Supreme Court

New South Wales

Case Name:	Gupta v Fordham Laboratories Pty Ltd (No 2)
Medium Neutral Citation:	[2018] NSWSC 694
Hearing Date(s):	On the papers
Date of Orders:	18 May 2018
Decision Date:	18 May 2018
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	(1) Order the defendant to pay the plaintiff's costs of the proceedings, including the cross-claim, fixed in the amount of $45,000 net of GST.
Catchwords:	COSTS – Plaintiff successful in obtaining order for specific performance – Defendant also partly successful on cross-claim – Whether costs should be apportioned – Application by plaintiff for gross sum costs order under s 98(4)(c) of the Civil Procedure Act 2005 (NSW)
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 98(1), (4) Uniform Civil Procedure Rules 2005 (NSW), r 42.1
Cases Cited:	Beach Petroleum NL v Johnson (1995) 57 FCR 119 Bostik Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304 Corbett Court Pty Limited v Quasar Constructions (NSW) Pty Limited [2008] NSWSC 1423 Green Camel Pty Ltd v Urban Ecological Systems Ltd [2017] NSWSC 362 Gupta v Fordham Laboratories Pty Ltd [2018] NSWSC 551 Hamod v State of New South Wales [2011] NSWCA 375 Harrison v Schipp (2002) 54 NSWLR 738; [2002] NSWCA 213

	Hughes v Western Australian Cricket Association (Inc) (1986) 8 ATPR 40-748 Idoport Pty Limited v National Australia Bank Limited [2007] NSWSC 23 In the matter of Optimisation Australia Pty Ltd (Costs) [2018] NSWSC 280 James v Surf Road Nominees Pty Limited (No 2) [2005] NSWCA 296 Leary v Leary [1987] 1 All ER 261 Macquarie International Health Clinic Pty Ltd v South Sydney West Area Health Services (No 2) [2011] NSWCA 171 Penson v Titan National Pty Ltd (No 3) [2015] NSWCA 121 Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd (Supreme Court (NSW), Hodgson CJ in Eq, 3 June 1998, unrep) Savage v Australian Unity Funds Management Ltd [2011] NSWCA 270 Short v Crawley (No 40) [2008] NSWSC 1302 Szanto v Bainton [2011] NSWSC 985 Waters v PC Henderson (Australia) Pty Ltd [1994] NSWCA 338
Category:	Costs
Parties:	Ranjan Gupta (Plaintiff) Fordham Laboratories Pty Ltd (Defendant)
Representation:	Counsel: L W Chan (Plaintiff) PJ McEwen SC with D Birch (Defendant) Solicitors: McCray Legal (Plaintiff) McDermott & Associates (Defendant)
File Number(s):	2016/00371617
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR**: On 1 May 2018, I handed down judgment (*Gupta v Fordham Laboratories Pty Ltd* [2018] NSWSC 551) in a dispute as to the status of the

plaintiff (Mr Gupta's) tenancy of commercial premises in a neighbourhood shopping centre in South Camden owned by the defendant (Fordham Laboratories Pty Ltd) and as to the cross-claim brought by Fordham for damages in respect of alleged breaches by Mr Gupta of his obligations as tenant in relation to the said premises. In these reasons I adopt the same abbreviations used in my principal judgment.

2 I concluded that Mr Gupta had not (as Fordham had contended) abandoned his rights under the agreement for lease that had come into existence on the valid exercise of the option granted to him under his original lease of the premises; nor was he now estopped from exercising those rights. I ordered that Fordham specifically perform the said agreement for lease (by providing to Mr Gupta, within 28 days, a lease for execution by Mr Gupta on the terms provided for under the option clause in the Lease (cl 4.6) with a commencement date of 30 June 2015 and at a commencing rental of $47,644.13 per annum). That order was expressly made subject to the provision by Mr Gupta to Fordham, within 21 days, of a written undertaking to rectify certain extant breaches of lease and to indemnify Fordham for any claim by any other tenant in the shopping centre of which the premises form part in relation to condensate discharge from the lines on the external walls of the building in relation to the premises. On Fordham's cross-claim, I made various orders in relation to breaches by Mr Gupta of his obligations in respect of the tenancy.

