



Supreme Court
New South Wales

Case Name: Larter v Hazzard (No 3)

Medium Neutral Citation: [2021] NSWSC 1595

Hearing Date(s): On the papers

Decision Date: 9 December 2021

Jurisdiction: Common Law

Before: Adamson J

Decision: The plaintiff to pay the third defendant's costs of the proceedings.

Catchwords: COSTS — Party/Party — Whether exception to general rule that costs follow the event where proceedings brought in the public interest applies — public interest may have been generated by the plaintiff's representations online and in the media — limited public interest element to the litigation — plaintiff raised funds online — no evidence as to quantum costs paid by either party — brevity of hearing and absence of expert evidence — no application brought under UCPR, r 42.4(1) — plaintiff to pay the third defendant's costs of the proceedings

Legislation Cited: Civil Procedure Act 2005 (NSW), s 98
Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 (NSW)
Public Health (COVID-19 Vaccination of Health Care Workers) Order (No 2) 2021 (NSW)
Uniform Civil Procedure Rules 2005 (NSW), rr 42.1, 42.4

Cases Cited: Can v State of New South Wales [2021] NSWSC 1480
Kassam v Hazzard; Henry v Hazzard [2021] NSWCA 299
Kassam v Hazzard; Henry v Hazzard [2021] NSWSC

1320

Larter v Hazzard (No 2) [2021] NSWSC 1451
Shelton v Repatriation Commission (1999) 85 FCR 587;
[1999] FCA 181

Category: Costs

Parties: John Edward Larter (Plaintiff)
The Hon. Brad Hazzard MP, Minister for Health and
Medical Research (First Defendant)
Health Administration Corporation (Second Defendant)
State of New South Wales (Third Defendant)

Representation: Counsel:
S Prince SC / M Maconachie / T Wong (Plaintiff)
Submitting appearance (First and Second Defendants)
J Kirk SC / T Prince / D Reynolds (Third Defendant)

Solicitors:
Pryor Tzannes & Wallis Solicitors & Notaries (Plaintiff)
Crown Solicitor's Office (NSW) (Defendants)

File Number(s): 2021/259688

JUDGMENT

Introduction

- 1 On 10 November 2021, I delivered the principal judgment in this matter: *Larter v Hazzard (No 2)* [2021] NSWSC 1451. I dismissed the further amended summons filed on 5 November 2021 and, at the parties' request, reserved the question of costs.
- 2 The plaintiff seeks an order that each party pay his or its (as the case may be) costs. The only active defendant, the third defendant (which will be referred to as the defendant), seeks an order that the plaintiff pay its costs of the proceedings.
- 3 These reasons are to be read with the principal judgment in which I dismissed a challenge to the Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 (NSW) (the Order), the Order as amended on 29 September 2021 at 2.44pm (the Amended Order), and the Public Health

(COVID-19 Vaccination of Health Care Workers) Order (No 2) 2021 (NSW) (Order 2) which repealed and replaced the Amended Order.

Consideration

- 4 Costs are in the discretion of the Court: s 98 of the *Civil Procedure Act 2005* (NSW). The defendant relied on the general rule that costs follow the event: Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 42.1. The plaintiff submitted that the present case falls into the well-recognised exception to the general rule: that the proceedings were brought in the public interest and, accordingly, that it would not be just for an unsuccessful plaintiff to have to bear the costs of a successful defendant. Mr Prince SC, who appeared with Mr Maconachie and Ms Wong on behalf of the plaintiff, relied on what the Full Court of the Federal Court (Burchett, Nicholson and Finkelstein JJ) said in *Shelton v Repatriation Commission* (1999) 85 FCR 587; [1999] FCA 181 at [10]:

“Often, in administrative law, such an application as this was clarifies the law in a wider interest than that of the applicant. Indeed, it is as essential to good administration as it is important in the interests of individual justice that administrative decisions should be open to accessible review. Persons affected by administrative decisions should not be overmuch deterred by the threat of costs orders in such cases, and the very wide discretion given to the Court by the *Federal Court of Australia Act 1976* (Cth) should not be automatically exercised adversely to the losing party.”

