Costs and limitation issues

Partner David Cross considers the circumstances in which the courts will order that a non-party bear the cost of litigation.

Lawyer Rachel Nemes reports that the limitation period for most claims under the Trade Practices Act 1974 – such as claims in relation to misleading and deceptive conduct in trade and commerce – has been increased, from three to six years.

Costs orders against non-parties

Entanglement in commercial litigation is usually costly. The forensic and adversarial nature of our trial process requires that a great deal be done both before and during trial in order to ensure that all relevant issues are adequately explored.

The victor's 'compensation' for being entangled in this system is usually viewed as being an order for costs against the loser.

However, the victor is not restricted to claiming costs against the losing party. In the past 18 months or so there has been an interesting series of cases in the Federal Court where orders for costs have been made against the following:

- The solicitor for the unsuccessful plaintiff.
- The 'guiding mind' of a corporate litigant.
- Informants who caused a statutory officer to commence unsuccessful legal proceedings.
Given the cost of modern litigation, and the successful party’s understandable desire to ‘leave no stone unturned’ in recovering those costs, it is to be expected that the number of these applications will increase.

**Costs against the solicitors - Cook & Ors v Pasminco Limited** (Lindgren J, Federal Court, 12 December 2000)

In this matter, Lindgren J dismissed a claim brought by several applicants against Pasminco for injury to their health alleged to have been caused by noxious emissions from the company’s smelters at Cockle Creek and Port Pirie.

The applications were dismissed because the federal element of the litigation (which was relied upon to attract the Federal Court’s jurisdiction) was found not to be genuine.

Pasminco applied for an order that its costs occasioned in the litigation up to the point of the dismissal should be borne by the solicitor for the applicants (the law firm Coleman and Greig). Lindgren J agreed and said:

> ...in my opinion the conduct of the solicitors in the present case warrants the award of an order that they pay Pasminco’s costs on an indemnity basis. The reason is that on the evidence, including the lack of relevant evidence from them explaining the position, I infer that they commenced proceedings in this court based on the [Trade Practices Act] claims, without any or any proper consideration of the prospects of success of those claims...If they had responsibly considered the matter they would have appreciated that the Federal claims had no prospects of success at all.

Orders for costs against solicitors, while not uncommon, are relatively novel.

In the past, orders have been made (usually at an interlocutory level) with the object of punishing solicitors (rather than the client) for failure to meet a court timetable or other oversights causing delay.

What makes the Pasminco case interesting is that costs were ordered in the context of litigation that was dismissed because it was brought in the wrong court, not because it was for all purposes hopeless. Nor was there a suggestion that the lawyers had been guilty of neglect or delay.

Coleman and Greig have filed an appeal to the Full Federal Court.

**Costs against the 'guiding mind' - Yates v Boland & Ors** (Full Federal Court, 21 December 2000)

In this matter, the Full Federal Court dismissed an appeal brought by Mr Yates against a decision of Branson J the result of which was that he was jointly liable (with the company Yates Property Corporation Pty Limited (YPC)) to pay the costs of all of the respondents in Federal Court litigation.

YPC had sued its former solicitors, senior counsel and junior counsel for negligence. It was claimed that the legal advisers had negligently advised YPC in relation to some Land and Environment Court proceedings. Those proceedings arose from the compulsory acquisition by the NSW Government of land owned by YPC at Darling Harbour, Sydney.

Mr Yates was a director of YPC and was the CEO. The effect of the decision by Branson J was that the respondents could look to both Mr Yates and the company YPC in order to realise the order for costs.

As a practical matter it meant that Mr Yates would have to pick up any shortfall if YPC’s resources were insufficient to meet the bill.

The bases upon which Branson J made the order (and upon which the Full Federal Court rejected Mr Yates’ appeal) were as follows:

- The party (YPC) lacked sufficient means and could be regarded as a ‘man of straw’.
- Yates himself had played an active part in the conduct of the litigation and had an interest in the subject of that litigation.

