FEDERAL COURT OF AUSTRALIA

Ashby v Slipper [2015] FCA 63

Appeal from:	Application for leave to appeal: *Ashby v Slipper* [2014] FCA 973
File number:	NSD 968 of 2014
Judges:	**MANSFIELD, SIOPIS AND GILMOUR JJ**
Date of judgment:	21 April 2016
Date of hearing:	Heard on the papers
Date of last submissions:	14 August 2015
Category:	No Catchwords
Number of paragraphs:	101
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ORDERS

NSD 968 of 2014

BETWEEN:	**JAMES HUNTER ASHBY** Applicant
AND:	**PETER SLIPPER** Respondent

JUDGES: **MANSFIELD, SIOPIS AND GILMOUR JJ**

DATE OF ORDER: **21 APRIL 2016**

THE COURT ORDERS THAT:

1. Leave be granted to appeal from the order made on 11 September 2014 vacating the order made on 17 August 2012 that the respondent pay the applicant's costs thrown away by reason of the amendment of the respondent's amended points of claim of 26 June 2012 (pursuant to leave to amend given on 17 August 2012) on an indemnity basis.
2. The appeal be dismissed.
3. If either party seeks an order for costs of the said application and of the appeal, direct that he file and serve his written submissions within seven days and that any responsive submissions be filed and served within a further seven days from service of these submissions, to the intent that the Court will determine any application for costs on consideration of the written submissions.

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

REASONS FOR JUDGMENT

THE COURT:

1 The applicant seeks leave to appeal from Order 1 of a judge of the Court made on 11 September 2014: *Ashby v Slipper* [2014] FCA 973 (the primary decision). That order is in the following terms:

> 1. The indemnity costs order made on 17 August 2012 is vacated.

2 Obviously, it is necessary to identify the context in which that order was made. It is set out below.

3 For the reasons given, in our view the application for leave to appeal should be granted and having granted leave to appeal, the appeal should be dismissed.

THE CONTEXT OF THE ORDER

4 On 20 April 2012, the applicant commenced a proceeding (the principal proceeding) against the Commonwealth of Australia and the respondent. In essence, the applicant made two claims for relief:

(1) a claim under the *Fair Work Act 2009* (Cth) (Fair Work Act) that he had suffered adverse action by both the Commonwealth and the respondent in the form of sexual harassment; and

(2) a claim for damages for breach by the Commonwealth of his contract of employment by "involving [him] in questionable conduct in relation to travel", namely conduct in relation to cabcharges.

The claims as against the Commonwealth were ultimately resolved and the principal proceeding against the Commonwealth was discontinued by consent in September 2012.

5 On 8 June 2012, the respondent filed an interlocutory application seeking, among other things, an order pursuant to r 26.01 of the *Federal Court Rules 2011* (Cth) (the Rules) that judgment be given against the applicant because the proceeding as against the respondent was an abuse of process of the Court or, alternatively, he sought a permanent stay of the proceeding on that ground, or as a further alternative, an order pursuant to r 6.02 that the applicant must not continue the proceeding against the respondent without leave on the ground that the applicant had commenced a vexatious proceeding against the respondent (the summary dismissal application).

6 The trial judge in the principal proceeding directed the exchange of points of claim and points of defence on the summary dismissal application. Following the filing of points of claim on the summary dismissal application on 25 June 2012 (subsequently amended on 26 June 2012) (APOC), it was directed that the applicant need not file his proposed evidence resisting the application, as the APOC asserted unlawful disclosure of the respondent's private diary to certain persons (in particular in paras 21 and 31 of the APOC). The hearing of that application commenced on 23 July 2012, and the respondent's evidence was completed on that occasion.

7 On that date, and after the respondent's case was completed, the applicant filed his response to the APOC. He also filed a Notice under s 78B of the *Judiciary Act 1903* (Cth) of a matter arising under the Constitution, namely the extent to which the implied freedom of political communication would require a court to decline to enforce a confidentiality provision in a valid contract (or by reason of equitable duties of confidence) when enforcement of that provision (or that obligation) would prevent disclosure of information that prima facie revealed an iniquity and/or that it was in the public interest to disclose.

