HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

PAUL UYSAL AKTAS APPELLANT

AND

WESTPAC BANKING CORPORATION LIMITED &
ANOR RESPONDENTS

Aktas v Westpac Banking Corporation Limited [No 2]
[2010] HCA 47
15 December 2010
S3/2010

ORDER

First respondent's further amended summons filed on 24 September 2010 dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

T S Hale SC with A T S Dawson for the appellant (instructed by Penhall & Co Lawyers)

J R Sackar QC with K P Smark SC and R J Hardcastle for the first respondent (instructed by Mallesons Stephen Jaques)

Submitting appearance for the second respondent

CATCHWORDS

Aktas v Westpac Banking Corporation Ltd [No 2]

High Court – Practice and procedure – Judgments and orders – Costs – Power to vary orders not yet authenticated – Circumstances in which power should be exercised.

1 FRENCH CJ, GUMMOW AND HAYNE JJ. On 4 August 2010, the Court delivered judgment allowing this appeal. The Court made orders in the following terms:

> "1. Appeal allowed.
>
> 2. Set aside Order 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 9 February 2009 and in its place order that:
>
> (a) the appeal by Mr Aktas be allowed with costs;
>
> (b) set aside Order 1 of the orders made by Fullerton J on 7 November 2007 and in its place enter verdict and judgment for Mr Aktas for damages in the sum of $50,000 with interest;
>
> (c) set aside Order 2 of the orders made by Fullerton J on 29 November 2007 and in its place order that Westpac Banking Corporation Limited ("Westpac") pay the costs of the action by Mr Aktas.
>
> 3. Westpac to pay Mr Aktas's costs in this Court.
>
> 4. The parties are at liberty within 28 days to re-list the appeal for further orders if an agreement is reached respecting the interest to be added to the verdict of $50,000. In the absence of agreement, the question of interest will be remitted for determination by a Judge of the Supreme Court of New South Wales."

The parties did not re-list the appeal for further orders respecting the interest to be added to the verdict of $50,000.

2 On 9 September 2010, the respondent (Westpac) filed a summons seeking the variation of pars 2 and 3 of the orders made by this Court. An amended summons was filed on 16 September 2010 and a further amended summons on 24 September 2010. The effect of the variations sought by the amended summons would be to order that Westpac pay Mr Aktas some but not all of the costs of the action up to 4 June 2007, and that Mr Aktas pay Westpac's costs of the action thereafter, including the costs of the appeal to the Court of Appeal and the appeal to this Court. The exception which Westpac said should be made to the order that it pay Mr Aktas the costs of the proceedings up to 4 June 2007 was described as being "in relation to his [Mr Aktas's] special damages claim". In that regard, Westpac sought an order that Mr Aktas pay Westpac's costs "thrown away by the abandonment of his special damages claim on 20 April 2007". In

the alternative, Westpac sought an order remitting all questions of costs, other than the costs in this Court, to the Court of Appeal.

3 Westpac submitted Mr Aktas should have no order for costs after 4 June 2007 but should instead pay Westpac's costs of the proceedings at trial, in the Court of Appeal and in this Court, because on that day it had offered to pay Mr Aktas and his then co-plaintiff (Homewise Realty Pty Ltd – "Homewise"), jointly, the sum of $620,000 plus costs on terms that, subject to the publication of an apology, the terms of the settlement would be confidential. That offer was not accepted. The total of the amounts ultimately recovered in the proceedings by Homewise and Mr Aktas is said to be less than the amount offered on 4 June 2007. Westpac further submitted that the costs of the abandoned claim for special damages should fall on Mr Aktas because the claim was abandoned just before trial of the action. The trial Judge (Fullerton J) reserved the costs of the interlocutory proceedings at which the abandonment of the claim was debated and what were described as the "consequential costs" of the application.

4 In his notice of appeal to this Court and again in his written submissions, Mr Aktas said that if the appeal were allowed he should have orders for the costs of the proceedings at trial, on appeal to the Court of Appeal and in this Court. Westpac made no submissions to the contrary in its written or oral submissions on the hearing of the appeal. Westpac neither made nor foreshadowed any application for any special costs orders until, by its summons of 9 September 2010, issued five weeks after judgment had been delivered, it sought the orders that have been described earlier.

5 This Court's orders have not yet been authenticated. There is no doubt that the Court has power to recall the orders made on 4 August 2010. The question is whether it should.