3 I expressed the tentative view that Fordham should pay Mr Gupta's costs of the proceedings, given that Mr Gupta had had a large measure of success on his claim, without which he would not have been able to retain his occupancy of the premises (see at [269] of my principal judgment) but reserved the question of costs to be dealt with on the papers following the provision of any written submissions by the respective parties.

4 Those submissions have now been provided. In summary, Mr Gupta seeks an order that Fordham pay his costs of the proceedings and of the cross claim; and that a gross sum costs order should be made fixing those costs in the sum of $52,590 (net of GST). Fordham, on the other hand, contends that the

appropriate order is that it pay 70% of Mr Gupta's costs of the proceedings as agreed or assessed on the ordinary basis (it does not agree to the proposition that there should be a gross sum costs order).

5 There is no dispute between the parties as to the applicable principles when exercising the power to award costs pursuant to s 98(1) of the *Civil Procedure Act 2005* (NSW). The power of the court to award costs is discretionary, subject to the rules of court and to statute, and the discretion is a very wide one. An order for costs in favour of the successful party is compensatory in nature in order to reflect the vindication of its successful claim, rather than punitive.

6 I have considered the respective costs submissions and am of the view, for the reasons set out below, that Fordham should pay roughly 85% of Mr Gupta's costs of the proceedings and that a gross sum costs order (net of GST) should be made in respect of those costs.

Submissions

7 Mr Gupta argues that this is a case where the general rule provided for under rule 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) – that costs follow the event unless it appears to the court that some other orders should be made as to the whole or any part of the costs – should apply. The circumstances in which the general rule may be displaced have been considered in various cases – see, for example, the examples given by Hammerschlag J in *Corbett Court Pty Limited v Quasar Constructions (NSW) Pty Limited* [2008] NSWSC 1423 (at [31]). The circumstances in which it may be appropriate to apportion costs where the losing party has succeeded on certain issues (or, conversely, where the otherwise successful party has failed on certain issues) are well-known (see *James v Surf Road Nominees Pty Limited (No 2)* [2005] NSWCA 296 (at [34]); *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 (at [38]); and *In the matter of Optimisation Australia Pty Ltd (Costs)* [2018] NSWSC 280 (at [13])).

8 Mr Gupta's written submissions on costs set out the examples given by Hammerschlag J in *Corbett Court v Quasar Constructions* (at [31]) of instances where the general rule may be displaced. Mr Gupta argues that the present

case falls within none of those examples and that the general rule has not been displaced. He argues that the dominant and only issue for him in the proceedings was his entitlement to an order for specific performance. He contends that Fordham's cross-claim was defensive in nature (aimed at establishing that Mr Gupta had engaged in disentitling conduct such that the court should not exercise its discretion to order specific performance of the agreement for lease) and points out that it sounded only in a small quantum of damages. Mr Gupta further argues that most of the hearing time was not occupied in addressing the breaches of lease alleged in the cross-claim.

9 Fordham, however, contends that this is an appropriate case in which to apportion costs on the basis of its success on a number of issues that it says were clearly definable and severable from the principal issue in the case, pointing to its success on its cross-claim in respect of: the air-conditioning defects and aerial penetration of the roof sheeting; the failure to maintain compliant fire extinguishers; the failure to maintain a disabled car space; the redecoration of the premises; the absence of a signage plan; the absence of evidence of insurance coverage; and the unauthorised sublease (see [250]-[262] of my principal judgment).

10 Fordham says that the breaches in respect of which it obtained orders in its favour were significant (noting that the order for specific performance was made subject to the giving of an undertaking to rectify those breaches and for Mr Gupta to indemnify it in relation to any claim by another tenant in respect of one of those breaches). Fordham argues that the issues in relation to those breaches occupied a significant part of the trial, though referring in particular to the extent of the affidavit evidence adduced by Fordham to prove the various breaches of lease (i.e., to time spent in preparation for the hearing as opposed to hearing time in the trial itself).