8 The hearing of the summary dismissal application was adjourned to a later date. On 9 August 2012, during the period before the hearing resumed, the respondent by his solicitors wrote to the applicants' solicitors to inform them that the respondent proposed to amend paras 21 and 31 of the APOC to delete the word "unlawfully" wherever it appeared in those paragraphs. The solicitors for the applicant on 13 August 2012 gave notice that the applicant objected to the late removal of the allegations of unlawfulness and reserved his rights in relation to any application made as to costs. In the light of that response, on 13 August 2012, the respondent filed an interlocutory application seeking leave to delete the word "unlawfully" wherever it appeared in paras 21 and 31 of the APOC.

9 On 17 August 2012, the judge hearing the summary dismissal application (the docket judge) granted leave to the respondent to further amend the APOC filed on 26 June 2012 by deleting the word "unlawfully wherever it appeared in paras 21 or 31 of the APOC. The respondent was ordered to pay the applicant's costs thrown away by reason of the amendment on an indemnity basis (Indemnity Costs Order). That is now the subject of this application. The costs of the interlocutory application of 13 August 2012 were reserved. It is clear that order relates to that particular amendment. The costs thrown away would be those costs incurred between the date that allegation of unlawfulness was first made and 17 August 2012 solely by

reason of that allegation of unlawfulness. They would not be the costs incurred in that period in the general preparation of the principal proceeding, or in the preparation for the summary dismissal application (save for those costs incurred only because the word unlawfully was included in the APOC) and as costs incurred in filing and serving amended points of defence. The assertion there was disclosure of the private diary stood.

10 On 30 August 2012, the respondent filed a further interlocutory application requesting that the judge hearing the matter exercise the power conferred by r 39.04 to vacate the Indemnity Costs Order. That application was fixed to be heard on 2 October 2012. In the meantime, as noted, in September 2012, the applicant and the Commonwealth reached an agreement that resolved the applicant's claims against the Commonwealth, and the proceeding against the Commonwealth was discontinued by consent.

11 On 5 October 2012, the respondent's application to vacate the Indemnity Costs Order was heard. That application was dismissed; therefore the Indemnity Costs Order stood. No application for leave to appeal, or any appeal, was then made against the Indemnity Costs Order or against the order of 5 October 2012.

12 In the meantime, the summary dismissal application was heard. Judgment on that application was given on 12 December 2012: *Ashby v Commonwealth (No 4)* (2012) 209 FCR 65. The application was successful, and the principal proceeding was dismissed. The applicant was ordered to pay the costs of the respondent of the principal proceeding, save that the amount of the Indemnity Costs Order was to be set off against those costs.

13 There was an appeal by leave from those orders. It was successful: *Ashby v Slipper* (2014) 219 FCR 322. The costs orders made by the judge on 12 December 2012 were also set aside, leaving the Indemnity Costs Order made on 17 August 2012 in place. The Full Court also consequently ordered the respondent to pay the costs of the application for leave to appeal and the costs of the appeal. On 10 June 2014, that order as to costs was vacated by the Full Court: *Ashby v Slipper (No 2)* [2014] FCAFC 67, as it was concluded that the Court had no power to award costs, given the terms of s 570 of the Fair Work Act.

14 The applicant then applied on 18 June 2014 to the Full Court under r 39.04 of the Rules to have its orders in *Ashby v Slipper (No 2)* (above) set aside, in effect to restore the costs orders first made when the appeal was allowed and the status of the principal proceeding was restored, and then (by proposed amendment to the application) the applicant also sought

orders that the costs orders should extend so that both the Commonwealth and the respondent should pay the costs of the respondent's summary dismissal application and the costs of the application of 18 June 2014.

15 On 9 February 2015, the Full Court refused the applicant leave to amend his application to the Full Court by extending his claim for costs of the summary dismissal application to a claim for costs against the Commonwealth. It also refused to vacate the orders as to costs made by the Full Court on 10 June 2014, as set out in [13] above: *Ashby v Slipper (No 3)* [2015] FCAFC 9.