All of this is consistent with earlier High Court authority (*Knight v FP Special Assets Limited* (1992) 174 CLR 178).
Costs against informants - *Hamberger v Williamson & Anor* (Marshall J, Federal Court, 9 March 2001)

This case arose out of proceedings commenced by the Employment Advocate (Jonathan Hamberger) in which punitive orders were sought against the CFMEU (a registered trade union) under the *Workplace Relations Act 1916* (Cth).

The proceedings were commenced following information provided to the employment advocate by two individuals. The information was to the effect that officials of the CFMEU had sought to coerce persons to join the union.

During the main hearing it became clear that the evidence of the informants was fabricated. One of the informants compounded his difficulty when it was revealed that he had secretly (and, therefore, unlawfully) taped a discussion with a union official.

Following its success, the CFMEU sought an order for costs against the Employment Advocate and the two informants.

The claim against the Employment Advocate failed because of a section in the Workplace Relations Act which prohibits the making of costs orders in any proceeding under the Act unless it is determined that the proceedings were instituted vexatiously or without reasonable cause. In practice this constitutes quite a high standard and it was not surprising that the CFMEU failed to make it out against the statutory official.

However, the same restriction does not apply to the making of costs orders against non-parties (ie the two informants).

Marshall J had little hesitation in ordering that the two informants pay the CFMEU's costs. In arriving at this decision Marshall J relied upon *Knight v FP Special Assets Limited* and, in particular, the fact that the informants (although non-parties) had played an active part in the litigation and had an interest in the subject of the litigation.

Intriguingly, there was no consideration of the 'man of straw' issue upon which the reasoning in *Knight* was equally based.

Marshall J also found that it was consistent with the interests of justice that the order be made because the informants:

- Misled the Employment Advocate.
- Deliberately concocted a situation designed to provoke the CFMEU into an alleged breach of the Act.
- Gave highly suspect and implausible evidence.

**Summary**

The successful party in litigation, particularly in the Federal Court and especially when the unsuccessful party may not have sufficient assets to meet an award of costs, should give consideration to seeking costs orders against:

- The legal advisers to the unsuccessful party.
- The guiding mind of a corporate litigant.
- Informants who caused a statutory officer to commence unsuccessful proceedings.
- Any other third party funders of the litigation.

**New limitation period for Trade Practices Act 1974 claims**

Most corporations will be familiar with the consumer protection provisions of the *Trade Practices Act 1974* (TPA) and, in particular, sections such as s52, which prohibit misleading and deceptive conduct in trade and commerce. A remedy for breach of s52 and other consumer protection provisions is recovery of damages under s82(1).

Readers may be aware that the limitation period for such claims was 3 years from the date on which the cause of action accrued. However, recent amendments to the TPA, contained in the *Trade Practices Amendment Act (No.1) 2001*, which came into effect on 26 July 2001, have substantially extended this limitation period to 6 years.
Accrual of the cause of action

A cause of action accrues under s82(1), not when a corporation makes a misrepresentation, but when actual (as opposed to potential) loss or damage is suffered as a result of that misrepresentation. The amendments mean that actions can now be commenced under s82(1) up to 6 years from the date on which the relevant loss or damage was suffered.

Effect of the new limitation period

The new limitation period cannot enliven actions that were statute barred at the time the amendments came into effect. That is, an action that accrued more than 3 years ago will not be made current by the amendment. However, all actions that were within the 3-year limitation period at the time the amendments came into effect will now be subject to a 6-year limitation period. For example, a cause of action which accrued on 17 May 1999 (and would otherwise have expired on 17 May 2002) will now continue until 17 May 2005.

Plaintiffs assisted

This amendment brings the TPA in line with the limitation periods that apply to contractual and tortious claims and is clearly designed to assist plaintiffs who may have difficulty assembling a case within a 3-year limitation period. Defendants will therefore have a potential liability in relation to consumer protection claims for an additional 3 years.

Exception

It worthwhile noting, however, that s74J of the TPA was not amended. The limitation period for product liability actions against manufacturers and importers remains at 3 years.

Summary

Potential defendants need to be aware that potential claimants now have a longer period within which to bring TPA claims. Of course, potential claimants now have the benefit of the extended period.