- 5 Mr Prince submitted that, if the plaintiff had been successful, the result would have been of benefit to “all those health workers who have not been vaccinated”, being, I infer, a reference to those employed by NSW Health who, not having been double-vaccinated by 30 November 2021, would be prohibited from working. He contended that the proceedings “involved the validity of public health orders that intentionally deprive thousands of otherwise qualified professionals from continuing to serve the public in their chosen field, due to what must be strongly held convictions.” Mr Prince also submitted that the donors to the plaintiff’s cause (who are described in more detail below) “were contributing to that cause, not to pay the costs of the State of New South Wales.” He referred to the comments from the donors which appear from the screenshot of the relevant webpages.

- 6 In light of the plaintiff's submissions, it is necessary to address the ambit of the proceedings. First, as noted in the principal judgment, the sole ground of review was manifest unreasonableness: that is, that it was not open to the first defendant to make the public health orders in the terms in which they were made. Thus, the reasons for the public health orders were highly relevant to the determination of legal validity.
- 7 The plaintiff's argument was, in effect, that, having regard to the high levels of vaccination within the community, it was unreasonable to require health care workers to be vaccinated since they did not pose a particular risk. The defendant's answer to this was that people in health facilities administered by NSW Health, even if vaccinated, are vulnerable, if infected by the COVID-19 virus (the virus), to serious illness and, in some cases, death. This was because, almost by definition, such people are disproportionately (when compared with the general population) elderly, infirm, immunocompromised and suffering from acute or underlying health conditions. Further, an infection in that setting has the potential to cause significant disruption to the operations of NSW Health in that staff members are required to isolate, other staff members have to be re-located to redress the deficiency of staff in the infected location and facilities have to be closed for deep-cleaning.
- 8 The articulation of the reasons for the public health orders, which was done through the affidavit of Dr Kerry Chant, the Chief Health Officer at NSW Health, and her oral evidence in cross-examination, resulted in a finding that the public health orders were not invalid on the grounds of manifest unreasonableness. While questions of interpretation arose peripherally (such as the effect of the first relevant public health order purporting to address consequences extending beyond 90 days of its making), the issue in the proceedings was, in substance, limited to alleged manifest unreasonableness. In this respect, the proceedings are to be distinguished from *Can v State of New South Wales* [2021] NSWSC 1480, which turned on the construction of public health orders and the *Public Health Act 2010* (NSW). In that case, the plaintiff's interest, though sufficient to give him standing, was the same as others in New South Wales in that his right to leave and return home was affected. Thus, Mr Can's interest coincided with the public interest.

- 9 Further, the plaintiff, in the principal hearing and in his application for an order that there be no order as to costs, relied on the submission that the proceedings had *caused* the first defendant to remake the order in substantially different terms and that, in this respect, his position that the earlier orders were deficient had been vindicated. The substance of the public health orders was the same. The differences related, in the main, to the expression of the grounds for the making of the orders. In Order 2, the grounds were expressed in a more comprehensive way and, in Dr Chant's view, better articulated the reasons for the public health order. I found all three iterations of the relevant public health order (the Order, the Amended Order and Order 2) to be valid. Thus, there was no "vindication" of the plaintiff's position. Secondly, for the reasons given in the principal judgment, the articulation of grounds did not affect the result. The specification in the grounds for the Order in cl 3(b) that "COVID-19 is a potentially fatal condition and is highly contagious" is sufficient to explain why the Order, the Amended Order and Order 2 were made. Thirdly, I could not infer that the proceedings had any impact, much less a causative one, on the making of either the Amended Order or Order 2. I accept Dr Chant's evidence at the principal hearing that the orders were constantly under review.
- 10 The plaintiff also relied, in support of his application regarding costs, on the way in which the proceedings were conducted on his behalf. Mr Prince contended that the plaintiff's case was "appropriately and narrowly focused" and "did not attempt to re-litigate issues determined in previous litigation." The plaintiff also relied on various attempts he had made to resolve the proceedings.
- 11 The hearing was conducted over one and a half days, most of which was taken up with the cross-examination of Dr Chant as to the reasons for her advice to the first defendant to make the public health orders which were in fact made. Mr Prince accepted, for the purposes of the proceedings, that vaccinations were effective to reduce the risk of infection and transmission of the virus and to ameliorate its consequences. He substantially accepted the correctness of *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 (*Kassam*), an appeal against which has been dismissed: *Kassam v Hazzard; Henry v*

