Costs applications in the High Court

Aktas v Westpac Banking Corporation Limited (No.2) [2010] HCA 47; (2010) 273 ALR 118; 85 ALJR 302

A small oversight can cost you dearly

A recent decision establishes a short but significant point in respect of seeking special orders for costs following the hearing and determination of an appeal to the High Court.

The substantive proceedings (which were noted in the Recent Developments section of the Summer 2010 –2011 edition of *Bar News*) concerned an action in defamation. Mr Aktas sued Westpac in relation to 30 cheques that Westpac had wrongfully dishonoured and returned with the words 'refer to drawer' stamped on the reverse side. A jury found that Westpac had defamed Mr Aktas, however the trial judge (Fullerton J) and three members of the Court of Appeal (Ipp, Basten JJA and McClellan CJ at CL) upheld the defence of qualified privilege.

A majority of the High Court (French CJ, Gummow and Hayne JJ) allowed the appeal by Mr Aktas and assessed his damages at $50,000. The court ordered Westpac to pay the costs of the appeal, as well as costs in the Court of Appeal and costs before the trial judge. These costs were likely to be considerable. Heydon and Kiefel JJ dissented.

Some five weeks after the judgment in the substantive proceedings had been delivered, Westpac filed a summons in the High Court, seeking a variation of the costs orders. Westpac disclosed that, three years earlier, it had offered to pay Mr Aktas $620,000 plus costs, together with an apology, on the basis that such settlement be confidential.

The same majority accepted that the High Court, as a court of final appeal, had the discretion to recall its substantive orders and grant a rehearing. However, their honours declined to do so on the basis that Westpac had had ample opportunity to foreshadow a special costs order, but had failed to do so. The majority pointed out that Westpac had clear notice that Mr Aktas sought costs as it was contained in his notice of appeal and was repeated in his written submissions. Westpac only had itself to blame for 'not having raised those facts earlier, or at least foreshadowed the need to consider further facts before costs orders were made' (at [7]). Westpac's application was dismissed with costs.

Heydon and Kiefel JJ dissented on the substantive judgment and neither proposed any orders on the costs application. However, Heydon J opined that there were three possible courses open to a party who sought a special costs order:

1. In contrast to the usual practice in the High Court, the party could brief counsel to take judgment, and to raise the issue then. However Heydon J noted that it is now extremely rare for parties to appear before the High Court to take judgment, although not uncommon a few decades ago, and also observed that it would significantly increase costs if parties had to brief counsel familiar with the matter to appear in Canberra merely for the purpose of taking judgment;
2. The party could disclose the existence of the offer to the court at the hearing of the appeal. Heydon J said that there was much to be said for the view that this course should not be adopted, because it would be inappropriate to violate the 'without prejudice' nature of such documents; or
3. The party could foreshadow prior to judgment that there may be a need to have separate argument as to costs.

Ultimately, it would seem that it was Westpac's failure to adopt the third course identified by Heydon J, namely to foreshadow prior to judgment a need to have further argument as to costs, which formed the basis of the majority's decision to refuse to grant a rehearing. Heydon J noted that the majority's view is now binding and said that it was neither necessary nor appropriate for him to discuss the majority reasoning.

Presumably, the requirement identified by the majority would be satisfied if a party indicated either in its written submissions or at the hearing of the appeal that it will seek the opportunity to make further arguments as to costs. This author suggests that a party could also foreshadow seeking such relief in its written summary of argument and notes that the template in Part IV of form 19 in the *High Court Rules* 2004 (Cth) specifies '[Any special order for costs sought by the respondent.]'; cf Order 3 in form 23 for applicants.

By Charles Alexander