11 In that regard, Fordham points to the evidence required to establish the various breaches of lease relating to, first, the breaches relating to the air-conditioning defects and aerial penetration of the roof sheeting (proof of which involved evidence from Mr Lubrano of his observations of the installation of the air conditioning units; photographic evidence of the installations; evidence of

quotes with which Mr Lubrano was provided; evidence of Mr Lubrano's conversations with Mr Gupta and his staff; and evidence of Mr Lubrano's efforts to obtain a quotation to rectify the defects – see Mr Lubrano's affidavit sworn 7 April 2017 at [18]-[22], [34], [54]-[55], [65]; Mr Lubrano's affidavit sworn 5 September 2017 at [15], [18](e)); and, second, the failure to maintain complaint fire extinguishers (proof of which involved evidence from Mr Lubrano of his observations concerning the location of the fire extinguisher, the date stamps on it, and the fact that its inspection tag had not been punched for some years; evidence of his inquiries with Complete Fire Certification and his attendance with that company's representative to replace the fire extinguisher; and evidence of the relevant unpaid invoice – see Mr Lubrano's affidavit sworn 7 April 2017 at [89]-[94], [96]).

12 Fordham says that, while Mr Lubrano was not cross-examined at length about this evidence, the matter occupied some time at the trial in the resolution of numerous unsuccessful objections to the admissibility of the affidavit evidence. Fordham also notes that Mr Gupta had made a bare denial of the various breaches and had adopted the position (ultimately unsuccessfully – see [228]-[231] of my principal judgment) that Fordham, in continuing to accept rent, had irrevocably elected to affirm the lease (see defence to cross-claim at [24(c)], [31(a)], [40(a)], [43(a)], [45(a)], [47(a)], and [49(a)]). Fordham says that it was not until Mr Gupta served his latest affidavit on 25 October 2017, three business days before the hearing, that Mr Gupta seemed to acknowledge any breaches (referring by way of example to [9] of that affidavit) and stated his willingness to take all necessary steps to rectify any breaches (see [10] of that affidavit). (Mr Gupta argues, contrary to this, that the issues raised by Fordham were time-consuming to defend factually and required Mr Gupta to prepare four affidavits over an 11 month period; and that detailed calculations were required to be prepared to counter the allegation that Mr Gupta was in arrears of rent at the time of the hearing.)

13 By contrast, Fordham argues that the issue as to whether Mr Gupta had abandoned the agreement for lease arising out of his exercise of the option (or was estopped from exercising his rights under that agreement) was essentially resolved by an analysis of the correspondence passing between the parties

and their solicitors between 23 March 2015 and 26 September 2016; and says that, although that correspondence was voluminous, it did not require affidavit evidence of any complexity.

14 If it succeeds on its argument for apportionment of the costs having regard to its success on various issues in the cross-claim, Fordham submits that it would be preferable to make a single order that covers all of the issues (i.e., on a broad brush or "broad axe" percentage basis – see *In the matter of Optimisation Australia Pty Ltd (Costs)* at [16]) because of the complexities that multiple costs orders may create for costs assessor. Fordham refers in this regard to *Macquarie International Health Clinic Pty Ltd v South Sydney West Area Health Services (No 2)* [2011] NSWCA 171 (at [3]), for the proposition that the nature and extent of the apportionment should here be made on an overall general impression rather than by precise identification and quantification of the issues.

15 In this regard, Fordham submits that the percentage figure that it has suggested (70%) reflects the fact that Fordham was successful on severable issues of importance, which required Fordham to put on affidavit evidence of some complexity and which Mr Gupta did not seek to challenge substantively.