6 As Mason CJ rightly said in *Autodesk Inc v Dyason [No 2]*[1], the exercise of the jurisdiction to reopen a judgment and to grant a rehearing "is not confined to circumstances in which the applicant can show that, by accident and without fault on the applicant's part, he or she has not been heard". The jurisdiction is, however, to be exercised with great caution[2], having regard to the importance of

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1 (1993) 176 CLR 300 at 301-302; [1993] HCA 6.

2 *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; [1982] HCA 41; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38; [1982] HCA 51.

the public interest in the finality of litigation. That Mason CJ dissented in the result in that case does not deny the accuracy of the propositions just made.

7 Westpac had ample opportunity to foreshadow that, if the appeal succeeded, it wished to be heard in support of an application for special costs orders of the kind it now seeks. Westpac had clear notice of the costs orders Mr Aktas sought if his appeal were allowed. If, in framing the orders pronounced on 4 August 2010, the Court proceeded on some misapprehension of the facts, the misapprehension is to be attributed solely to Westpac's not having raised those facts earlier, or at least foreshadowed the need to consider further facts before costs orders were made. The orders pronounced on 4 August 2010 should not now be varied.

8 Westpac's further amended summons of 24 September 2010 should be dismissed with costs.

9 HEYDON J. Assume that a defendant makes an offer of settlement to a plaintiff which is expressed to be without prejudice save as to costs and which the plaintiff rejects. Assume that the defendant considers that that rejection may be unreasonable if there turns out to be a disproportion between a relative lack of success for the plaintiff in the proceedings and the advantages which would have accrued to the plaintiff had the rejected offer been accepted. Assume that the defendant therefore decides to seek a special order as to costs if the plaintiff's success turns out to be sufficiently limited. How is that decision to be communicated to the court?

10 One course – in some ways the most desirable course – may be for a legal representative of the defendant to attend the court when judgment is delivered, armed with instructions to submit that, whatever orders the court makes, a costs order should not be made, or, if made, should be suspended until there has been an opportunity for the court to hear and determine an application for a special costs order. The attendance of legal representatives to "take judgment" is common enough in trial and intermediate appellate courts in this country. It is a courtesy to the court – part of the dignified aspect of litigious custom. But it is also a useful aspect: for it is common for the courts, particularly trial courts, to require further attendance from the parties to work out the precise form of orders, and if the parties are represented when judgment is given, expeditious arrangements can be made for matters to be finalised, including costs matters. But the attendance of legal representatives to take judgment in this Court, not uncommon a couple of decades ago, is now very rare. If it were revived in this Court to the extent of attendance not by a Canberra agent but by legal representatives familiar with the litigation, the revival would increase costs to a significant extent.

11 Plainly there is much to be said for the view that a second possible course – disclosing the documents which, the defendant submits, support a special order as to costs before the court decides whether the plaintiff should succeed on substantive issues – should not be adopted. To adopt that course would deprive the documents of their without prejudice character.

12 A third course is for the defendant, before judgment, to foreshadow a later application for a special order as to costs without disclosing those documents. For the reasons given below, it is not proposed to examine the merits of this course.

13 The reasoning of the majority rests on the proposition that the first respondent's failure to adopt the third course was fatal. It thus constitutes a binding decision of this Court that the third course is compulsory in this Court. There is no point in a detailed consideration of the difficult question whether the proposition should attract support or disagreement. An expression of disagreement would not undercut the status of the majority's proposition as a binding decision. That is so partly because it would be a dissenting opinion, and

the binding status of a precedent in this Court is not affected by the existence of dissenting opinions. And an expression of support would not strengthen the binding status of the precedent: if it is a precedent, it must be followed, and there is no proposition in Australian law that courts bound by a precedent are to follow it with different degrees of enthusiasm depending on how many judges supported it. Further, an expression of disagreement in this case would not be essential to the result arrived at by the opinion which expressed it: it could only be a dictum. That is because the arguments advanced for and against the present application in relation to costs orders are immaterial to the validity of the more favourable costs orders I supported when the appeal was allowed by majority. The fate of the first respondent's application is a matter only for the majority. In the circumstances it is neither necessary nor appropriate to discuss the majority reasoning.

14 KIEFEL J. The respondent seeks the variation of orders as to costs made on 4 August 2010. I did not join in those orders and it is therefore not appropriate for me to consider their variation.