral Citation:	[2020] NSWCA 191
Hearing Date(s):	25 June 2020
Date of Orders:	25 August 2020
Decision Date:	25 August 2020
Before:	Basten JA at [1]; Macfarlan JA at [31]; White JA at [32]
Decision:	1 Refuse the applicants leave to appeal from the judgment of the Common Law Division. 2 Dismiss the amended summons with costs.
Catchwords:	CIVIL PROCEDURE – discontinuance – costs – no consent to discontinue without paying costs – plaintiff sought leave to discontinue with no order as to costs – proceedings lacking practical utility – both defendants impecunious – defendants' cross-claim abandoned – no right by way of defence and set-off to recover any amount exceeding the debt owed to the plaintiff – litigation had begun to "feed on itself" – Uniform Civil Procedure Rules 2005 (NSW), r 12.1 COSTS – discontinuance – usual rule that discontinuing party pay defendant's costs – power to order otherwise – plaintiff sought leave to discontinue with no order as to costs – Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 42.19(2)
Legislation Cited:	Australian Securities and Investments Commission Act 2001 (Cth), s 12GM Civil Procedure Act 2005 (NSW), Pt 6

	Supreme Court Act 1970 (NSW), s 101 Uniform Civil Procedure Rules 2005 (NSW), rr 12.1, 28.2, r 42.19
Cases Cited:	Bank of Western Australia v Daleport [2010] NSWSC 1207 Be Financial Pty Ltd as trustee for Be Financial Operations Trust v DAS [2012] NSWCA 164 Bitannia Pty Ltd v Parkline Construction Pty Ltd [2009] NSWCA 32 Edwards v Adam [2016] NSWSC 1534 Genworth Financial Mortgage Insurance Pty Ltd v Hodder Rook & Associates Pty Ltd [2017] NSWSC 640 Nichols v NFS Agribusiness Pty Ltd [2018] NSWCA 84 The Age Company Ltd v Liu (2013) 82 NSWLR 268; [2013] NSWCA 26
Category:	Principal judgment
Parties:	Alexander Raymond Walton (First Applicant) Daleport Pty Ltd (Second Applicant) Commonwealth Bank of Australia (Respondent)
Representation:	Counsel: Ms N Obrart (Applicants) Mr T D Castle (Respondent) Solicitors: Barron & Allen Lawyers (Applicants) Dentons Lawyers (Respondent)
File Number(s):	2019/274063
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Common Law
Citation:	[2019] NSWSC 958
Date of Decision:	15 August 2019
Before:	McCallum J

File Number(s): 2008/287869

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **BASTEN JA**: The applicant, Alexander Raymond Walton, was the guarantor of loans made between 2003 and 2008 to a company controlled by him, Daleport Pty Ltd, by Bank of Western Australia Ltd ("Bankwest"). (The Bank was subsequently acquired by Commonwealth Bank of Australia, the present respondent.)

2 Following a default in repayments, in September 2008 Bankwest demanded repayment of the loans from Daleport. The demand was not met and receivers and managers were appointed. In October 2008 Bankwest commenced proceedings against Daleport and Mr Walton. Between 2008 and 2013, when the receivers retired, properties of the company provided as security for the loans were sold.

3 By a notice of motion filed on 1 June 2018 the respondent sought to have the Court separately determine two questions. The purpose was to obtain a ruling that the defences filed by Daleport and Mr Walton could not provide any greater benefit to them than relief from the amount owing to the Bank. In the event that the questions were answered favourably to the Bank, it sought to discontinue its proceedings on terms that there be no order as to costs.

4 Pursuant to a judgment delivered on 15 August 2019 the primary judge, McCallum J, answered the questions in the way proposed by the Bank and gave leave to the Bank to discontinue on the basis that there would no order as to the costs of the proceedings.[1]

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[1] Commonwealth Bank of Australia v Daleport Pty Ltd (in Receivership) (No 6) [2019] NSWSC 958 ("primary judgment").