Hazzard [2021] NSWCA 299. Where Mr Prince challenged *Kassam*, he did so formally, to protect the plaintiff's position on appeal. The plaintiff failed to comply with some court rules and directions but I accept that some latitude ought be given in circumstances where the public health orders were being amended and remade. Ultimately, shortly before the hearing, the plaintiff filed a summons which complied with the rules.

- 12 On 24 October 2021, after the making of Order 2, the defendant offered to agree to the plaintiff discontinuing the proceedings with no order as to costs. The offer was expressed to remain open until 3pm on Monday 25 October 2021 (at that time the defendant was required to serve its evidence by close of business on that day). The plaintiff did not accept the offer.
- 13 The plaintiff disclosed that, as at 22 November 2021, he had raised \$244,420 (out of a total goal of \$300,000) through "GoFundMe" from the 3,700 donations (which when divided into the total indicates an average of approximately \$66 per donation). A screenshot of the webpage was exhibited to the affidavit of Jarryd Wilson, the plaintiff's solicitor. The GoFundMe webpage is entitled, "Fundraiser by John Larter: John Larter v NSW Health". The statement of the reasons for the fundraiser appears from the webpage as follows:

"On Friday 10 September 2021 I filed administrative action in the NSW Supreme Court seeking declaratory relief from the NSW Public Health Order mandating that all NSW Health workers receive the COVID-19 vaccination by 30 November 2021.

This action has attracted some of Australia's most senior legal minds.

I am fighting for this as I strongly believe no person should be discriminated against due to their medical status, and under no circumstances should they be excluded from the workplace due to that medical status.

I am committed to freedom of choice, and I strongly believe that all individuals should have the choice and ability to decide what medical procedures they undergo."

- 14 The defendant's evidence included an earlier screenshot of the plaintiff's "GoFundMe" page which showed that on 26 October 2021, the plaintiff had raised a total of \$161,740 (of his goal of \$200,000). It also included a later screenshot which showed that on 24 November 2021, the plaintiff had raised a total of \$244,570 (of his \$300,000 goal). The defendant also adduced evidence which indicates that the plaintiff also raised funds through a Telegram account

entitled, “John Larter v NSW Health (Mandatory Vaccinations)”. The posts, viewed by Greta Bromwich, the solicitor with carriage of the matter on behalf of the defendant, provided information as to how to donate directly to a “Solicitor Controlled Account”. A screenshot of the Telegram account said:

“NSW Health and Brad Hazzard have made it very clear during our legal proceedings they will try and bully and scare me into settling this case with threats of massive legal fees.

My legal team have advised me I’m going to need another \$50,000, at least, to fight this to the end!

I’d ask all of my loyal supporters to dig deep and help out on this really important issue.

There are two ways to donate.

GoFundMe – <https://www.gofundme.com/f/XXXX>

Directly to our Solicitor Controlled Account:

Account Name: Pryor Tzannes and Wallis ATF John Edward Larter (CMA 1002)

BSB: XXX-XXX

Account No: XX-XXX-XXXX”

- 15 In so far as Ms Bromwich has been able to establish, the amount donated to the Solicitor Controlled Account has not been published.
- 16 I infer that some members of the public were interested in the proceedings. The Court made the proceedings available on livestream because of the perceived interest shown by the public, and also on the basis of the interest which had been shown in *Kassam*. Whether proceedings are brought in the public interest is to be distinguished from whether members of the public are interested in them. For example, public interest in the most salacious details of a murder trial where the deceased or accused is a celebrity does not make the trial any more a matter of public interest than the criminal trial in the court room next door to it, which may attract neither media nor public interest. In a sense, all invocations of this Court’s jurisdiction to determine the legality of administrative acts involve the public interest in that the Court is adjudicating on the executive’s compliance with the will of Parliament as evinced through legislation. However, such challenges do not constitute a blanket exception to the general rule that costs follow the event.

