FEDERAL COURT OF AUSTRALIA

Liu v Stephen Grubits and Associates [2019] FCAFC 24

Appeal from:	*Liu v Stephen Grubits and Associates (No 2)* [2018] FCCA 842
File number:	NSD 783 of 2018
Judges:	**REEVES, KERR AND LEE JJ**
Date of judgment:	12 February 2019
Catchwords:	**INDUSTRIAL LAW** – appeal from the Federal Circuit Court – whether primary judge erred in awarding costs against the appellant in a matter arising under the *Fair Work Act 2009* (Cth) **COSTS** – contention that there is no power for the Federal Circuit Court to award costs against a party in proceedings relating to a matter arising under the *Fair Work Act* – consideration of the construction and application of s 570 of the *Fair Work Act* in circumstances where s 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) does not apply in proceedings relating to a matter arising under the *Fair Work Act* – appeal dismissed – Federal Circuit Court does have power to award costs against a party when the preconditions specified in s 570(2) of the *Fair Work Act* are satisfied
Legislation:	*Acts Interpretation Act 1901* (Cth) ss 13, 15AA *Fair Work Act 2009* (Cth) ss 12, 539, 545, 569, 569A, 570, Pt 4-2 Div 4 *Federal Circuit Court of Australia Act 1999* (Cth) s 79 *Federal Court of Australia Act 1976* (Cth) s 43 *Judiciary Act 1903* (Cth) s 79
Cases cited:	*Australasian Meat Industry Employees' Union v Fair Work Australia (No 2)* [2012] FCAFC 103; (2012) 203 FCR 430 *Commissioner of Police for New South Wales v Eaton* [2013] HCA 2; (2013) 252 CLR 1 *Commonwealth v Baume* (1905) 2 CLR 405 *Cooper Brookes (Wollongong) Proprietary Limited v Commissioner of Taxation of the Commonwealth of*

	Australia (1981) 147 CLR 297 *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 229 FCR 221 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 91 ALJR 936
Date of hearing:	12 February 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	20
Counsel for the Appellant:	Mr I Chatterjee
Solicitor for the Appellant:	AHL Legal
Counsel for the Respondent:	Mr C Lambert
Solicitor for the Respondent:	Michael Green Legal

ORDERS

NSD 783 of 2018

BETWEEN:	**YUNLONG LIU** Appellant
AND:	**STEPHEN GRUBITS & ASSOCIATES** Respondent

JUDGES:	**REEVES, KERR AND LEE JJ**
DATE OF ORDER:	**12 FEBRUARY 2019**

THE COURT ORDERS THAT:

1. The amended notice of appeal filed 25 September 2018 is dismissed.
2. The appellant is to file an outline of submissions on the question of costs within 7 days.
3. The respondent is to file an outline of submissions on the question of costs within 14 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the transcript)

THE COURT:

1 A costs order was made by the primary judge in a Federal Circuit Court of Australia proceeding in relation to a matter arising under the *Fair Work Act 2009* (Cth) (**FW Act**). The only issue on this appeal is whether the Federal Circuit Court had power to make such an order in such a proceeding.

2 The issue arises this way.

3 Section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) (**FCCA Act**) was (and is) in the following terms:

> **Costs**
>
> (1) This section does not apply to family law or child support proceedings or proceedings in relation to a matter arising under the *Fair Work Act 2009* or section 14, 15 or 16 of the *Public Interest Disclosure Act 2013*.
>
> > Note: See section 117 of the *Family Law Act 1975* in relation to family law or child support proceedings. See section 570 of the *Fair Work Act 2009* for proceedings in relation to matters arising under that Act. See section 18 of the *Public Interest Disclosure Act 2013* for proceedings in relation to matters arising under section 14, 15 or 16 of that Act.
>
> (2) The Federal Circuit Court of Australia or a Judge has jurisdiction to award costs in all proceedings before the Federal Circuit Court of Australia (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which any other Act provides that costs must not be awarded.
>
> (3) Except as provided by the Rules of Court or any other Act, the award of costs is in the discretion of the Federal Circuit Court of Australia or Judge.
>
> (underlining added)

4 Section 570 of the FW Act provides:

> **Costs only if proceedings instituted vexatiously etc.**
>
> (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.
>
> > Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.
>
> (2) The party may be ordered to pay the costs only if:
>
> (a) the court is satisfied that the party instituted the proceedings vexatiously or

> without reasonable cause; or
>
> (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
>
> (c) the court is satisfied of both of the following:
>
> (i) the party unreasonably refused to participate in a matter before the FWC;
>
> (ii) the matter arose from the same facts as the proceedings.
>
> (emphasis added)

5 Shorn of unnecessary complication, the argument of the appellant against whom the costs order had been made, proceeded by reference to the following three propositions:

- *First*, the general power to award costs in the Federal Circuit Court is contained in s 79 of the FCCA Act and no other provision of the FCCA Act provides a specific power to award costs in a matter arising under the FW Act;
- *Secondly*, s 570 of the FW Act does not confer a power to award costs but rather operates as an express limitation on the discretion to award costs that is to be found elsewhere (this proposition is said to be supported by the decision of the Full Court in *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 229 FCR 221 at 252 [140]);
- *Thirdly*, given that sub-s 79(1) provides that the section "does not apply" in a matter arising under the FW Act (and no other specific provision exists), there is a want of statutory power to award costs by the Court in such matters.

