

HIGH COURT OF AUSTRALIA

BEECH-JONES J

GEORGE DEFTEROS

APPLICANT

AND

GOOGLE LLC

RESPONDENT

[2024] HCASJ 6

Date of Judgment: 7 February 2024

M121 of 2018

ORDER

- 1. The respondent be granted leave pursuant to r 4.03.2 of the High Court Rules 2004 (Cth) to file its bill of costs.*

Representation

The applicant is represented by Defteros Lawyers

The respondent is represented by Johnson Winter & Slattery

1 BEECH-JONES J. On 5 December 2018, this Court (Gordon and Edelman JJ) refused an application by the applicant, George Defteros, for special leave to appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria. Mr Defteros was ordered to pay the costs of the respondent to that application, Google LLC ("Google").

2 Rule 4.03.02 of the *High Court Rules 2004* (Cth) provides that "[w]here 3 years or more has elapsed since any party has taken any step in a proceeding, no step shall be taken without the leave of the Court or a Justice".

3 On 19 September 2023, Google applied for leave under r 4.03.02 to file its bill of costs concerning the application for special leave to appeal for assessment.

4 Mr Defteros is a solicitor. In 2016, Mr Defteros commenced proceedings in the Supreme Court of Victoria against Google for defamation arising out of a "hyperlink" to a newspaper article concerning him that was yielded by a search on the worldwide web using Google's search engine ("the 2016 proceedings"). Mr Defteros was successful at trial and on appeal. However, in August 2022, this Court upheld Google's appeal and judgment was entered in favour of Google.¹

5 Mr Defteros also commenced separate proceedings against Google in 2017 in respect of a similar subject matter. Those proceedings were unsuccessful at trial.²

6 The application for special leave to appeal that was refused on 5 December 2018 sought leave to appeal from a judgment of the Court of the Appeal refusing leave to appeal from a refusal to strike out part of Google's defence in the 2016 proceedings.³ The costs order made following the refusal of that application was one of several costs orders made against Mr Defteros in relation to interlocutory applications in the 2016 proceedings. There were also many costs orders made in favour of Mr Defteros in those proceedings, including the costs of Google's successful appeal to this Court. This was so because it was a condition of the grant of special leave to appeal to this Court that Google pay Mr Defteros' costs of the appeal and not seek to disturb the costs order in his favour in the courts below.⁴

1 *Google LLC v Defteros* (2022) 96 ALJR 766; (2022) 403 ALR 434.

2 *Google LLC v Defteros* (2022) 96 ALJR 766 at 772 [5]; (2022) 403 ALR 434 27 at 437 [5] per Kiefel CJ and Gleeson J.

3 *Defteros v Google Inc LLC* [2018] VSCA 176 at [3]-[6] per Beach, Hargrave JJA and Sifris AJA.

4 *Google LLC v Defteros* (2022) 96 ALJR 766 at 772 [5]; (2022) 403 ALR 434 at 437 [7] per Kiefel CJ and Gleeson J.

7 In *William Crosby & Co Pty Ltd v The Commonwealth* ("*William Crosby*"),⁵ McTiernan, Kitto, Taylor and Owen JJ described the purpose to the predecessor to r 41.08.1,⁶ which specified a period of six years, as not being to "enable the Court to insist that an action shall proceed and to fix times within which further steps shall be taken", but instead "to forbid the further prosecution of proceedings in which no step has been taken for six years unless leave is given to continue".⁷ Their Honours added that "it follows that it is for an applicant for leave to show that there is good reason for excepting the particular proceedings from the general prohibition which the rule imposes".⁸

8 In *William Crosby*, leave was sought in 1963 to deliver notices to admit facts and documents in proceedings that had been commenced in 1946. The last step in the proceedings had taken place in 1953. The proceedings had yet to come on for trial. The absence of any justification for that 10-year delay, the potential for written records to have been lost or destroyed during that period and the death or disappearance of persons who could have given material evidence at the hearing warranted the application for leave being refused.⁹

9 A number of decisions of single judges of this Court have applied r 4.03.02 or its equivalent to an application for leave to file a bill of costs after proceedings had otherwise concluded without requiring the applicant provide an acceptable explanation for the delay. Instead only the prejudice involved in granting the application for leave was considered.¹⁰ On behalf of Mr Defteros, it was submitted that these decisions were inconsistent with *William Crosby*, and that the Court should apply that decision in this context as Bell J did in *Doppstadt Australia Pty*

5 *William Crosby & Co Pty Ltd v The Commonwealth* (1963) 109 CLR 490 ("*William Crosby*").

