IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT ARBITRATION LIST

Not Restricted

No 4655 of 2011

CHRISTOPHER ANTONY DALE — Plaintiff

V

CLAYTON UTZ (a firm) — Defendant

JUDGE:	HOLLINGWORTH J
WHERE HELD:	Melbourne
DATE OF HEARING:	5 August 2013 (Further written submissions received on 19 and 26 August, and 2 September 2013)
DATE OF JUDGMENT:	22 November 2013
CASE MAY BE CITED AS:	Dale v Clayton Utz (No 3)
MEDIUM NEUTRAL CITATION:	[2013] VSC 593

PRACTICE & PROCEDURE – Costs – Interlocutory application to restrain party from retaining lawyer – Application successful – Whether costs should be ordered in favour of successful applicant – If so, whether there should be any exceptions to the costs order – Whether costs should be taxed immediately – Costs ordered to be paid without exception and taxed immediately – *Supreme Court (General Civil Procedure) Rules 2005* rr 63.20, 63.20.1, 63.22 and 63.90.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr I Martindale SC	O'Donnell Salzano Lawyers
For the Defendant	Mr P Riordan SC Mr N De Young	Minter Ellison

HER HONOUR:

Introduction

1 Christopher Dale was, for many years, a partner in the solicitors' firm of Clayton Utz. In October 2005, Clayton Utz terminated Mr Dale's partnership. In September 2011, Mr Dale issued this proceeding, in which he claims that, in deciding to expel him, his former partners acted unlawfully and in breach of the partnership agreement.

2 By paragraph 1 of a summons dated 14 February 2012, Mr Dale sought an order restraining Clayton Utz from continuing to retain Allan Myers QC as their counsel in this proceeding.[1] That application had a rather complex and protracted path to determination.

3 After Randall As J had determined a number of disputes about subpoenas, and the admissibility of the parties' affidavits, the injunction application was referred to me for hearing.

4 A preliminary issue arose as to whether Clayton Utz should be permitted to cross-examine Mr Dale during the hearing of the injunction application. On 29 November 2012, I granted limited leave to cross-examine Mr Dale.[2]

5 After hearing the substantive application in late January 2013, on 26 March 2013 I granted an injunction to restrain Clayton Utz from retaining Mr Myers in this proceeding.[3]

6 There are now the following disputes about the costs of the injunction application:

(a) Mr Dale seeks an order that Clayton Utz pay his costs of the application, including reserved costs;

---

1 Paragraph 2 of the summons seeks an order striking out large parts of the defence, on various grounds. The strike out application has not been pursued before me.

2 *Dale v Clayton Utz* [2012] VSC 577 ("the first reasons").

3 *Dale v Clayton Utz (No 2)* [2013] VSC 54 ("the second reasons").

(b) Mr Dale seeks an order that those costs be taxed immediately;

(c) Clayton Utz says that the costs of the application should be costs in the proceeding;

(d) Alternatively, Clayton Utz says that if the court is minded to make a costs order in favour of Mr Dale, there should be the following exceptions:

(i) Mr Dale should pay the firm's costs in relation to all or part of the hearings on 26 June and 28 August 2012; or

(ii) The parties should bear all or part of their own costs relating to those two hearings;

(e) In any event, Clayton Utz says that costs should not be taxed prior to the conclusion of the proceeding.

Should Clayton Utz pay Mr Dale's costs of the injunction application?

7 Mr Dale seeks his costs of and incidental to the interlocutory injunction application under r 63.22[4] of the *Supreme Court (General Civil Procedure) Rules 2005*, which provides:

> Where by order of the Court the costs of any interlocutory or other application, or of any step in the proceeding, are reserved, the reserved costs are the parties' costs in the proceeding, unless the Court otherwise orders.

8 The current r 63.22 came into operation on 1 April 2013, as did several other rules which are relevant to this application. It is common ground that the new rules apply to this application for costs, by virtue of the transitional provision in r 63.90.