16 By reason of the above event, the costs of the appeal had been finally resolved, and the principal proceeding had been restored. The only costs order which remained was the Indemnity Costs Order.

17 It is now appropriate to refer to the course of the principal proceeding after its status was restored by the order of the Full Court as set out also in [13] above.

18 On 12 March 2014, the principal proceeding was listed for hearing for 10 days, commencing on 30 June 2014.

19 On 18 June 2014, the applicant filed an interlocutory application seeking leave to discontinue the principal proceeding on certain terms. The applicant's reasons for discontinuance were set out in an affidavit affirmed by his solicitor on 18 June 2014 in support of that application. They included:

(1) the disparity in the funding for legal costs available to the respondent as a consequence of the Commonwealth having agreed to fund the respondent's legal costs and the Full Court having vacated the costs orders that had been made in the appellant's favour;

(2) the apprehension that the respondent did not have funds to pay any damages or compensation which might be awarded in the event the appellant was successful in the principal proceeding;

(3) the fact that the applicant had already achieved some satisfaction that the respondent's conduct, the subject of complaint, would not be repeated and some vindication by the decision of the Full Court;

(4) recognition of the deteriorating mental health of the respondent; and

(5) the fact that the issue of the respondent's misuse of his travel entitlements, which had been of concern to the appellant, was by then the subject of separate criminal proceedings.

For present purposes, it is not necessary to make any findings based on those assertions.

20 On 23 June 2014, the primary judge granted leave to the applicant to discontinue the principal proceeding on the terms agreed, including that there be no order as to costs but, at the request of the respondent, on terms that enabled the respondent to pursue an interlocutory application seeking to vacate the Indemnity Costs Order. The principal proceeding was duly discontinued.

21 On 23 June 2014, the respondent also filed an interlocutory application seeking, among other things, an order under r 39.04 vacating the Indemnity Costs Order. The power to make such an order under r 39.04 was available because the Registrar had not formally entered the Indemnity Costs Order.

22 The application was heard on 2 September 2014. Senior counsel for the respondent acknowledged that the Indemnity Costs Order was properly made at the time it was made, but argued that it was "unfair" for the applicant to now keep the benefit of a costs order in circumstances where he had discontinued the principal proceedings.

23 On 11 September 2014, the primary judge delivered the primary decision ordering that the Indemnity Costs Order be vacated.

24 On 24 September 2014, the applicant filed an application for leave to appeal from that decision. The applicant requested that his application for leave not be determined until his interlocutory application filed on 18 June 2014 in the appeal proceeding and referred to at [14] above had been determined, as its outcome may have made an appeal from the decision of the primary judge of little practical utility. As noted, on 9 February 2015, the Full Court dismissed the applicant's interlocutory application of 18 June 2014.

25 Hence, it is now necessary to address the application for leave to appeal from the order made on 11 September 2014 that the Indemnity Costs Order be vacated.

PROCEDURE

26 By orders made on 29 April 2015, the Chief Justice directed that this application be heard by a single judge, based upon written submissions, to decide on the papers whether the

application for leave to appeal should be heard separately from, or concurrently with, the proposed appeal, and, if the application for leave to appeal is to be heard separately, to hear and determine it. If leave to appeal is to be granted, or the application for leave to appeal is to be heard concurrently with the appeal, directions were to be given for doing so and the matter would be heard by a Full Court constituted by Mansfield, Siopis and Gilmour JJ.

27 It has been determined that the application for leave to appeal, and the appeal (if leave is given) should be heard by the Full Court, and that those matters should be heard on the papers. The parties have had an opportunity to make written submissions in relation to them.

28 The Court has also considered the interlocutory application of 12 June 2015 seeking leave for the applicant to file an affidavit of Michael Harmer of 12 June 2015 relating to the present application. That itself generated a further round of written submissions which have, of course, been considered.