16 As noted above, Mr Gupta also seeks a gross sum costs order. The *Civil Procedure Act* provides for the making of such an order in s 98(4)(c):

> (4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:
>
> …
>
> (c) a specified gross sum instead of assessed costs…

17 Mr Gupta notes that the principles which inform the exercise of the discretion to make a gross sum costs order were summarised in *Idoport Pty Limited v National Australia Bank Limited* [2007] NSWSC 23 (at [9] per Einstein J) (and cited with approval in *Savage v Australian Unity Funds Management Ltd* [2011] NSWCA 270 by Young JA at [32] and by the Court of Appeal in *Hamod v State of New South Wales* [2011] NSWCA 375 at [794]; [814]). The purpose of rules permitting such orders has been said to avoid the expense, delay and aggravation involved in protracted litigation arising out of the process of

taxation or assessment of costs (see *Beach Petroleum NL v Johnson* (1995) 57 FCR 119 per Von Doussa J at 120; *Leary v Leary* [1987] 1 All ER 261 at 265). The court making a gross sum costs order should be confident that the approach taken to the estimate of costs is logical, fair and reasonable (see *Beach Petroleum v Johnson* at 123); but, once that threshold is crossed, the gross sums can only be "fixed broadly having regard to the information before the Court" (at 124), provided there is adequate information, and after the parties have had an adequate opportunity to make submissions.

18 Mr Gupta notes that in *Hamod v State of New South Wales* at [818]-[819], the Court of Appeal said:

> The power may also be exercised where a party's conduct has unnecessarily contributed to the costs of the proceedings, especially where the costs incurred have been disproportionate to the result of the proceedings: *Leary v Leary* [1987] 1 WLR 72; [1987] 1 All ER 261; *Sony Entertainment (Aust) Ltd v Smith; Microsoft v Jiang* (2003) 58 IPR 445; [2003] FCA 101; Ritchie's Uniform Civil Procedure NSW at [s 98.60].
>
> The assessment of any lump sum to be awarded must represent a review of the successful party's costs by reference to the pleadings and complexity of the issues raised on the pleadings; the interlocutory processes; the preparation for final hearing and the final hearing: *Smoothpool v Pickering* [2001] SASC 131. In the exercise of its discretion the court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment: *Harrison v Schipp* at 743; *Hadid v Lenfest Communications Inc* at [35]; *Auspine Ltd v Australian Newsprint Mills Ltd* (1999) 93 FCR 1 at 5; [1999] FCA 673.

19 In support of his application for a gross sum costs order, Mr Gupta points to the procedural history of the proceedings (set out in the affidavit affirmed by his solicitor, Mr Gregory McCray, on 8 May 2018; and see the chronology set out in my principal judgment) and to my observation (at [175] of my principal judgment) that the landlord/tenant relationship had been marked by considerable "ups" and "downs" (which I considered may have explained delays and/or difficulties in communication during the period in which the lease terms were the subject of negotiation). It is submitted by Mr Gupta that the protracted nature of the negotiations in relation to the new lease for the premises led to the ultimate breakdown of the relationship of the parties and he notes that for the last 2 years the parties have been in dispute. In those circumstances, Mr Gupta submits that a gross sum costs order would assist the parties to draw a line in the sand and start afresh with "a clear

understanding of their respective rights and obligations under the option lease now to be specifically performed" (see [268] of my principal judgment). Mr Gupta says that he is prepared to accept a significant discount in respect of his costs in order to facilitate this.

20 In that regard, Mr Gupta has put forward the invoices of his legal representatives as evidence of the costs incurred (that amount, after deduction of costs not referable to the proceedings, being in the order of approximately $89,000 inclusive of GST (see [21] of Mr McCray's affidavit)). It is submitted that the costs incurred are fair and reasonable and that, on assessment, Mr Gupta would recover at least 70%-80% of his solicitor/client costs (referring by way of example to what was said in *Hamod v State of New South Wales* at [786]; [791]). However, Mr Gupta would be prepared to limit his claim in relation to costs to 65% (i.e., to around $57,850 inclusive of GST), which on a net basis would mean a costs order of $52,590 (being $57,850 x 10/11).