9 The new r 63.22 deals with some of the matters addressed by both the old rr 63.20 and 63.22, which provided:

> 63.20 Each party shall bear that party's own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders.

---

4 Although Mr Dale's original written submissions referred to r 63.20, his counsel said in oral submissions that the application was in fact being brought under r 63.22.

63.22 (1) Where by order of the Court the costs of any interlocutory or other application or of any step in a proceeding are reserved, and the Court does not thereafter direct by and to whom those costs are to be paid, then, unless the Court otherwise orders, the Costs Court may by order so direct.

(2) Paragraph (1) shall not apply where after the order that costs be reserved is made the Court determines that no further order be made with respect to those costs.

10 For completeness, I note that since 1 April 2013, r 63.20 provides:

63.20 Where an interlocutory or other application is made in a proceeding and –

(a) no order is made on the application; or

(b) the order made is silent as to costs –

the costs are the parties' costs in the proceeding, unless the Court otherwise orders.

11 Mr Dale seeks an order that Clayton Utz pay his costs of the application, including all reserved costs. He says that the March orders were the final determination of the injunction application. The injunction application was a discrete matter, not related to the substantive claim in the proceeding, and not an ordinary step to take in a proceeding. In those circumstances, he says it is appropriate for the court to deal with the costs separately, and at this stage of the proceeding.

12 Clayton Utz says that the costs of the application should be costs in the proceeding, as it is not possible to determine at the present time on which side justice requires the costs should fall.

13 Rules 63.20 and 63.22 both reflect the fact that interlocutory applications usually do not conclude a proceeding, so the court is often not in a position at that stage of the proceeding to determine where the justice lies between the parties in any costs order.[5] However, both rules empower the court to "otherwise order" in an appropriate case. The court's discretion to "otherwise order" is not circumscribed in any way by the rules, but must be exercised judicially.

---

5 *Castel Electronics Pty Ltd v TCL Air conditioner (Zhongshan) Co Ltd* [2013] VSC 092 per Davies J at [28].

14 The parties took me to a number of cases in this jurisdiction and elsewhere, in which courts have considered whether or not to "otherwise order" the costs of an interlocutory application.

15 One category of cases dealt with whether costs should be ordered after an unsuccessful application for summary judgment. Even though such costs are always in the court's discretion, it has been described as the "common" or "normal" practice in such a case to order that the parties' costs be costs in the proceeding, or else reserved. That is because:

> such an application may fail even though that applicant may have good prospects of ultimately succeeding in the action. The party seeking to resist the application may rely on evidence which may not be accepted for the final hearing and the applicant may be obliged to proceed on the basis that the respondent's version of the facts be accepted for the purposes of the application.[6]

16 A summary judgment application involves an examination of the very issues which are the subject of the substantive dispute between the parties, albeit on a preliminary basis. The evidence called at such a hearing may differ from that ultimately called at trial, either by being more limited (for example, there are usually fewer deponents, and no cross-examination) or being of a type which would not be admissible at trial (such as hearsay evidence). If summary judgment is refused, the trial judge will in due course consider the substantive issues more fully and rigorously, and be in a good position to determine who should ultimately pay for the costs of the summary judgment application.

17 But even that common or normal practice may not prevail at the interlocutory stage, where the application was misconceived – because the applicant ought reasonably to have appreciated that the application would fail – or made for an improper or collateral purpose (such as to secure a forensic advantage).[7]

---

6 *State of Queensland v Nixon & Ors* [2002] QSC 296 at [6].

7 *Ibid* at [7]; see also *Whitehall Holdings Pty Ltd v Custom Credit Corporation Ltd* Unreported, Supreme Court of Western Australia, Full Court (No 150 of 1991), 19 June 1992; BC9201139; *Young v Wylie (No 2)* [2010] FCA 616 per Moore J.

18 Similarly, it is common on the grant or dismissal of an application for an interlocutory injunction to order either that costs be in the proceeding, or reserved.[8] That is in recognition of the fact that there may be various reasons why a party may fail at the interlocutory injunction stage, but nevertheless succeed at trial.