6 The debate in written submissions largely focussed, unusually, on whether the conclusion reached by a Federal Circuit Court judge in another case (*Cross v Harbour City Ferries Pty Ltd t/as Harbour City Ferries (No 2)* [2017] FCCA 1713), that s 79 of the FCCA Act did provide such a power, through a process of "inserting words" into s 79, was correct. This was a distraction. The argument of the appellant fails because the second proposition identified above is unsound, which means the third proposition is based on a false premise.

7 *Melbourne Stadiums Ltd v Sautner* is not authority for the second proposition advanced. Two observations as to costs were made in that case by the Full Court (Tracey, Gilmour, Jagot and Beach JJ, White J agreeing), both of which were obiter: *first*, the Full Court observed that in a proceeding which involves causes of action pursuant to both the common law and the FW Act, s 570(1) of the FW Act operates, subject to the exceptions in s 570(2), to preclude the Court from making any order as to the costs of the entire proceeding (at 254 [157], 256 [173]); and

secondly, and more relevantly, at 252 [140], the Full Court noted that s 570 operates "as an express limitation on the broad discretion to award costs" which is conferred on this Court by s 43 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and on a cognate Victorian legislative provision. It is important, however, that this last observation is not misunderstood nor decontextualised. In a practical sense, the limitation in s 570 does operate as attenuating what would otherwise be a broad discretion contained in s 43 of the FCA Act in FW Act matters and any relevant provision under state law operating as "surrogate" federal law but, as is explained at [10] below, this is not determinative as to the identification of the power to award costs in the Federal Circuit Court in FW Act matters.

8 Section 570 of the FW Act does more than provide a fetter on powers to be found elsewhere. The limitation suggested by the appellant is not required by the text, and a purposive construction of s 570, in the context of Part 4-2 of the FW Act entitled "Jurisdiction and powers of courts", requires otherwise: see s 15AA of the *Acts Interpretation Act 1901* (Cth) (**AI Act**). One is required to interpret s 570 in accordance with the requirement "to ascertain the legislative intention by reference to the language of the instrument viewed as a whole": *Cooper Brookes (Wollongong) Proprietary Limited v Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297 at 320 (per Mason and Wilson JJ). For a recent explanation of the principled approach see *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 91 ALJR 936 at 940-941 [14] per Kiefel CJ, Nettle and Gordon JJ.

9 As s 560 provides, Part 4-2 of the FW Act is "about the jurisdiction and powers of the courts in relation to matters arising under this Act"; Divs 2 and 3 confer jurisdiction on the Federal Court and the Federal Circuit Court respectively, and Div 4 (within which s 570 is located), deals with, among other things, "costs … in relation to proceedings in the Federal Court, the Federal Circuit Court and, in some cases, a court of a State or Territory".

10 Of course, the FW Act contemplated that a matter arising under the FW Act could be the subject of litigation in the Federal Court, the Federal Circuit Court or an "eligible State or Territory court" being: (a) a District, County or Local Court; (b) a magistrates court; (c) the Industrial Relations Court of South Australia; (d) the Industrial Court of New South Wales; and (e) any other State or Territory court that is prescribed by the regulations: see ss 12, 539 and 545 of the FW Act. Each of these courts might have very different costs regimes. The evident purpose of Div 4, within a Part of the FW Act which deals with both the jurisdiction and power of courts, was to provide a uniform set of pre-conditions which must be satisfied before any award

of costs could be made by any of these courts in the matters regulated by the FW Act. The way this purpose was achieved across all the courts invested with jurisdiction and power to deal with a matter arising under the FW Act may differ, but the result is the same. More specifically:

(a) in relation to the *Federal Court*, as the Full Court noted in *Melbourne Stadiums Ltd v Sautner*, s 570 operates as a limitation on the broad discretion contained in s 43 of FCA Act when both those laws of the Commonwealth are read together;

(b) in relation to the *Federal Circuit Court*, the general power to award costs under s 79 of the FCCA Act is specifically excluded and s 570 operates according to its terms; and

(c) in relation to *eligible State or Territory courts*, s 570 operates according to its terms and any state or territory power to award costs of general application to proceedings in those courts is not "picked up" as being applicable without the limitations provided for in the FW Act, because a law of the Commonwealth provides otherwise than the relevant state or territory costs provision: see s 79 of the *Judiciary Act 1903* (Cth).