6 *High Court Rules 1952* (Cth), order 60 r 12(2).

7 *William Crosby* (1963) 109 CLR 490 at 496 per McTiernan, Kitto, Taylor and Owen JJ.

8 *William Crosby* (1963) 109 CLR 490 at 496 per McTiernan, Kitto, Taylor and Owen JJ.

9 *William Crosby* (1963) 109 CLR 490 at 499 per McTiernan, Kitto, Taylor and Owen JJ.

10 *Hospital Products Ltd v United States Surgical Corporation* (1993) 67 ALJR 777 at 779; (1993) 116 ALR 218 at 221 per Gaudron J; *Mineralogy Pty Ltd v Sino Oron Pty Ltd & Ors* [2021] HCATrans 55 at line 5 per Gageler J.

3.

Ltd & Anor v Lovick & Son Developments Pty Ltd & Anor ("Doppstadt").¹¹ Even so, in *Doppstadt*, her Honour noted that the "question of whether good reason has been shown for the grant of leave requires consideration of all the circumstances of the case" and "the fact of an inexcusable delay does not necessarily preclude an applicant from establishing that there is good reason".¹²

10 It is unnecessary to address whether, as a matter of substance, there is any difference in approach revealed by these cases, much less determine which approach is to be preferred. In this case, I am satisfied that the delay is sufficiently explained by the circumstance that the costs the subject of the application relate to an interlocutory application where the substantive proceedings continued well after the costs order was made by this Court. At the time the costs order was made in this Court in December 2018, it should have been anticipated by the parties that further costs orders would be made in the litigation as proved to be the case. Given the ongoing litigation, it is understandable that a party such as Google would not seek the immediate assessment of the costs payable as a result of this Court's order but instead wait until the proceedings concluded. Moreover, it should have been apparent to the parties that the matter might resolve on terms that obviated any necessity to quantify the costs payable as a result of this Court's order.

11 Mr Defteros also contends that he will be prejudiced by the grant of the application. In his affidavit sworn on 11 January 2024, Mr Defteros stated that until December 2018, a solicitor within his firm, Mr Kevin Dorey, had carriage of all proceedings between himself and Google. Mr Defteros said that he was not involved in the "day-to-day carriage" of the proceedings and this was designed to ensure that, as a client of the firm, he received "arms-length advice" and provided proper instructions. Mr Dorey passed away in May 2022. Mr Defteros stated that another solicitor employed by his firm, Michael Cunningham, also undertook "day-to-day" work on the proceedings during 2018. Mr Cunningham is still employed by Mr Defteros' firm.

12 Mr Defteros is concerned that, in the absence of Mr Dorey, he will be unable to substantively comment on, and thereby challenge, Google's bill of costs. I do not accept that this amounts to any real prejudice. The bill of costs sets out the time and cost of Google's solicitors and counsel, not those engaged by Mr Defteros. Mr Defteros' files should disclose the state of the litigation as at 2018. Otherwise, the type of work to prepare and conduct an application for special leave and the appropriate rates for such work are well known. In light of that and Mr

11 *Doppstadt Australia Pty Ltd & Anor v Lovick & Son Developments Pty Ltd & Anor* [2021] HCATrans 1.

12 *Doppstadt Australia Pty Ltd & Anor v Lovick & Son Developments Pty Ltd & Anor* [2021] HCATrans 1 at line 220 per Bell J.

Cunningham's knowledge of the proceedings, Mr Defteros should be able to make such objections to Google's bill of costs as are appropriate.

13 In his affidavit, Mr Defteros also stated that the prolonged delay by Google in seeking to have their bill of costs assessed "adds to the stress and uncertainty of this litigation and the emotional toll the proceedings have upon [him]". He referred to the content of certain submissions filed on behalf of Google in relation to his application to assess his bill of costs in Google's successful appeal to this Court which are unnecessary to describe.

14 It follows from the above that I do not accept that there has been any "prolonged delay" on the part of Google. Otherwise, it can be accepted that Mr Defteros experiences stress and uncertainty from his involvement in litigation with Google, including concern about his overall costs position. However, it was Mr Defteros who commenced the litigation, and anxiety about costs inures in the conduct of most proceedings. As noted, Mr Defteros is presently seeking an assessment of his costs of Google's successful appeal to this Court. Given that fact, and the existence of the other costs orders, it would be unjust to deny Google the opportunity to assess the costs order made in its favour in this Court and seek to have that assessment form part of an overall determination of the net position between itself and Mr Defteros.

15 I order that the respondent be granted leave pursuant to r 4.03.2 of the *High Court Rules 2004* (Cth) to file its bill of costs.