HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

THE BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION APPELLANT

AND

GREGORY PAUL BARCLAY & ANOR RESPONDENTS

Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]
[2012] HCA 42
3 October 2012
M128/2011

ORDER

The respondents pay the costs of the appellant.

On appeal from the Federal Court of Australia

Representation

J L Bourke SC with P M O'Grady for the appellant (instructed by Lander & Rogers Lawyers)

R C Kenzie QC with M A Irving for the first and second respondents (instructed by Holding Redlich)

T M Howe QC with S P Donaghue SC and L E Young intervening on behalf of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (instructed by Australian Government Solicitor)

CATCHWORDS

Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]

Procedure – Costs.

1 FRENCH CJ, GUMMOW, HAYNE AND CRENNAN JJ. Order 3 of the order of the Court made on 7 September 2012 provided that in the absence of agreement any question of the costs of the appeal be dealt with on the papers as indicated in the reasons for judgment.

2 Written submissions have been received and the matter has been considered on the papers. The appellant seeks orders against both the respondents and the intervener ("the Minister"). The proposed orders would require the respondents pay 85 per cent of the appellant's costs and the Minister to bear the balance. But in accordance with established practice in this Court respecting interveners, no order should be made against the Minister. If no such order be made, the appellant seeks an order for all of its costs against the respondents.

3 The respondents accept that the provision with respect to certain costs which is made by s 570 of the *Fair Work Act* 2009 (Cth) does not apply to the appeal to this Court. The respondents, however, submit that the Court should exercise its power with respect to those costs by making no order as to costs. They point to the absence in the Draft Notice of Appeal and the Notice of Appeal of any order seeking costs and to the late emergence of the point shortly before delivery of judgment on 7 September 2012.

4 However, those circumstances are insufficient to displace the *prima facie* entitlement of the successful appellant to the costs order it seeks against the respondents.

5 An order should be made that the respondents pay the costs of the appellant.

6 HEYDON J. The appellant seeks certain costs orders in relation to the appeal only (not the application for special leave to appeal). One order is that the respondents pay 85 per cent of its costs. The other order is that an intervener, whose legal representatives variously described him as the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, and the Minister for Employment and Workplace Relations, pay 15 per cent of its costs. Alternatively, if no costs order is made against the Minister, the appellant seeks an order that the respondents pay 100 per cent of its costs.

7 The appellant's desire for favourable costs orders was belatedly expressed. The appellant did not raise it before or at the hearing on 29 March 2012. Its claim for costs was first raised in letters to the solicitor for the first respondent and the solicitor for the Minister on 17 July 2012. Its claim was pressed in three further letters sent before judgment was delivered on 7 September 2012. The solicitor for the Minister sent courteous acknowledgments of them and dealt with their contents. The respondents did not. On 7 September 2012, this Court ordered the parties to file written submissions about costs. Since then the parties have pursued the question in written submissions. The solicitor for the Minister has indicated his position by correspondence both before and after 7 September 2012.

8 The respondents relied on the appellant's failure to indicate that it was seeking costs when it filed the special leave application. In particular, they relied on the appellant's positive assertion when seeking special leave that it sought no order as to costs. They submitted that the "appellant should not be permitted to resile from its position." Otherwise, they said, "appellants would be encouraged to waive any right to costs when seeking special leave to appeal and then make an application for costs at the time of judgment." The respondents also suggested that the appellant's conduct was not "a mere oversight" but "a deliberate forensic choice".

9 The respondents pointed to no evidence supporting that allegation. At the start of the oral argument a member of the Court pointed out one relevant circumstance undermining it. The appeal did not arise under the *Fair Work Act* 2009 (Cth), but under s 73 of the Constitution, consequent upon a grant of special leave under the *Judiciary Act* 1903 (Cth). It may be inferred from that and other circumstances that the appellant acted as it did because its legal advisers had in good faith initially formed the erroneous view that s 570 of the *Fair Work Act* applied, but later abandoned it. The respondents now concede that s 570 does not apply. The respondents did not identify any prejudice occasioned to them from the appellant's change in position. The respondents have not suggested that their conduct in vigorously opposing the appeal would have been different in any way had they been told earlier that they might have to pay the costs if they lost. The respondents' suggestion that the appellant's stance on costs was a forensic device to obtain special leave is baseless. The premise of that suggestion – that a device of that kind could ever increase the chance that special leave would be

granted against a body like the second respondent – is equally baseless. The second respondent is the Australian Education Union, which, it may be inferred, stands behind the first respondent, one of its officials. It is not a penniless natural person who will have only one curial encounter in his or her lifetime. The respondents' position is typical of the mindless and rancorous technicality which characterises litigation about industrial law. It is entirely without merit. That is particularly so in view of the extraordinary weakness of the respondents' substantive case on the appeal.

10 To the extent that the Minister shared the respondents' approach in relying on the appellant's failure to seek a costs order in its Notice of Appeal, those comments, with respect, apply equally to him. The Minister, however, went beyond the respondents' approach. In addition, he relied on (a) the proposition that his intervention did not increase the appellant's costs to any material extent and (b) the proposition that there are no "special circumstances" justifying a costs order against him.

11 Proposition (a) is not correct. The 15 per cent figure proposed by the appellant is a reasonable estimate of the impact which the Minister's intervention had on the costs the appellant incurred. The Minister's written submissions were lengthy. His oral submissions consumed a not insignificant amount of time.

12 As to proposition (b), the circumstances were exceptional. That is because the Minister's stance before and during the oral hearing was not that of an intervener, but that of a partisan. For example, some of the Minister's oral submissions were directed to factual material. This is hardly the province of an intervener. The respondents were represented by able and experienced counsel who could and did put their clients' case as forcefully as possible. The arguments for the Minister did not go beyond the respondents' case. They were works of supererogation. Would-be interveners who wish to behave like parties should not intervene, or should seek to be joined as parties if they satisfy the rules for joinder of parties, or should suffer the same fate as the losing parties in respect of costs if they back the losing party's cause.

13 However, though the Minister has indicated his general position in correspondence, the Court's orders on 7 September 2012 did not permit the Minister to file written submissions regarding costs. Though the Minister has requested the opportunity to file written submissions, it has not been afforded. For that reason, it would be unjust to order that the Minister pay the appellant's costs. But it would also be unjust to order that the respondents pay only 85 per cent of those costs. The consequence which flows from the conclusion that the Minister is not to pay any part of the appellant's costs is not that the appellant should bear the burden of the Minister's intervention, but that the respondents should do so. It was, after all, the respondents who took the forensic initiative by seeking to overturn, and overturning, an impeccable judgment by the trial judge, which it took an appeal in this Court to restore.

14 The ordinary practice of this Court when intervention takes place is not to order that the loser pay the winner's costs less those attributable to the intervention, but to order that the loser pay the whole of the winner's costs.

15 The respondents should pay 100 per cent of the appellant's costs of the appeal.