



Supreme Court
New South Wales

Case Name: Desane Properties Pty Limited v State of New South Wales [No2]

Medium Neutral Citation: [2018] NSWSC 738

Hearing Date(s): 4, 18 May 2018, written submissions

Date of Orders: 18 May 2018

Decision Date: 18 May 2018

Jurisdiction: Equity - Commercial List

Before: Hammerschlag J

Decision: The Second Defendant is to pay the Plaintiff's costs.

Catchwords: COSTS – where plaintiff succeeds on various causes of action but fails on one – appropriateness of apportioning costs on an issue by issue basis; HELD – apportionment not appropriate; ORDERS – where proposed acquisition notice declared of no statutory effect – appropriateness of making quashing order and granting injunctions; HELD – declaration as to invalidity suffices

Legislation Cited: Land Acquisition (Just Terms Compensation) Act 1991 (NSW)

Cases Cited: Desane Properties Pty Limited v State of New South Wales [2018] NSWSC 553

Category: Procedural and other rulings

Parties: Desane Properties Pty Limited - Plaintiff
Roads and Maritime Services - Second Defendant

Representation: Counsel:
D. R. Pritchard SC [4 May] and D. Krochmalik [4 & 18 May] - Plaintiff

J.R. Clarke SC - Second Defendant

Solicitors:

Levitt Robinson Solicitors - Plaintiff

Hunt & Hunt - Second Defendant

File Number(s): 2017/00243774

EX TEMPORE JUDGMENT

- 1 HIS HONOUR: On 1 May 2018, I gave the principal judgment in this case: *Desane Properties Pty Limited v State of New South Wales* [2018] NSWSC 553. Defined terms in the principal judgment are used here. Desane succeeded. The Court determined that the PAN is of no statutory effect.
- 2 Desane has proposed a form of final orders, which includes orders that RMS pay the costs of the proceedings as between it and RMS, and for the payment of interest on costs. The claim for interest is supported by an affidavit of a solicitor, parts of which were objected to on form grounds, and rejected.
- 3 The proposed orders include an uncontentious form of declaration that the PAN is invalid and of no statutory effect, and an uncontentious order that RMS lodge with the Registrar-General a request to remove the land dealing registered on the title of the Property as a consequence of the PAN.
- 4 Desane seeks, in addition, and RMS opposes, an order quashing the PAN and an injunction restraining RMS from acting on the PAN or taking any step in reliance upon, or giving effect to, it.
- 5 RMS argues that Desane should not have all of its costs because Desane's claim for misleading or deceptive conduct failed. RMS puts that Desane should only have 60 per cent of its costs.
- 6 I received written submissions from Desane and RMS, and I heard oral submissions from counsel. I do not propose to make orders quashing the PAN or granting any injunction. In the particular circumstances of this case, such orders are surplusage. The PAN will be declared to be of no statutory effect and the Registrar-General will be requested to remove the land dealing. I do not consider there to be any realistic risk that RMS, which has the status, privileges and immunities of the Crown and which may be expected to act as a

model litigant will, in the face of the orders of this Court, act on the PAN or take any steps which assume its validity. A declaration will suffice.

- 7 In my view, nothing in this case warrants an exercise of discretion so as to depart from the ordinary rule that costs should follow the event or from the usual position that, unless there is good reason to do so, the Court will not embark upon the exercise of apportioning costs between issues. To the contrary, there is every good reason why Desane should have all its costs. The general sub-stratum of fact with which the Court had to deal, straddles both the improper purpose case and the misleading or deceptive conduct case.
- 8 The misleading or deceptive conduct case was not unreasonably brought. That, in the end, relief would not have been granted on that cause of action, as opposed to another cause of action covering the same general sub-stratum of fact, is not a reason to depart from the usual position. Even less is it appropriate to embark on a dissection of the misleading or deceptive conduct count into 'carrying on business' and relief subcategories of that cause of action.
- 9 It is also appropriate for there to be an order that Desane receive interest on its costs as paid during the course of this lengthy litigation.
- 10 The Court:
 - (1) declares that the Proposed Acquisition Notice given by the Second defendant to the plaintiff dated 26 May 2017 (PAN) is invalid and of no statutory effect.
 - (2) orders that, within fourteen days, the second defendant request the Registrar-General to remove land dealing AM439720 from the title of the Register for Lot 1 in Deposited Plan 74891 (which was originally the subject of notification by the second defendant to the Registrar-General).
 - (3) orders that the second defendant pay the plaintiff's costs of the proceedings as between the plaintiff and the second defendant.
 - (4) orders that the second defendant pay to the plaintiff interest on costs and disbursements at the rates set out in Practice Note SC (Gen) 16, on the allowed percentage of each amount of costs and disbursements actually paid by the plaintiff, from the date of payment by the plaintiff of such amount of such costs and disbursements, until the first to occur of:
 - (a) such time as the second defendant has paid the costs due to the plaintiff under any order made in these proceedings; or

(b) the assessment of the costs to which the plaintiff is entitled pursuant to the costs orders in its favour.

(5) In this order:

'X' equals the total amount of costs and disbursements which the plaintiff has paid to its legal advisors in connection with these proceedings.

'Y' equals the total amount of costs and disbursements allowed on assessment to the plaintiff in connection with these proceedings.

'Allowed Percentage' equals $(Y / X) \times 100\%$.

Notation:

The Court notes that nothing in these orders is intended to affect any right in the plaintiff otherwise to compensation from the second defendant pursuant to s 69 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

11 These orders dispose of these proceedings.

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