5 On 18 September 2019 Mr Walton served a notice of intention to appeal on the Bank. The notice was six days out of time. The summons seeking leave to appeal was filed on 13 November 2019 and would have been in time had the notice of intention to appeal been filed within time. The Bank does not oppose an extension of time to Mr Walton. The application by Mr Walton sought leave to appeal from so much of order (4) made on 15 August 2019 (granting the Bank leave to discontinue) as provided that there be no order as to costs.

6 On 7 May 2020 an amended summons seeking leave to appeal was filed which sought leave to join Daleport as an applicant. The applicants filed evidence to establish that Daleport was not in fact in receivership, either at the time of the judgment below, or at the time of the present application. That evidence was admitted and accepted. Daleport's application for an extension of time within which to seek leave to appeal was not opposed, and was granted.[2] No issue arose from the failure of Daleport to be joined as an applicant at the commencement of the leave application by Mr Walton. Nor did Daleport have any better claim to a grant of leave to appeal than did Mr Walton.

7 For reasons set out below, the amended application for leave to appeal should be refused. Both applicants are liable for the Bank's costs in this Court.

Principles applicable to applications for leave to appeal

8 The issues sought to be raised by the applicants being limited to the costs order made by the primary judge, leave is required to appeal, pursuant to s 101(2)(c) of the *Supreme Court Act 1970* (NSW).

9 The general principles governing leave to appeal are not in doubt. As explained by Bathurst CJ in *The Age Company Ltd v Liu*,[3] referring to *Be Financial Pty Ltd as trustee for Be Financial Operations Trust v DAS*:[4]

> "Generally speaking, it is only appropriate to grant leave in matters that involve issues of principle, questions of public importance or in circumstances where it is reasonably clear that an injustice has occurred by reason of error in the judgment, going beyond what is merely arguable."

[2] CA Tcpt, 25/06/20, p 5(5).
[3] (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]
[4] [2012] NSWCA 164 at [32]-[38].

Needless to say, the weight to be given to particular considerations will turn on the circumstances of the individual case.

Issues

10 On 1 June 2018, the Bank filed a notice of motion seeking determination of two questions and, if the questions were answered favourably to its case, leave to discontinue proceedings brought by it against the applicants on terms that there be no order as to costs. In the absence of consent, the Bank required leave of the court to discontinue, pursuant to Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 12.1(1). Where the plaintiff discontinues proceedings the general cost rule is that it must pay a defendant's costs incurred prior to the filing of the notice of discontinuance: UCPR, r 42.19(2). However, the court has power to order otherwise with respect to costs, pursuant to r 42.19(2). The issue raised by the proposed appeal was whether the judge properly exercised her discretion in directing that there be no order as to the costs of the proceedings.

11 The proceedings brought by the Bank sought judgment against Daleport as the principal debtor and against Mr Walton as the guarantor of Daleport's debts, in an amount in excess of $14 million. Recovery from Daleport, beyond the amounts realised by the receivers and managers, was not expected. When Mr Walton conceded that he was impecunious, further pursuit of the proceedings by the Bank became futile.

12 However, Daleport had brought a cross-claim against the Bank seeking relief from unconscionable conduct under the *Trade Practices Act 1974* (Cth), later amended to a claim under s 12GM of the Australian *Securities and Investments Commission Act 2001* (Cth). In 2010 the Bank had obtained an order for security for costs in amount of $60,000; the amount was not paid and the cross-claim was dismissed.[5] The applicants nevertheless sought to pursue the proceedings on the basis that the damages claimed under the cross-claim (in excess of $87 million) were also claimed by way of defence and set-off. The claim greatly exceeded the amount of the debt to the Bank. The applicants

[5] Bank of Western Australia v Daleport [2010] NSWSC 1207.

contended that they could recover an amount in excess of the debt to the Bank by way of defence and set-off.

13 The Bank denied the applicants could recover any amount beyond the outstanding balance of the debt for which it sued. Its separate questions were intended to resolve that issue. The primary judge agreed to the separate determination of the proposed questions, pursuant to UCPR r 28.2.

