

# The effect of delay in making an application for a Special Costs Order - a costly lesson learned: *Bartlett v Roffey* [2023] WASC 3 (S)

September 11, 2023

Under Order 66, Rule 51(1) of the Rules of the Supreme Court 1971 (WA) (**Rules**) the Court can, instead of making an order for taxation of costs, make an order fixing the costs of a party to the action or make a special costs order under the *Legal Profession Uniform Law Application Act 2022* (**LPUL**).

The Court can make an order under Order 66, Rule 51(1) on its own motion or on an application by a party. However, under Order 66, Rule 51(3) a party seeking a special costs order under the LPUL must apply for the order within:

- (a) 30 days after the date of the relevant judgment; or
- (b) another time fixed by the Court.

Two pertinent questions arise:

First, is a special costs order available to a party if the proceedings are settled or discontinued?

Secondly, does the 30-day time period under the Rules apply in those circumstances?

In *Bartlett v Roffey* [2023] WASC 3 (S) his Honour Justice Solomon considered those issues.

In that matter, the Plaintiff filed with the Court a Notice of Discontinuance discontinuing the action under Order 23, Rule 1 of the Rules. Order 23, Rule 1 of the Rules provides that the Plaintiff must, in those circumstances, pay the Defendants' costs of the action to be taxed if not agreed.

The Defendants applied for a special costs order (**Application**) that their costs be:

- (a) taxed without regard to the limits imposed under the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2022* (**Scale**); or
- (b) fixed at \$321,562.75.

His Honour was required to determine three key issues:

- (a) whether the Court had jurisdiction to make a special costs order after the proceedings were discontinued;
- (b) if the Court has jurisdiction, whether the Defendants' application for a special costs order was out of time; and
- (c) whether a special costs order should be made.

His Honour held that:

- (a) the Court has a broad discretion to award costs;
- (b) the Rules provide for the ways in which that discretion can be exercised; and

(c) the Court's power to make special costs orders arise under Order 66, Rule 51 of the Rules and section 141(3) of the LPUL.

With respect to the first two key issues his Honour stated that:

(a) a discontinuance of the action did not deprive the Court of the power to make a special costs order under the LPUL;

(b) the 30-day period specified under Order 66, Rule 51 is to be applied by analogy to events such as a discontinuance or a settlement of an action because the purpose of the 30-day period:

(i) is to overcome any prejudice to the successful party if that party is not given the opportunity to consider costs; and

(ii) is to balance that prejudice and the interests in the finality of the litigation; and

(c) any delay in making an application for a special costs order will militate against the granting of a special costs order. Prejudice to the unsuccessful party caused by the delay in making the application will weigh against a special costs order after the 30-day time period.

His Honour found that:

(a) the Defendants' delay of nearly 5 months, 2 months from the discontinuance, in applying for a special costs order was "significant" in the circumstances particularly because the Defendants had provided no additional evidence to explain the delay;

(b) for the defendants seeking costs that are nearly four times the amount allowable under the Scale, two months after the plaintiff by his own conduct effectively ended proceedings, was evidently prejudicial;

(c) the delay in bringing the application "weighs heavily against the granting of the application"; and

(d) the Court should not exercise its discretion to extend the time for the defendants to bring their application.

Whilst his Honour was not required to determine the third issue, his Honour confirmed the principles applicable to special costs orders. His Honour stated that:

(a) "It is not unusual that the costs actually incurred by a party to litigation exceed the scale limits; in fact, that is often, if not ordinarily the case";

(b) the "party seeking a special costs order must be able to demonstrate a nexus between the costs incurred, and the unusual difficulty, complexity or importance of the case"; and

(c) "the costs incurred by the defendants appear to be disproportionate to the substantive matters to which those costs relate" and his "experience of the matter does not appear to justify a costs order of over \$320,000, and certainly not in excess of \$410,000".

The "take aways" from his Honour's judgment are that:

(a) a party can apply for a special costs order where proceedings are discontinued or settled;

(b) applications for special costs orders under the LPUL should be made promptly and likely within the 30-day period even where the "rule" does not directly apply; and

(c) any delay in making an application for a special costs order must be explained by evidence.

Dentons are ready and available to assist including by taking instructions from legal representatives in costs matters from a position of independence, knowledge and broad litigation experience.

# Your Key Contacts



**John Park**

Partner, Perth

D +61 8 9323 0925

[john.park@dentons.com](mailto:john.park@dentons.com)