21 Each party was given an opportunity to provide a response to the submissions of the other. Fordham reiterated its submission as to a 70% costs order being the more appropriate approach, arguing that Mr Gupta's submission in effect seeks 100% of the plaintiff's estimate of the adjusted GST inclusive costs rather than an independent third party's estimate of those costs, but it did not otherwise argue against a gross sum costs order. Fordham further submitted that:

> Given the discretionary aspects of this matter it should, in the context of costs, be borne in mind that the Plaintiff's original application before His Honour Judge [sic] Darke sought a two months' extension of his then occupancy to conclude a sale of his pharmacy business (without disclosing to the Court that the Defendant had offered this extension). Subsequently the Claim focused on the Option issue only with a result that the Plaintiff did not press or succeed on the two months' extension issue.

22 Pausing here, on that last submission, I do not propose to explore further the history of the proceedings in this Court. I have summarised in my principal judgment the procedural history of the matter. Whether or not Mr Gupta was prepared at an earlier stage to accept a regime whereby he would only obtain a short extension of his occupancy is now a matter of past history. As to any complaint about the matters disclosed to Darke J when the matter came before his Honour on an interlocutory application, I have insufficient material to form a

view as to the adequacy of disclosure – particularly when it is not apparent to me whether the alleged non-disclosure related to matters the subject of without prejudice privilege. At this stage of the proceedings it is not appropriate to delve into such issues, there being no application made in that regard.

Determination

23 There are, in essence, two issues raised by the competing submissions: first, whether there should be a reduction in the costs to be awarded to Mr Gupta who was, overall, the successful party - in order to reflect the fact that Fordham was successful in establishing (and obtaining orders in respect of) discrete breaches of the lease by Mr Gupta; and, second, whether there should be a gross sum costs order - in order to minimise ongoing expense, delay and aggravation in respect of the costs assessment process that would otherwise apply (assuming agreement as to costs cannot be reached).

24 As to the first, in *James v Surf Road Nominees Pty Ltd (No 2)* (at [34]) the Court of Appeal said (emphasis added):

> Where a matter involves multiple issues and the question before the court is whether it should make some other order as to costs other than the order that costs follow the event, a distinction is commonly drawn between cases which involve clearly discrete issues for determination, and those in which all issues are inseparable, or at least sufficiently linked, with respect to the overall disposition of a particular matter. In *Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd* (unreported, NSWSC, 3 June 1998), Hodgson CJ in Eq noted that *the obvious examples of a matter involving discrete issues is one where a plaintiff makes separate claims for different relief, or a claim by a plaintiff and a cross-claim by a defendant*.

25 In *Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd* (Supreme Court (NSW), Hodgson CJ in Eq, 3 June 1998, unrep) to which the Court of Appeal in *James v Surf Road Nominees Pty Ltd (No 2)* referred, had said (at 12) emphasis added):

> Dealing first with severability, I should state right away that I am not here dealing with the situation where there are separate claims for different relief, such as two claims by a plaintiff for different relief, or a claim by a plaintiff and a cross-claim by a defendant. In those cases, it is generally fairly clear that the overall winner will get the general costs of the action, *but will be liable to pay costs to the extent that they were increased by the separate claim on which he or she was unsuccessful.*

26 A number of authorities have considered the discretion to apportion costs where a particular issue is separable. It has been said that the courts approach

with “cautious disapproval” the prospect of “apportioning costs according to success in issues”: see Hodgson CJ in Eq in *Permanent Trustee v FAI General Insurance* at 4-5 and the authorities there cited. In *Short v Crawley (No 40)* [2008] NSWSC 1302, White J (as his Honour then was) cited a passage from *Waters v PC Henderson (Australia) Pty Ltd* [1994] NSWCA 338 in which Mahoney JA approved a statement that:

> Where the proceedings involve multiple issues the application of the rule that costs follow the event may involve hardship where a party succeeds on some issues and yet fails on others.

27 A successful party who has failed on certain issues may be deprived of the costs of those issues (or may be ordered as well to pay the other party’s costs of them – see *Hughes v Western Australian Cricket Association (Inc)* (1986) 8 ATPR 40-748 at [48,136]).