14 The questions were heard separately and answered by the primary judge in the following terms:

> "(a) Whether the relief, which the first and/or second defendants would be entitled to claim under section 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth) (Act) (or any cognate provision under any other legislation), if it established a contravention of Division 2 of Part 2 of the Act (or its cognates), is limited to:
>
> (i) non-monetary relief against the plaintiff; and/or
>
> (ii) the amount of the debt claimed by the plaintiff in these proceedings, as due and owing at the time of judgment, against the first defendant.
>
> (b) Whether the first and/or second defendants are otherwise precluded from seeking or obtaining judgment for a monetary amount against the plaintiff."

As to Daleport, the judge answered question (a)(i) "No" and question (a)(ii) "Yes". With respect to Mr Walton, both questions were answered "Yes".

15 The effect of those answers was that neither applicant could obtain relief exceeding the amount claimed by the Bank in its proceeding. Accordingly, pursuit of the proceedings was, from the Bank's perspective, futile in practical terms and, from the perspective of the applicants, futile for legal and practical purposes. In these circumstances, there was evidently much to be said for the view that the proceedings should be discontinued with no order as to costs.

16 The applicants submitted that leave to appeal with respect to the issue of costs should be granted on the basis that they had real prospects of success in demonstrating error on the part of the primary judge in the exercise of her discretion, and on a basis that involved an issue of principle.

Reasoning of primary judge

17 The primary judge applied two decisions in which, due to sequestration orders made against the respective defendants, proceedings had become futile.[6] She treated these cases as indicative of a broader principle.

18 The judge then noted a submission by counsel for Mr Walton and Daleport that they had expended considerable sums in seeking relief on the ground of the Bank's unconscionable conduct and the "no costs" order would only benefit the Bank. The judge rejected the submission on the basis that "[t]o incur such costs in the face of two offers from the Bank to 'walk away' made sense only on [the premise that they would have been able to recover an amount in excess of the debt owing to the Bank]." Having rejected the legal basis of the premise, neither party had any interest in pursuing the proceedings except to resolve the question of costs.[7]

19 The judge concluded that it was appropriate to make the order on the terms sought by the Bank on the basis that, for the proceedings to continue, would result in litigation that has begun to "feed on itself" in the sense identified in *Nichols v NFS Agribusiness Pty Ltd*.[8]

Proposed error

20 The applicants disputed the judge's rejection of the factual proposition that only the Bank would benefit from the proposed order. They argued that, in the face of their impecuniosity, the Bank had no realistic prospect of recovering costs. On the other hand, the applicants would not recover amounts expended in pursuit of their claim based on unconscionable conduct.

21 So far as the quantum of costs was concerned, the applicants sought leave to rely upon further evidence by way of an affidavit from Mr Walton's solicitor, calculating that the amount of costs foregone as a result of the "no costs" order was $365,604. The affidavit was apparently filed primarily for the purpose of demonstrating that the amount in issue was in excess of the $100,000 floor, under which leave is required pursuant to the *Supreme Court Act*, s 101(2)(r). Leave was, however, required separately on the basis that the claim related only to costs. In any event, there can have been no doubt that both parties had incurred considerable costs in pursuing the proceedings over some years.

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[6] Primary judgment at [77]. See Genworth Financial Mortgage Insurance Pty Ltd v Hodder Rook & Associates Pty Ltd [2017] NSWSC 640 (Black J) and Edwards v Adam [2016] NSWSC 1534 (Slattery J).
[7] Primary judgment at [78].
[8] [2018] NSWCA 84 at [1]; primary judgment at [79].

22 Quantifying the amount at stake gave credence to the Bank's insistence that if the term of the proposed discontinuance were not accepted, it would pursue its claim to judgment. If successful it might not recover its judgment debt, but it would avoid liability to pay the applicants' costs.

23 In the course of oral submissions, counsel for the applicants took issue with a statement in the primary judgment that it was the limitation on the availability of relief under the defence which prompted the Bank to conclude that the proceedings had become futile and the utility of any hearing was confined to the question of costs.[9] Counsel submitted that the subjective understanding of the discontinuing party was irrelevant. However, in dealing with the question of costs, the primary judge relied upon the objective futility of the proceedings, given the rulings on the separate questions.