19 But, once again, that common practice may not prevail in every case. If an interlocutory injunction is refused, it may be necessary to have regard to the reason for refusal; for example, if the application fails because the applicant has not even established a prima facie case, a court may be more willing to order costs against the unsuccessful applicant, than in a case where the applicant fails on the balance of convenience, or on a discretionary ground.

20 As with summary judgment applications, most interlocutory injunction applications involve a consideration of the very issues which are the subject of the pleadings, and will be examined more fully by the trial judge in due course. The position is different where, as here, an applicant seeks interlocutory injunctive relief of an uncommon and discrete nature, which is wholly unrelated to the substantive dispute between the parties. In such a case, it may well be appropriate for the judge dealing with the interlocutory application to determine what costs orders are fair and just.

21 The appropriateness of such a practice is reflected in a number of decisions of this court, on applications for interlocutory injunctions to restrain lawyers from acting, in which costs have been ordered by the judge who heard the injunction application:

(a) In *Pate v Grinter*,[9] Beach J ordered that the party which unsuccessfully opposed the injunction application pay the costs of the successful applicant;

(b) In *Yunghanns v Elfic*,[10] Gillard J indicated that he proposed to order that the party which unsuccessfully opposed the injunction application pay the costs

---

8 *Topseal Concrete Services Pty Ltd v Sika Australia Pty Ltd* [2008] WASC 57 per Beech J, cited with approval in *Perdaman Chemicals and Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd* [No 7] [2012] WASC 502 at 300 per Edelman J.

9 Unreported, Supreme Court of Victoria (No 7928 of 1994), 24 January 1995; BC9502621.

10 Unreported, Supreme Court of Victoria (No 5970 of 1997), 3 July 1998; BC9803031.

of the successful applicant;

(c) In *McVeigh v Linen House Pty Ltd*,[11] Callaway and Batt JJA stated that they would grant an injunction to restrain a firm of solicitors from acting for a party in the appeal, unless the firm offered an appropriate undertaking in lieu thereof. Upon the firm offering such an undertaking, the court ordered the solicitors to pay the appellant's costs of the injunction application;

(d) In *Sent and Primelife Corporation Ltd v John Fairfax Publications Pty Ltd*,[12] Nettle J (as he then was) ordered that the party which unsuccessfully opposed the injunction application pay the costs of the successful applicant;[13]

(e) In *Commonwealth Bank v Kyriackou*,[14] Judd J ordered that the unsuccessful applicant for an injunction pay the respondent's costs of the application; and

(f) In *Connell v Pistorino*,[15] Byrne J ordered that the party which unsuccessfully opposed the injunction application pay the costs of the successful applicant.

22 In each of those cases, the judges clearly considered it appropriate to "otherwise order."[16] I turn to consider what would be fair and just in the current case.

23 Mr Dale succeeded in the injunction application because I accepted his evidence, particularly in relation to a meeting he had with Mr Myers in August 2004. In that meeting, Mr Dale sought and Mr Myers provided legal advice about something called the Ebner matter. Mr Dale's conduct in relation to the Ebner matter is one of the grounds relied upon by Clayton Utz in terminating his partnership; Mr Dale's conduct in that regard will be an important issue at the trial of this proceeding.

---

11 [1999] 3 VR 394.

12 [2002] VSC 429.

13 Costs were not discussed in Nettle J's reasons for decision. However, the court has been provided with a copy of his Honour's orders, dated 7 October 2002, in which costs were ordered.

14 [2008] VSC 146.

15 [2009] VSC 289.

16 Rule 63.20 in the *Supreme Court (General Civil Procedure) Rules 1996* was in relevantly similar terms to r 63.20 in the 2005 rules, prior to the April 2013 amendment.

