
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RHODES-SMITH -v- NODDIES PROPERTIES PTY
LTD [2013] WASC 426

CORAM : MASTER SANDERSON

HEARD : 14 NOVEMBER 2013

DELIVERED : 28 NOVEMBER 2013

FILE NO/S : CIV 2524 of 2010

BETWEEN : CLAIRE RHODES-SMITH
Plaintiff

AND

NODDIES PROPERTIES PTY LTD as Trustee for the
NODDIES UNIT TRUST (ACN 100 812 815)
First Defendant

KAPIRIS BROS (VIC) PTY LTD (ACN 061 780 210)
Second Defendant

KAPIRIS BROS (WA) PTY LTD as Trustee for the
KAPIRIS BROS (WA) UNIT TRUST
(ACN 082 799 317)
Third Defendant

HARALAMBOS KAPIRIS
Fourth Defendant

Catchwords:

Appeal from registrar - Costs order where no trial of action - Whether refusal of offer of contribution to costs was unreasonable - Turns on own facts

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Ms M L Coulson
First Defendant	:	Mr P L Harris
Second Defendant	:	Mr P L Harris
Third Defendant	:	Mr P L Harris
Fourth Defendant	:	Mr P L Harris

Solicitors:

Plaintiff	:	Coulson Legal
First Defendant	:	Ilberys Lawyers
Second Defendant	:	Ilberys Lawyers
Third Defendant	:	Ilberys Lawyers
Fourth Defendant	:	Ilberys Lawyers

Case(s) referred to in judgment(s):

Cachia v Hanes [1994] HCA 14; (1994) 179 CLR 403

Calderbank v Calderbank [1975] 3 All ER 333

CVW Group Holdings Pty Ltd v Addison [2011] WASC 267

Ford Motor Company of Australia Ltd v Lo Presti [2009] WASCA 115; (2009)
41 WAR 1

Re Western Australian Planning Commission; Ex parte Solomon [2010]
WASCA 236 (S)

Soia v Bennett [No 5] [2012] WASC 289 (S)

Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)

The Liberal Party of Australia (Western Australia Division) Inc v City of
Gosnells [2013] WASC 267

1 **MASTER SANDERSON:** This was an appeal from a decision of Registrar C Boyle. I will detail the nature of the dispute which led to the registrar's decision more fully below. But a brief summary will put the decision in context. The parties settled the substantial dispute between them. The settlement was embodied in a deed. It was anticipated by the deed the action would be discontinued. At the time the matter came on before the registrar no notice of discontinuance had been filed. That was because the parties could not resolve the question of costs of the action. That was what the registrar was called upon to determine.

2 The defendants sought indemnity costs for the entire action. The plaintiff sought an order there should be no costs for the proceedings up to and including 25 March 2012 and thereafter the plaintiff was entitled to costs on an indemnity basis. The learned registrar agreed with the plaintiff's submissions and made orders accordingly. It was against those orders the defendants appealed.

3 Appeals against a decision of a registrar are covered by O 60A r 6 of the *Rules of the Supreme Court 1971* (WA). That rule reads as follows:

6. Powers of judge or master on appeal

- (1) An appeal from a registrar shall be by way of rehearing.
- (2) The judge or master hearing an appeal has the powers and duties of the Court of Appeal on an appeal and may cancel or amend any interlocutory order or case management direction made by the registrar.

4 There has been some disagreement between members of the General Division as to how this appeal provision operates. However this appears to have been settled by the decision of Le Miere J in *CVW Group Holdings Pty Ltd v Addison* [2011] WASC 267. His Honour said:

The appeal from a registrar to a judge is not a hearing anew as if there had been no hearing before, and decision by, the registrar. That is apparent from O 60A r 5 which requires an appeal to be commenced by filing a notice of appeal and for the notice of appeal to state, amongst other things, the grounds of the appeal. Nevertheless, having regard to the fact that a registrar is exercising delegated powers, and having regard to the provisions of O 60A r 4, 5 and 6, an appeal from a registrar by way of rehearing involves many of the features of a hearing de novo. The appeal may be on the evidence before the registrar or as supplemented by any further evidence the judge admits. The appeal from a registrar to a judge is a hearing de novo in the sense that the powers of the court on appeal are exercisable not only where the appellant can demonstrate that, having regard to all the evidence now before the court, the order that is the subject

of the appeal is the result of some legal, factual or discretionary error. On an appeal from a registrar the court may exercise its powers regardless of error [17].