THE APPLICANT'S CONTENTIONS

29 The applicant's written submissions do not accept that leave to appeal is necessary. The argument is expressed in the following way:

30 Leave to appeal from an interlocutory judgment is required by s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). The word "interlocutory" is not defined in that Act. In *Brouwer v Titan Corporation Ltd* (1997) 149 ALR 50 the Full Court held that the test for determining whether a judgment is final, as distinct from interlocutory, is whether the judgment finally determines, in a legal sense, the rights of the parties to proceedings.

31 Reference is then made to the observation of French J (as he then was) in *SZAJB v Minister for Immigration and Citizenship* (2008) 168 FCR 410 at [16]:

> The distinction can be "productive of much difficulty": *Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246 at 248 (Gibbs CJ). The discrimen, broadly stated, is that a judgment is final if it finally disposes of the rights of the parties. Otherwise it is interlocutory: *Hall* 117 CLR at 439-440 (Taylor J. Owen J agreeing) and 443 (Windeyer J): *Licul v Corney* (1976) 180 CLR 213 at 225.

32 The next step is to say that the orders made by the primary judge on 23 June 2014, when leave to discontinue the principal proceeding was given, including noting the condition that:

> (ii) the Applicant undertakes not to initiate any new proceedings against the Respondent in relation to any acts or omissions taken by the Respondent prior to the date of discontinuance of proceeding NSD 580 of 2012.

had the effect of finally disposing, in a legal sense, of the rights of the parties to those proceedings.

33 Additionally, or alternatively, it is said the judgment given by the primary judge on 11 September 2014 including, and in particular, to vacate the Indemnity Costs Order where final orders had already been made, must necessarily itself be "final" in that it finally disposes of the rights of the parties in the primary proceeding. Consequently, no further decision or further orders can be made and no further action can now take place in the principal proceeding as it has been concluded. Accordingly, the vacation of the Indemnity Costs Order of 11 September 2014 is final and leave is not required to appeal from that judgment.

34 Alternatively, the applicant says in support of his proposed appeal, that it involves important questions as to the legal principles to be applied in relation to interlocutory costs orders in any proceedings that are discontinued. The decision has significant implications, not only for the appellant, but also for litigants with limited funds more generally. Substantial injustice would result if this decision were to stand. Consequently, the criteria for the grant of leave to appeal are said to be made out.

CONSIDERATION

(1) Is leave to appeal required?

35 This issue can be addressed in short compass.

36 As the applicant points out, judgment is final if it finally determines the rights of the parties in a principal proceeding between them: *Hall v Nominal Defendant* (1966) 117 CLR 423 (*Hall*). The order under challenge vacated an earlier costs order made in the principal proceeding: the Indemnity Costs Order. The earlier costs order was obviously interlocutory. When it was made, the judgment did not dispose with finality any rights of the parties in the principal proceeding. Indeed, it did not finally dispose of any rights at all. That judgment is plainly interlocutory.

37 The orders made on 23 June 2014 were to give leave to the applicant to discontinue the principal proceeding, subject to preserving the ability of the respondent to maintain the interlocutory application to the Full Court in matter NSD 22 of 2013 to re-open its decision on costs (referred to in [20] above).

38 The next step was the interlocutory application of 23 June 2014 referred to at [20]-[22] above. As the primary judge said at [5] of the primary decision, both the applicant and the respondent "took their chances" as to whether that costs order would be vacated.

39 In our view, the Orders made on 11 September vacating the Indemnity Costs Order, did not finally determine the rights between the parties. The applicant was given leave to discontinue the principal proceeding on terms. He then chose to discontinue the principal proceeding. The effective determination of such rights as he had against the respondent was done by his act in discontinuing the principal proceeding. Subject to very confined circumstances (which are not said to have arisen), the notice of discontinuance itself brought the primary proceeding to an end, having regard to the undertaking noted at [30] above. But it is not correct to say, as the applicant does, that giving him leave to make that interlocutory application to vacate the costs order made on an interlocutory application to amend the APOC elevates the vacation of a costs order on an interlocutory application to the status of the final determination of rights on the principal proceeding.