24 Clayton Utz chose to defend the injunction application on a particular basis, including by limiting the number of witnesses whose affidavits they sought to rely upon. That was a perfectly legitimate forensic decision for them to make; but it had consequences in terms of affecting how the injunction application proceeded. Clayton Utz were restricted as to the scope of cross-examination of Mr Dale, in part to preclude them from having an unfair dry run at pre-trial cross-examination, in circumstances where they had chosen not to expose any of their witnesses to equivalent testing. They will not be subject to that particular restriction on cross-examination at trial.

25 At trial, Clayton Utz will be permitted to cross-examine Mr Dale about his conduct in relation to the Ebner matter, to seek to prove that it justified his termination. But, unless Mr Dale chooses to waive legal professional privilege and confidentiality, Clayton Utz will still not be able to cross-examine him about the contents of his discussions with Mr Myers, including what he and Mr Myers discussed about the Ebner matter.

26 It is possible that, as a result of Clayton Utz calling additional witnesses or documentary evidence, or exploring topics that I did not permit them to explore in cross-examination, the trial judge may make a different assessment of Mr Dale's credit to my assessment, or come to a different conclusion about conversations or events in respect of which Mr Dale's account was not challenged before me.

27 However, at the trial, there will be no further consideration of whether or not Clayton Utz are entitled to retain Mr Myers to act for them in this proceeding. Even if the trial judge takes a different view about Mr Dale's credibility to the view I took, or makes different factual findings, the trial judge will not be reconsidering whether or not Mr Myers can be retained in this proceeding – that is not a matter raised by the pleadings and will not require determination at trial. Nor will the trial judge be considering whether it was appropriate for me to grant the injunction, on the material which the parties chose to put before me for the purposes of the

interlocutory application. My decision is the final judicial determination of the question of Clayton Utz's ability to retain Mr Myers in this proceeding.[17]

28 In the circumstances, it is appropriate for me to make an order at this time dealing with the costs of the injunction application. And, Mr Dale having been wholly successful in the application, the ordinary practice would be that costs should "follow the event".

The proposed exclusions

29 Clayton Utz does not dispute that, if I am minded to make an order as to costs at this time, Mr Dale should receive most of his reserved costs. However, they oppose his receiving the reserved costs relating to the hearings on 26 June and 28 August 2012. They say that either he should pay their costs, or the parties should bear their own costs, of those two hearings. They argue that those hearings were discrete events, in relation to which they were wholly or substantially successful.

30 I accept that, if that was a proper characterisation of what in fact occurred, it may be appropriate to prevent Mr Dale from recovering some or all of his costs of those days. It is therefore necessary to consider what occurred on those two days.

26 June 2012

31 Clayton Utz says that most of the costs of the hearing on 26 June 2012 related to a discrete matter, in relation to which they were wholly successful; that matter relates to an objection to the inspection of subpoenaed documents. In their original written submissions, Clayton Utz sought to exclude the whole of the costs of that day; in their oral submissions, they said the exclusion should be limited to the costs of the part of the day which dealt with the subpoena dispute.[18]

32 Mr Dale says there is nothing about the circumstances of the hearing to justify any different treatment of the costs of that day.

---

17 Although a notice of appeal against the second decision was filed and served, it has since been abandoned.

18 They expressly disavowed seeking the costs of correspondence before the hearing or the costs of inspection of the subpoenaed documents (T361-2).

33 After various affidavits and submissions had been filed and served, the injunction application was set down for hearing on Monday 30 April 2012, before Randall As J. On the preceding Friday, the initial date was vacated by consent, with costs reserved.

34 After further correspondence concerning possible hearing dates, on 15 May 2012 Randall As J relisted the hearing for 26 June 2012.

35 On 29 May 2012, Clayton Utz's solicitors issued a subpoena to Mr Warwick Spargo of RSM Bird Cameron, seeking the production of the audio tapes and transcripts of Mr Dale's record of interview with Victoria Police on 12 and 15 August 2005. A second subpoena, seeking the same materials, was issued on 8 June; this one was addressed to Victoria Police. The police interviews related to something called the Schmidt matter, which is referred to in the pleadings and in the second reasons.