- 5 Really appeals from a registrar are something of a hybrid. The way in which each particular appeal is treated depends upon the background circumstances which led to the appeal. There are generally three situations which background an appeal. First the registrar makes a decision without giving detailed reasons for doing so. This can happen when for instance there is a disagreement between the parties as to the time within which certain steps in the proceedings are to be taken. After hearing argument the registrar may say no more than he or she is satisfied a particular time frame is reasonable in the circumstances. No detailed reasons are provided and none could be expected. Appeals against these decisions are rare but they do occur and they are of necessity a hearing de novo.
- 6 By far the most common circumstance is where the registrar after hearing argument makes a decision and explains his or her reasons for doing so. All hearings in registrar's chambers are transcribed and so the reasons for decision are available on the hearing of the appeal. On occasions the extempore reasons given by the registrar will be brief - on other occasions they might be more expansive. But in dealing with the appeal it is appropriate to have regard to what was said by the registrar and the reasons for decision. In a busy list a registrar does not have time to consider every aspect of an application. Given there are so few appeals from decisions of registrars generally this is clearly the optimum method of dealing with most applications. But on appeal it may be necessary to consider wider circumstances and a range of submissions some of which may not have been put to the registrar. This is the classic hybrid situation.
- 7 The final category is those situations where the registrar produces written reasons. Sometimes these reasons are published as a judgment. Frequently they are not. But if written reasons are prepared it is much easier to consider the reasoning of the registrar and assess whether or not there is some error.
- 8 This present case falls into the last category. The learned registrar produced detailed reasons. Having read those reasons (which were not published) it is clear the registrar made no error either in recounting the facts or applying the law. It is tempting simply to annexe a copy of the registrar's reasons to this decision and say that I agree with what was decided for the reasons the registrar gives and do nothing else. But the registrar's decision was not published and it is therefore I think

appropriate if I consider the decision in detail and explain why I think it was correct.

- 9 The learned registrar summarised the genesis of the dispute in the following way:

Mr Haralambos Kapisiris and Ms Claire Rhodes-Smith had a complex relationship revolving around a piece of land at Canning Vale. Immediately before this action commenced, the proprietor of that was the first defendant Noddies Properties Pty Ltd ('Noddies'), as trustee for the Noddies Unit Trust. Ms Rhodes-Smith owned units in that trust. Mr Kapisiris and Ms Rhodes-Smith fell out. In order for them to go their separate ways, their business interests had to be disentangled. It was never controversial that Ms Rhodes-Smith would be entitled to something. It was controversial what that was.

- 10 In a misguided attempt to protect her interest Ms Rhodes-Smith lodged a caveat over the Canning Vale land. Noddies instituted proceedings by originating summons seeking removal of the caveat. The application was listed before Allanson J on 28 September 2010. Prior to the hearing the parties negotiated a settlement. Ms Rhodes-Smith was to withdraw her caveat and the net proceeds of the sale of the Canning Vale land would be deposited in an interest bearing account. Disposition of the funds would await determination of who was entitled to what.

- 11 The matter then came before me in chambers on 2 December 2010. I made a mediation order and programmed the matter through to a special appointment. It is not clear what was to be dealt with at the special appointment. The learned registrar assumed it was the question of costs in the caveat proceedings. I think he was correct. It is difficult to see what else was at issue.

- 12 At this point the registrar took over management of the file. It became apparent the Kapisiris parties would not go to mediation until Ms Rhodes-Smith provided discovery. The registrar made orders requiring Ms Rhodes-Smith to make discovery and also requiring her to file an affidavit setting out the basis upon which she claimed she was entitled to part of the proceeds of sale. Further directions were made by the registrar on 4 November 2011 effectively converting the action which had been commenced by originating summons into proceedings as if commenced by writ. Certain further parties were joined as defendants and Ms Rhodes-Smith did file a statement of claim. The parties reached a settlement which was embodied in a deed of compromise executed in August 2012. What that deed did not do was deal with costs. That was the issue upon which the registrar was called upon to determine.