- 17 The public interest, such as it was, in the proceedings, may have been generated by the plaintiff's representations on his webpages and through the media that he is opposed to "mandatory vaccinations". This epithet may have enabled him to gain the support, including financial support, from those who oppose compulsory health procedures. I note that Beech-Jones CJ at CL in *Kassam*, at [9], found that the voluntariness of a person's decision to have the vaccine was not vitiated by public health orders which imposed double vaccination as a condition of participation in certain activities.
- 18 The proceedings were brought for the benefit of the plaintiff and, if the plaintiff had been successful, would have provided a benefit to a small minority of NSW Health workers who were not vaccinated by the dates specified in the public health orders in that such persons would not have been prohibited from working.
- 19 Those who donated money to the plaintiff's fighting fund for the litigation have had the satisfaction of the matters referred to above being raised in this Court and determined. To the extent to which their own grievances did not entirely correspond with the way the plaintiff's case was put, the position with respect to costs is not altered. This Court is a forum for adjudicating and determining disputes about legal rights, not a platform for political or philosophical grievances to be aired.
- 20 The evidence does not reveal the amount of the costs paid by either the plaintiff or the defendant. In the absence of evidence, it would be reasonable to infer from the brevity of the hearing and the fact that the plaintiff did not adduce expert evidence to counter Dr Chant's evidence that the combined costs of both parties would be significantly less than the total of the money raised through GoFundMe (leaving aside the unknown amount separately raised). However, the plaintiff's solicitor has deposed in an affidavit sworn on 3 December 2021 as follows:

"Following my review of the records maintained by [Pryor Tzannes & Wallis], I believe the funds raised by Mr Larter including via donations from third party sources have been entirely exhausted in payment of his legal fees and disbursements in preparing for and running these proceedings."

- 21 As this evidence has not been challenged, I consider myself bound to accept it, although it is not in proper form. However, it reveals that the proceedings, which were apparently (as far as was evident from what occurred at the final hearing) conducted in a cost-effective manner, involved an expenditure on costs which is, on its face, exorbitant. If the monies raised for the litigation have already been distributed to the plaintiff's legal advisers, issues may arise as to the duty owed by the plaintiff's solicitors to the plaintiff which may require them to remit the funds to the plaintiff in order that he can meet any costs liability to the defendant (this being an inevitable risk of litigation and one of which the plaintiff ought to have been advised before filing the summons). Such issues do not arise for consideration, much less determination, in the present application.
- 22 It is not determinative that the donors to the plaintiff's cause may not have appreciated that, if the plaintiff were to lose the proceedings, an order might be made that the plaintiff pay the defendant's costs of the proceedings. The liability for costs of an unsuccessful party in conducting proceedings necessarily includes the potential liability for the costs of the successful party. This matter is generally determined at the conclusion of the proceedings but may also be determined in advance. Rule 42.4(1) of the UCPR, makes provision for the court to specify the maximum costs that may be recovered by one party from another. The purpose of the rule is to ensure proportionality. However, it has particular application in litigation which is alleged to have been brought in the public interest since it affords the plaintiff advance notice of his or her exposure to costs. The plaintiff brought no such application in advance of the delivery of judgment.
- 23 For the reasons given above, I am satisfied that the proceedings were substantially brought for the plaintiff's benefit and would, if successful, have benefited a limited cohort of health workers in the same position as the plaintiff (being unvaccinated at the relevant dates). Further, having regard to the reasons given by Dr Chant for the public health orders (initially in her affidavit), the argument that the orders were manifestly unreasonable was weak. Six weeks after the commencement of the proceedings (during which there had been several directions hearings), the plaintiff refused the defendant's offer to

resolve the proceedings on the basis that there would be no order as to costs. Having regard to the matters set out above, I am not satisfied that the order sought by the plaintiff ought be made or that the general rule that costs follow the event ought be displaced.

Orders

24 For the reasons given above, I make the following order:

(1) The plaintiff to pay the third defendant's costs of the proceedings.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.