36 Mr Dale's solicitors gave notice that he objected to inspection of the subpoenaed documents. The court advised the parties that Randall As J could hear the objection to inspection on 19 June 2012. However, that date did not suit Clayton Utz's counsel, so Clayton Utz requested that the subpoena objection be argued on 26 June, with the substantive injunction application to be heard some time in the week after that.

37 Having read the extensive correspondence between the parties and the court, I do not accept Clayton Utz's submission that their counsel turned up on 26 June expecting to argue the injunction application that day. That might have been their hope when the matter was originally fixed for the 26th, but it had later become abundantly clear that would no longer occur once the subpoena objection arose.

38 At the hearing on 26 June, Randall As J heard argument, and then ruled in Clayton Utz's favour, in relation to inspection of the subpoenaed documents.

39 On 26 June, there was also argument about Mr Dale's objections to the admissibility of parts of the affidavits filed by Clayton Utz. It is sufficient to note for present purposes that each side had some wins and some losses, in relation to the admissibility arguments.

40 The transcript of the hearing of that day runs to 52 pages. A little over half of those pages deal with the subpoena objection; the remainder deal with other matters, including objections to Clayton Utz's affidavits. However, the transcript is not a complete or accurate reflection of the cost or time spent preparing for or determining the two matters, as lengthy written outlines had also been filed prior to the hearing.

41 After succeeding in relation to the objection, Clayton Utz sought some time to enable them to inspect the hundreds of pages of subpoenaed documents. Accordingly, the injunction application was adjourned to a date to be fixed. His Honour reserved the costs of that day.

42 For the purposes of the injunction application, the subpoenaed documents related only to matters going to Mr Dale's credit, and clearly had no issue relevance.[19] Clayton Utz subsequently sought leave from me to cross-examine Mr Dale about a number of matters which only went to credit, including an aspect of the Schmidt matter concerning some alleged payments by a Mr Milte. I did not permit Clayton Utz to cross-examine in relation that matter, as it would have been unfair to allow them an opportunity to have a practice run at cross-examining Mr Dale about a matter raised in the pleadings, without exposing any of their own witnesses to similar pre-trial cross-examination.[20]

43 On the one hand, it is true that Mr Dale was unsuccessful in opposing the inspection of the subpoenaed documents. On the other hand, succeeding in inspecting the subpoenaed documents took Clayton Utz nowhere in the injunction application, because of the forensic decision they took about what material they would put before the court.

44 The balance of the hearing on 26 June was spent on arguments as to admissibility, and other matters, which properly formed an integral part of the injunction

---

19 Assuming the Schmidt matter remains in the pleadings, the subpoenaed documents will have issue relevance at trial.

20 At [84] and [85] of the first reasons.

application. Both sides had some wins and losses along the long and complicated path until the final determination of the injunction application. I see no reason in fairness or principle to separate out this one part of one half day's argument from the overall preparation for the injunction application.

45 In the circumstances, I am not persuaded that it would be fair and just to deprive Mr Dale of all or part of the costs of the hearing on 26 June 2012.

28 August 2012

46 Despite lengthy correspondence between the parties and the court, it became increasingly unlikely that Randall As J was going to be able to list the injunction application before himself for a two day period, after early July, on dates that suited both sides. Accordingly, the matter was referred to me.

47 When the injunction application was first mentioned before me on 17 August 2012, it was apparent that there were going to be problems listing it for hearing in the following months, due to lengthy periods of unavailability of Mr Myers (who, at that stage, may have been required for cross-examination on his affidavits) and Clayton Utz's then senior counsel, Mr Alan Archibald QC. However, the parties agreed that the following preliminary issues could be determined in the meantime:

(a) Whether leave was required to cross-examine Mr Dale; and

(b) If so, whether it should be granted.

48 I heard argument on the preliminary issues on 28 August 2012, and reserved my decision.

49 In the first reasons, I held that:

(a) Clayton Utz did require leave to cross-examine Mr Dale;

(b) Clayton Utz would be granted limited leave to cross-examine in relation to some narrowly defined areas, and in a manner which would not breach confidentiality or legal professional privilege.