- 13 In his reasons the registrar deals extensively with the legal principles in relation to costs especially when there is no event for costs to follow. I will not repeat what the learned registrar had to say. There was no complaint by the defendant (appellant) about the registrar's statement of legal principle. He refers to the High Court decision of *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403; *Soia v Bennett [No 5]* [2012] WASC 289 (S); *Re Western Australian Planning Commission; Ex parte Solomon* [2010] WASC 236 (S); and perhaps most importantly *The Liberal Party of Australia (Western Australia Division) Inc v City of Gosnells* [2013] WASC 267.
- 14 The learned registrar then examined the submissions put on behalf of the defendants as to why they should have the costs of the action. He referred specifically to the defendants' submission that the plaintiff's delay in agreeing to the release of funds to pay capital gains tax caused expense to the first defendant in terms of legal fees. He concluded that submission was without merit. The registrar followed through correspondence passing between the parties and carefully considered the position of each side. Without detailing the registrar's reasons it is clear the conclusion he reached was correct. Furthermore, the learned registrar concluded there was fault on both sides. Once again it is difficult to fault the learned registrar's reasoning. In the end he decided there should be no order as to costs.
- 15 Having correctly stated the law and carefully analysed the position of both parties it seems to me the learned registrar came to not only the correct conclusion but the only conclusion which was logically consistent. At the hearing of the appeal counsel for the defendants was not able to offer any significant critique of the registrar's reasons. He was not able to point to any errors of fact or any additional matters which if taken into account would have led to a different conclusion. Accordingly not only am I satisfied the registrar made no error of fact or law but if I was considering the matter afresh I too would have come to the same conclusion.
- 16 There remained then a question as to who should pay costs incurred since the terms of the deed of compromise were settled or as the registrar expressed it - who should pay the costs of the argument about costs. The registrar determined the costs should be paid by the defendants and paid on an indemnity basis.

17 The circumstances which led to this indemnity costs order were summarised by the registrar. Once again I can do no better than set out what the registrar had to say:

In late 2011, as part of a proposal for settlement, Wilmoth Field Warne [solicitors] for the defendants sought costs of \$90,000 from Ms Rhodes-Smith. It was said that the total costs of the action to the Kaporis parties were some \$230,000. On 14 March 2012, Mr Primerano [the solicitor acting for Ms Rhodes-Smith] wrote offering a contribution of \$40,000: That offer is referred to in the plaintiff's submissions as the plaintiff's first offer. It was not accepted. On 22 March [2012] Wilmoth Field Warne raised the demand for a contribution to \$148,130.21 On 13 April 2012 Mr Primerano wrote again. ... The plaintiff raised her offer to contribute to the defendants' costs of the action to \$53,500. That is referred to as the plaintiff's second offer. It was refused.

18 On behalf of the plaintiff it was submitted to the registrar that the letters written by the plaintiff's solicitors to the defendants' solicitors should be seen as a Calderbank offer: see *Calderbank v Calderbank* [1975] 3 All ER 333. The learned registrar then dealt with what constitutes a Calderbank offer. He referred to and quoted from the decision of the Court of Appeal in *Ford Motor Company of Australia Ltd v Lo Presti* [2009] WASC 115; (2009) 41 WAR 1. Once again the learned registrar correctly stated the law. He noted the defendants made two submissions. First the defendants were undoubtedly entitled to the costs of the action. Secondly where costs in excess of \$200,000 had been incurred by the defendants they were entitled to a contribution far in excess of what the plaintiff had offered.

19 The registrar found both submissions were without merit. Clearly he was right. There had been no trial and no surrender as the registrar had noted earlier in his reasons. It was simply not possible to conclude the defendants would have succeeded in their action. To then go on and say a contribution of \$140,000 towards costs was the figure it was reasonable to demand is illogical. Properly advised the defendants should have accepted the plaintiff's second offer. That is what the learned registrar concluded and he was right.

20 The remaining question then was whether costs ought be awarded on an indemnity basis. The registrar referred to *Swansdale Pty Ltd v Whitcrest Pty Ltd* [2010] WASC 129 (S) and the summary of principles provided in that decision. He decided the defendants rejection of the plaintiff's offer was so unreasonable the plaintiff ought be fully indemnified for the costs of the application. Once again the reasoning cannot be faulted. Once the point was reached where the second offer

was rejected, that offer being in all the circumstances reasonable, the defendants ran the real risk of being ordered to pay the costs of any further application on an indemnity basis. That is what the registrar concluded and he was correct to do so.

- 21 In my view this appeal was without any merit. Dare I say it, I will hear the parties as to costs.