28 In the present case, the issues raised in Fordham’s cross-claim (while defensive in the sense that they were relied upon not only for the claimed damages but also as a discretionary matter to be weighed against an order for specific performance of the agreement for lease were it to be found not to have been abandoned and for vacant possession of the premises) related to distinct alleged breaches by Mr Gupta in relation to his tenancy of the premises. Fordham succeeded on a number of those issues (though not on the – perhaps most fundamental – allegation that there was a breach in relation to the payment of rent or other moneys in respect of the tenancy). I am persuaded that it is appropriate to reflect Fordham’s success on those discrete issues by a deduction in the percentage of costs that would otherwise be recoverable by Mr Gupta if the general rule as to costs were to apply. That is because issues in relation to the air-conditioning breaches and the like (though linked to the specific performance claim in that they were relied upon as discretionary matters weighing against such an order) were issues on which Fordham succeeded in obtaining relief that it would not otherwise have obtained and because Mr Gupta was found to have been in breach of his obligations as a tenant in a number of respects.

29 A broad brush approach should be adopted in this regard. As a matter of general impression, the claims made by Fordham in relation to breaches of the

lease, other than the alleged arrears, played only a minor role in the actual hearing before me (although I accept that Fordham was put to the expense of adducing evidence in proof of the various breaches in light of Mr Gupta's defence to the cross-claim). I consider that the appropriate percentage discount to reflect Fordham's success on the various breaches would be 15%, thus notionally reducing the solicitor/client total costs (on Mr Gupta's solicitor's calculations) from around $89,000 to around $75,650.

30 As to the second of the issues, the gross sum costs order, I am of the opinion that, having regard to the relatively small amount of costs in issue and the desirability of avoiding expense, delay and aggravation which would be caused if the costs assessment process were to be protracted, it would be appropriate to make a gross sum costs order. The invoices in relation to costs are in evidence. They contain detailed narratives of the legal services provided. Fordham has had an opportunity to review them and to make submissions in relation to the making of such an order. This means that this is a case where I am confident I can arrive at an appropriate sum (*Harrison v Schipp* (2002) 54 NSWLR 738; [2002] NSWCA 213 at [22], referred to in *Hamod v State of New South Wales* at [813]). On the face of the invoices, the approach taken by the plaintiff to estimate its costs appears to be logical, fair and reasonable (*Beach Petroleum v Johnson* at 123; *Hamod v State of New South Wales* at [820]).

31 The estimate by Mr Gupta's solicitor as to a 70%-80% recovery on a party/party basis out of the total solicitor/client costs is commensurate with the rule of thumb adopted in various other matters (see, for example, *Green Camel Pty Ltd v Urban Ecological Systems Ltd* [2017] NSWSC 362 at [59]-[63]; *Szanto v Bainton* [2011] NSWSC 985 at [100]) and, in any event, Mr Gupta seeks less than the bottom end of that range (65%) by way of a costs order in the present proceedings, to reflect the avoidance of the possible expense, delay and aggravation of a costs assessment process (see above at [19]). I note that the approach in other cases, in arriving at a sum for a gross sum costs order, has been to apply a percentage reduction directly to the solicitor/client costs: for example, see *Penson v Titan National Pty Ltd (No 3)* [2015] NSWCA 121 at [24] (per Campbell AJA) (where there was an award of 70% of the solicitor/client costs).

32 Accordingly, to reflect my conclusions on the first and second issues, I propose to fix the costs payable to Mr Gupta in an amount which represents 65% of $75,650 (that being the allowed percentage of his solicitor/client costs – 85%) (i.e., $49,172.50). On a net of GST basis (that being the basis requested by Mr Gupta) this would on my calculations be $44,702.27, which I will round up to $45,000.

33 Accordingly, I make the following order:

(1) Order the defendant to pay the plaintiff's costs of the proceedings, including the cross-claim, fixed in the amount of $45,000 net of GST.

34 This then disposes of the proceedings.

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