50 In fact, at the hearing of the injunction application, Clayton Utz chose not to cross-examine in relation to several matters in respect of which leave to cross-examine had been granted.

51 I disagree with Clayton Utz's submission that they were wholly or substantially successful in relation to the preliminary issues. They failed completely in relation to the question of whether or not leave was required, and they were only granted significantly restricted leave to cross-examine Mr Dale. I also note that both sides had strongly resisted my suggestion, during the course of argument, that there might be limited cross-examination; both had pushed for an "all or nothing" outcome.

52 In any event, I regard the dispute about the extent of permissible cross-examination of deponents as being inextricably linked with the substantive injunction application, not a separate "event". Furthermore, the primary reason why the preliminary issues were dealt with in a separate hearing was to accommodate the long periods of unavailability of persons within the Clayton Utz "camp", while not wasting some time that I had available then to deal with any matters that did not require those persons' attendance.

53 In the circumstances, it would not be fair and just to deprive Mr Dale of the costs of 28 August 2012.

Should costs be taxed immediately?

54 Mr Dale seeks an order that his costs be taxed immediately. Clayton Utz says that costs should not be taxed before the end of the proceeding.

55 It is common ground that if I order that costs be taxed immediately, they will be payable forthwith upon taxation.

56 Rule 63.20.1 provides:

> If an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the Court orders that the costs may be taxed immediately.

57 Rule 63.20.1 came into operation on 1 April 2013. Prior to that time, there was no equivalent provision in this court's rules, and a party could seek immediate taxation in respect of any costs order. Rule 63.20.1 was clearly intended to make a substantial change to the previous position.

58 The authorities suggest that there are a number of reasons why rules similar to r 63.20.1 have been introduced in other jurisdictions, including:

(a) Avoiding multiple taxations, and the attendant costs;

(b) Avoiding interlocutory applications being used as a means to exhaust the funds of an opposing party; and

(c) Avoiding unfairness in a case where, for example, a party who is ultimately successful is unable to set off their judgment against an earlier liability to pay costs.[21]

59 Those are all important policy considerations, which I have borne in mind in considering this application.

60 However, as with the changes to rr 63.20 and 63.22, the court's discretion under r 63.20.1 to order that costs be taxed immediately is not circumscribed in any way by the rule itself, although it must be exercised judicially.

61 Rule 63.20.1 is similar to r 40.13 of the *Federal Court Rules 2011*, which currently provides:

> If an order for costs is made on an interlocutory application, the party in whose favour the order is made must not tax those costs until the proceeding in which the order is made is finished.
>
> *Note* The Court may order that costs of an interlocutory application be taxed immediately.

---

21 See for example *Australian Competition and Consumer Commission v Chaste Corporation and Ors (No 2)* (2003) 127 FCR 433 at [6]; *Orrcon Operations Pty Ltd v Capital Steel & Pipe Pty Ltd (No 2)* [2008] FCA 24 ("*Orrcon*") at [18]; *Young v Wylie (No 2)* ("Young") [2010] FCA 616 at [13].

62 Rule 40.13 replaced O 62 r 3(3) of the previous Federal Court Rules, which provided:

> An order for costs of an interlocutory proceeding shall not, unless the Court otherwise orders, entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded or further order.

63 Both parties agree that the change in wording between the current and former federal rules has not brought about any change of substance.

64 In *Thunderdome Racetiming and Scoring Pty Ltd v Dorian Industries Pty Ltd*[22] Olney J said of O 62 r 3(3) that:

> The discretion should be exercised in favour of a party who establishes that the demands of justice require that there be a departure from what appears to be the general practice envisaged by the rule, namely, that an order for costs of an interlocutory proceeding shall not entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded.[23]

65 Courts have recognised that the demands of justice may require a departure from the ordinary rule for one or more of three broad reasons:

(a) Because of the conduct of the unsuccessful party;

(b) Because of the likely delay before the final completion of the proceeding; and

(c) Because the interlocutory application involves a separate or discrete issue.