24 Perhaps inconsistently with the last submission, the applicants contended that their impecuniosity had been known to the Bank since 2012, and it should not be excused paying costs incurred thereafter in defending the proceedings. Nevertheless, as the primary judge correctly noted, in circumstances where the applicants were aware of their own impecuniosity (and indeed relied upon it for the purposes of the submission) such costs must have been justified commercially only on the basis that they could recover an amount in excess of the debt to the Bank. The Bank's "walk away" offers would, if accepted, have allowed Mr Walton to avoid bankruptcy, if that were part of his intention in pursuing the proceedings.

25 The applicants further submitted that the primary judge had failed to apply the principles governing the discretion to otherwise order pursuant to r 42.19. The submission turned on authorities supporting the proposition that there is an onus on the discontinuing party to demonstrate circumstances justifying the conclusion that some other order is appropriate. In that context, it was also submitted that the subjective reasons for the plaintiff's discontinuance were generally not relevant.

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[9] Primary judgment at [6].

26 Those propositions derived from *Bitannia Pty Ltd v Parkline Construction Pty Ltd*,[10] and particularly the reasons of Hodgson JA, with which Tobias JA agreed. At [54] Hodgson JA stated:

> "However, like UCPR 42.20, UCPR 42.19 states what the order for costs is to be unless there is a discretionary decision to order otherwise: *Australiawide Airlines Limited v Aspirion Pty Limited*.[11] This means there is an onus on the discontinuing party to make an application in respect of costs if it does not propose to pay the costs of the other parties: *Foukkare*.[12] In my opinion, it also means that there must be "some sound positive ground or good reason for departing from the ordinary course": *Australiawide Airlines* at [54]."[13]

27 Further, I stated in *Bitannia*:

> "[79] In some circumstances it may be argued that a discontinuance does not involve a surrender or abandonment by the plaintiff, but recognition that 'some supervening event' has militated against success, rendered the proceedings futile, or wholly removed the plaintiff's cause of action: see *One.Tel Ltd v Commissioner of Taxation*;[14] *Edwards Madigan Torzillo Briggs Pty Ltd v Stack*;[15] *Australiawide Airlines*.[16]"

28 The Bank accepted that it bore the onus of establishing that the court should otherwise order; it sought to establish that the proceedings were futile, both from its perspective and the perspective of the applicants. It sought to do so in the manner set out above. It was acceptance of the Bank's case in that regard that led the judge to accept that a "no costs" order was appropriate. There was no disregard, nor misapplication, of principles governing the proper exercise of the discretion. The discretion was not "unconfined", but its exercise was not tainted by improper or irrelevant considerations.

29 Nothing turned on the reasonableness or otherwise of the commencement of proceedings, nor the pleading of the defence. There no magic in the proposition that there may be a "supervening event" leading to the futility of further prosecution of the proceedings, being an event outside the control of the parties. The requirement of Pt 6 of the *Civil Procedure Act 2005* (NSW) to avoid unnecessary litigation for what was, in effect, a satellite proceeding, not

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[10] [2009] NSWCA 32 at [54] (Hodgson JA, Tobias JA agreeing), [70] (in my judgment).
[11] [2006] NSWCA 365 at [53].
[12] Foukkare v Angreb Pty Limited [2006] NSWCA 335 at [65].
[13] See also, in my judgment, at [74].
[14] (2000) 101 FCR 548; [2000] FCA 270 at [6] (Burchett J)
[15] [2003] NSWCA 302 at [5] (Davies AJA; Mason P and Meagher JA agreeing).
[16] [2006] NSWCA 365 at [50]-[52] (Bryson JA, McColl JA agreeing).

being a resolution of the real issues in dispute, but only costs, was an important principle supporting the order made by the primary judge.

Conclusions

30 There was no issue of principle raised by the acceptance by the primary judge of the term proposed by the Bank. The contention that the exercise of a discretionary judgment miscarried has not been made good. The appropriate course is to refuse the applicants leave to appeal and dismiss the amended summons with costs.

31 **MACFARLAN JA**: I agree with Basten JA.

32 **WHITE JA**: I agree with Basten JA.

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