11 In the present case of the Federal Circuit Court, such an interpretation has the advantage of meaning that the provisions of s 79 of the FCCA Act (which do not apply to matters under the FW Act) and Part 4.2 of the FW Act (which deals with the jurisdiction and powers of courts as to matters under the FW Act), have different fields of operation and work harmoniously. It is well established that just as multiple provisions within a single statute should be construed so far as possible to operate in harmony, so too should different statutes of the same legislature: *Commissioner of Police for New South Wales v Eaton* [2013] HCA 2; (2013) 252 CLR 1 at 33 [98] (per Gageler J, in dissent but not on this point). Such an approach also makes sense of the note contained in s 79 of the FCCA Act (see [3] above). Of course, this note forms part of the Act: see s 13 of the AI Act. This note must, as must every provision of an Act, be given meaning and effect: *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (per Griffith CJ). The appellant's contentions give the Note no work to do. Applying the Note as part of the text of the Act, the Note works to direct attention to where the provisions relating to costs in FW Act matters are found, in circumstances where the application of s 79 of the FCCA Act in such matters has been specifically excluded.

12 Leaving aside the broader context of the FW Act and how it operates harmoniously with the FCCA Act, the limitations for which the appellant contends are in tension with the terms of Div 4 of the FW Act itself.

13 Section 570 provides that a party "may be ordered by the court to pay costs", but only in three identified circumstances: (a) in accordance with sub-s 570(2); (b) in accordance with s 569; or (c) in accordance with s 569A.

14 Despite minor textual differences, ss 569 and 596A work similarly to sub-s 570(2): all provide that the general prohibition against costs orders in s 570(1) does not apply if certain criteria are met. In the case of s 569, it is where the Commonwealth Minister intervenes or appeals a judgment; in the case of s 569A, the same criteria are relevant in relation to the same actions by a State or Territory Minister. Subsection 570(2) also provides that costs "may be ordered" but specifies different criteria or pre-conditions for the power to be engaged in relation to an award against a party.

15 Although notes in the FW Act do not form part of that Act (by reason of the operation of s 40A of the FW Act), recourse can be had to the note in s 570 (see [4] above) to confirm the ordinary meaning conveyed in accordance with s 15AB of the AI Act. This note expressly provides that the "Commonwealth might be ordered to pay costs *under section 569*" and a "State or Territory might be ordered to pay costs *under section 569A*". The same can be said of the other costs provision: a party might be ordered to pay costs *under subsection 570(2)*.

16 The appellant placed much reliance on s 545(1) of the FW Act, noting that this gave a power to make such order as the Federal Court or the Federal Circuit Court considers appropriate upon finding that a civil penalty provision had been contravened. This type of provision is not unusual and provides two federal courts with the statutory power to provide a civil remedy: see Part 4-1 Div 2 of the FW Act. The restriction as to costs (which applies also to eligible state and territory courts), however, is to be found in that Part of the FW Act (Part 4-2) which deals with the topic of the jurisdiction and power of courts.

17 Finally, it is worthwhile noting that this construction is consistent with the extrinsic materials. The explanatory memorandum (**EM**) which accompanied the amending bill which eventually became the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), and which led to the introduction of s 79 of the FCCA Act, relevantly stated at [601]-[603]:

> Together these items make consequential amendments to subsection 79(1) to make it clear that the general costs provisions contained in that section do not apply to proceedings in relation to a matter arising under the FW Bill.
>
> In a proceeding where the Court is exercising jurisdiction under the FW Bill, the Court may only order a party to pay costs in accordance with clause 570 of the FW Bill.

> The ability of the courts to awards costs in workplace relations matters has been limited since 1904 and is consistent with discouraging legalism in proceedings before industrial courts.
>
> (emphasis added)

18 Although the reference to 1904 may be somewhat ahistorical (see *Australasian Meat Industry Employees' Union v Fair Work Australia (No 2)* [2012] FCAFC 103; (2012) 203 FCR 430 at [3] per Jessup and Tracey JJ), the statutory purpose is plain and is reflected in the text. The logic of the appellant's argument would be that costs could be awarded in FW Act matters by the Federal Court or any eligible State or Territory court but not by the Federal Circuit Court. To describe that result as anomalous would be an exercise in understatement (apart from constituting a result which means that the legislative intention as revealed by the EM must have miscarried).

19 When s 570 is construed in accordance with principle, the contention that there is a want of statutory power to award costs by the primary judge in this matter arising under the FW Act is misconceived.

20 The appeal must be dismissed. No occasion arises to consider the respondent's contention that the costs order could otherwise be justified by reference to the "implied powers" of the Federal Circuit Court because, it is contended, the applicant was engaged in abuse of process. Leave to appeal was limited to the statutory construction issue.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Reeves, Kerr and Lee.

Associate: 

Dated: 13 February 2019