Unsuccessful party's conduct

66 The existence of the first of those grounds is not in dispute, although its scope has been subject to slightly different formulation in the cases. Some of the cases have spoken in terms of the unsuccessful party's conduct being "unreasonable"[24] or "reprehensible".[25] Others have considered whether the unsuccessful party has not

---

22 (1992) 36 FCR 297.

23 At 312.

24 For example, *Fiduciary Limited v Morning Star Research Pty Ltd* (2002) 55 NSWLR 1 ("*Fiduciary*"). The NSW rule under consideration in *Fiduciary*, Part 52A r 9(3) specifically refers to the concept of "unreasonableness", as well as to the broader concept of "justice", unlike the federal rules or our rules.

25 For example, *Rafferty v Time 2000 West Pty Ltd (No 3)* (2009) 257 ALR 503 at [24].

acted with "competence and diligence", thereby requiring the successful party to incur significant costs over and above those which would otherwise have been incurred.[26]

67 It is not necessary for me to define the precise limits of the first ground, as Mr Dale does not allege that Clayton Utz's conduct brings it within this ground, however defined.

Delay

68 At the heart of this ground is the likelihood of there being a considerable lapse of time between the interlocutory application and the final determination of the proceeding, making it unfair to deprive the successful party of the benefit of their costs order for a lengthy period.

69 In *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 14)*,[27] Lindgren J said that where the final determination of a proceeding was "far away", it might be appropriate for use to be made of O 62 r 3. In *Allstate Life Assurance Co v Australia and New Zealand Banking Group Ltd (No 13)*,[28] the Full Federal Court, in considering the costs of an interlocutory appeal, noted that the litigation was complex and final judgment was unlikely to be given for at least one year. The court said it would "be wrong if the successful parties do not enjoy the fruits of their order for costs for such a long time."

70 Those two decisions were cited with approval by Branson J in the *Life Airbag* case. Her Honour was considering whether to order that the costs resulting from several applications for leave to further amend the statement of claim should be payable forthwith under O 62 r 3(2). In that case, the statement of claim suggested that the litigation would be complex, the matter had proceeded slowly to that date[29] and a

---

26 *Harris v Cigna Insurance Australia Ltd* (1995) 17 ATPR 41-445; cited with approval by Branson J in *Life Airbag Company of Australia Pty Ltd v Life Airbag Company (New Zealand) Ltd*, Unreported, Federal Court of Australia (No NG 3141 of 1997), 22 May 1998; BC9801995 ("*Life Airbag*").

27 Unreported, Federal Court of Australia, 18 August 1995.

28 Unreported, Full Federal Court, 17 August 1995.

29 The proceeding had been commenced in June 1997, and by March 1998 five versions of the statement of claim had been delivered.

hearing date could not realistically be expected "for many months." Her Honour said that unless she made an order under O 62 r 3, the successful party to the interlocutory application would not receive the benefit of the order for costs in their favour for "a considerable time". In that case, her Honour was also clearly moved by the fact that the pleading amendments had not been handled with competence and diligence.

71 Other cases have described this ground in terms of there being "much to come in the proceedings" and there being "a fairly long time before the proceedings are disposed of."[30]

72 In my opinion, this case falls fairly and squarely within the principles just discussed. The proceeding was commenced in September 2011. The interlocutory injunction application itself took about one year from start to finish, with many intermediate steps along the way.

73 Early on in the proceeding, Clayton Utz issued a summons, dated 2 December 2011, seeking to permanently stay the proceeding and refer the partnership dispute to arbitration. That summons was dismissed by consent orders made by Croft J on 21 June 2013, some 18 months after it was issued.

74 On 20 September 2013, Efthim As J made orders for the delivery of an amended defence and a reply.

75 Once the pleadings have closed, there will need to be discovery and other pre-trial interlocutory steps. Given the size and nature of the pleadings, and the fact that the disputed events cover a period from about 1998 until 2005, I would not expect these interlocutory steps to be straightforward or completed quickly.

