

HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

DOUGLAS RONALD CAMPBELL AND ANOR

APPELLANTS

AND

BACKOFFICE INVESTMENTS PTY LTD
AND ANOR

RESPONDENTS

Campbell v Backoffice Investments Pty Ltd [No 2]
[2009] HCA 36
23 September 2009
S435/2008

ORDER

1. *Respondents to pay appellants' costs of the proceedings in this Court.*
2. *The costs of proceedings in the Court of Appeal of the Supreme Court of New South Wales and of the proceedings at trial be in the discretion of the Court of Appeal.*

On appeal from the Supreme Court of New South Wales

Representation

A J L Bannon SC with J T G Gibson for the appellants (instructed by Rodd Peters Commercial, Media and European Lawyers)

J T Gleeson SC with T L Wong for the respondents (instructed by Watson Mangioni Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Campbell v Backoffice Investments Pty Ltd [No 2]

Procedure – Costs.

Federal Proceedings (Costs) Act 1981 (Cth), s 6.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. On 29 July
2009, the Court published its reasons for decision in this matter. The Court made
orders allowing the appeal, refusing special leave to cross-appeal, setting aside
certain of the orders of the Court of Appeal of the Supreme Court of New South
Wales made on 19 May 2008 and remitting the matter to that Court for further
hearing and determination.

2 In the course of the hearing in this Court, the parties sought the
opportunity to make further submissions as to costs after the publication of the
Court's reasons. Accordingly, when making orders disposing of the appeal and
the application for special leave to cross-appeal, the Court gave directions to the
parties about filing and serving written submissions about costs. Each side has
now made its submissions.

3 There is no dispute that the appellants should have their costs of the
proceedings in this Court. They differ about whether, as the respondents
submitted, enforcement of the order for payment of the costs of the proceedings
in this Court should be deferred until the proceedings in the Court of Appeal are
completed. They further differ about what orders should be made in respect of:
first, the costs of proceedings to date in the Court of Appeal, and secondly, the
costs of trial.

4 There is no reason to make an order deferring enforcement of the order for
costs in this Court.

5 As for the other points of difference between the parties, the appellants
submit that they should have their costs for proceedings in the Court of Appeal
so far. The appellants further submit they should now have an order giving them
half of their costs of the trial, and that the balance of the costs of trial should be
in the discretion of the Court of Appeal on remitter. By contrast, the respondents
submit that the costs of the proceedings at trial and the proceedings in the Court
of Appeal should be in the discretion of the Court of Appeal on remitter of the
proceedings to that Court.

6 Until the issues remitted for consideration by the Court of Appeal are
determined, it is not possible to say which side of this litigation will obtain
judgment in its favour. That being so, it would not be appropriate now to make
an order disposing of the costs of the proceedings at trial or on appeal to the
Court of Appeal. And to make an order of the kind which the appellants sought
(disposing now of part of the costs of trial and the whole of the costs before the

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Court of Appeal to date) would foreclose consideration by the Court of Appeal of any argument later advanced that some order for costs should be made that differentiated between issues or particular steps in the prolonged litigious process in this matter. Whether such an argument can be made, or if made, should be taken into account in determining who should bear any or all of the costs incurred should be questions for the Court of Appeal to determine.

7 The orders made by this Court on 29 July 2009 included an order setting aside the Court of Appeal's order dealing with the costs of proceedings in that Court. The Court of Appeal did not make any order dealing with costs at trial. In the circumstances, there should now be orders, in addition to those pronounced on 29 July 2009, as follows:

1. Respondents pay appellants' costs of the proceedings in this Court.
2. The costs of proceedings in the Court of Appeal of the Supreme Court of New South Wales and of the proceedings at trial be in the discretion of the Court of Appeal.

8 The respondents submitted that this Court should grant them a costs certificate pursuant to s 6(2) of the *Federal Proceedings (Costs) Act* 1981 (Cth). That sub-section provides:

"Subject to this Act, where a Federal appeal in relation to the amount of damages awarded by a court succeeds, the court that heard the appeal may, on the application of a respondent to the appeal, grant to the respondent a costs certificate in respect of the appeal."

A certificate granted under that provision "is a certificate stating that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under [the Act] to the respondent in respect of ... the costs incurred by the respondent in relation to the appeal"¹.

9 It is not necessary to consider whether it is right to describe the outcome of proceedings in this Court as success in "a Federal appeal *in relation to the amount of damages awarded by a court*" (emphasis added). Even if the condition for engaging s 6(2) of the *Federal Proceedings (Costs) Act* is satisfied,

1 *Federal Proceedings (Costs) Act* 1981 (Cth), s 6(3).

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this is not a case in which it would be appropriate to order that the burden of the costs should lie otherwise than where they fall.