76 From my knowledge of what occurred in the injunction application, together with a simple examination of the file, it seems that pretty much every conceivable point of

---

30 For example, *Fiduciary* at [13], and the cases referred to therein, which has been cited with approval in later cases such as *Orrcon*.

fact or law that could be taken by either side has been taken. Sometimes, points have later been withdrawn or modified, but often only after a lot of time and money has been spent on correspondence, affidavits and submissions addressing the point. In making those observations, I am not intending to single either side out; it is an approach that has thus far been adopted by both sides. And, I note that it is not unusual for former partners to take such an approach to their litigation.

77 It would be desirable for both parties to reflect on their obligations under the *Civil Procedure Act 2010*, but I have yet to see any evidence that either party intends to adopt a different approach to the litigation going forward. I expect that this will continue to be a hard fought case. There is no basis for me to assume that a trial in this proceeding will take place within the near future.

78 A further factor which affects when this proceeding might be completed arises from the unusual fact that both parties are very well-known within the legal community. That means that many judges of this court do or would regard themselves as prevented by a possible conflict of interest from sitting in this proceeding. There have already been substantial problems, due to possible conflict, when the court had to find a judge who was able to hear the injunction application, after it became apparent that Randall As J would be unable to hear it. Although Croft J is currently managing the proceeding in the Commercial Court, if it became necessary for his Honour to refer any other aspect of the proceeding off to another judge,[31] I expect that there may well be delays caused by the availability of a limited number of judges free of possible conflict.

79 Unless I permit Mr Dale to immediately tax what will be the very substantial costs of the interlocutory application, he would not receive the benefit of the order for costs in his favour for a considerable time. It is fair and just that his costs be taxed immediately on this ground, either alone or in conjunction with the next ground.

---

31 For example, an argument about legal professional privilege or confidentiality.

Separate or discrete issue

80 As with the other two grounds, this third ground has been formulated slightly differently in the cases.

81 In *Fiduciary*, Barrett J described this third ground as being where the application determines "a separately identifiable matter or may be viewed as the completion of a discrete aspect" of the case.[32]

82 In *Australian Agricultural Co Ltd v AMP Life Ltd*,[33] Sackville J described the application for an interlocutory injunction as "a self-contained part of the proceedings."[34]

83 The injunction application falls within these principles, however formulated. The injunction application concerned the separate or discrete question of Clayton Utz's entitlement to retain Mr Myers in this proceeding. The fact that at the trial there will be an examination of some of the factual matters referred to in the current affidavits (such as Mr Dale's dealings with his partners, or his conduct in relation to the Ebner matter) does not detract from that finding.

84 Although it formed part of the same summons as a strike out application, in fact the injunction application was treated as a separate application; there were not hearings or submissions which concerned the injunction application and other unconnected matters. The rest of the proceeding was largely put "on hold" until the determination of the injunction application. This means that the immediate taxation of the costs of the injunction application should not be unduly burdensome, in terms of identifying the costs which relate to that application.

85 In coming to the conclusion that costs should be taxed immediately, I have borne in mind the policy reasons behind the introduction of r 63.20.1. However, I am satisfied that the demands of justice require a departure from the general rule.

---

32 At [11].
33 [2003] FCA 1134.
34 At [14].

Conclusion

86 For these reasons, I propose to order:

(1) That Clayton Utz pay Mr Dale's costs of and incidental to the application made in paragraph 1 of the summons dated 14 February 2012, including all reserved costs:

(a) On a party-party basis for costs incurred prior to 1 April 2013; and

(b) On a standard basis for costs incurred thereafter.

(2) Those costs may be taxed immediately.

CERTIFICATE

I certify that this and the 18 preceding pages are a true copy of the reasons for decision of Hollingworth J of the Supreme Court of Victoria delivered on 22 November 2013.

DATED this 22nd day of November 2013.

.....
Associate