40 It is not, and could not be, said that the Indemnity Costs Order finally determined the rights of the parties in the principal proceeding. How is it said, then, that the vacation of that order has that character? It is an order vacating an interlocutory order about the costs payable on the grant of leave to amend a pleading in an interlocutory application. It is itself, therefore, an interlocutory order. It did not finally determine any rights of the parties to the principal proceeding. That is consistent with *Hall* per Taylor J (Owen J agreeing) at 439-440 and per Windeyer J at 443, and the Full Court (Beaumont, Lee and Dowsett JJ) in *Merit Protection Commissioner v Nonnenmacher* (1999) 86 FCR 112.

(2) Should leave to appeal be given?

41 The test for granting leave to appeal from an interlocutory judgment comprises two questions:

(1) whether, in all the circumstances of the case, the decision is attended by sufficient doubt to warrant its being reconsidered by the Full Court; and

(2) whether substantial injustice would result if leave were refused, supposing the decision to be wrong.

See *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-400. Each case must be considered on its merits.

42 The applicant has addressed each of those questions in his written outline of contentions.

43 As to the first question, it is useful to refer to the proposed grounds of appeal, upon which, if leave to appeal is given, the applicant says then that the vacation of the Indemnity Costs Order should be set aside.

44 There are four proposed grounds of appeal. It is said that the primary judge:

(1) acted on a wrong principle in holding at [22] and [23] of the relevant reasons that the "very fact of discontinuance" warranted the interlocutory costs order being set aside;

(2) erred in stating at [26] that "there is considerable merit in a proposition that a party who seeks to discontinue a proceeding should not normally be permitted to retain the benefit of prior interlocutory costs orders";

(3) erred in failing to take into account material considerations set out in the affidavits of his solicitor filed on 20 June 2014 and 26 August 2014 as to the reasons the applicant discontinued the principal proceeding; and

(4) erred in taking into account the matters referred to in [27], in circumstances where the Court was in no position to make any assessment of the merits of the principal proceeding, and acknowledged that it would be wrong to do so.

45 The respondent says that the order is not attended with sufficient doubt to justify it being reconsidered by the Full Court. That is more particularly so, it is said, because the order was made in the exercise of a discretionary power under r 39.04 of the Rules, and so error of the kind referred to in *House v King* (1936) 55 CLR 499 must be shown.

46 Having regard to s 570(2) of the Fair Work Act, it may be accepted (as the respondent did before the primary judge) that the judge in the principal proceeding who made the Indemnity Costs Order did so because his Honour was satisfied that the respondent had behaved unreasonably, not only within the meaning of s 570(2) of the Fair Work Act, but also to such an extent as to justify indemnity costs. He obviously considered at least that the making of the allegation of unlawfulness and then the late withdrawal of the allegation of unlawfulness warranted the making of the Indemnity Costs Order in respect of any work that the applicant had undertaken as a consequence of that allegation having been made.

47 The primary judge noted the terms of r 39.04 authorising the Court to vary or set aside any judgment or order before it has been entered. It is not contended that the judge had no power

to do so on the hearing of the respondent's interlocutory application. Nor is it contended that his Honour misdirected himself about the caution necessary before that power is exercised.

48 His Honour then addressed at [18] the significance of the discontinuance of the principal proceeding to the interlocutory application he was considering. It is at the point of identifying, and addressing, the particular submissions that the applicant says that error arose. His Honour said at [23] that he accepted the submission as described in [22] as follows:

> In the circumstances of the present case, the fact seized upon by Senior Counsel for Mr Slipper – and the fact which warrants the indemnity costs order being set aside – is the very fact of discontinuance. That was self-evidently a fact which could not have been taken into account when the order was made some two years in advance of the decision to discontinue. Although the indemnity costs order was conceded to have been properly made and may well have remained in place had the proceeding continued to final hearing and judgment, the fact that changed the position between the parties was Mr Ashby's decision to discontinue. Given that decision, it was then said on behalf of Mr Slipper that it would be unfair to permit Mr Ashby to walk away from the proceeding he had instituted whilst at the same time retaining the benefit of the indemnity costs order.

49 It is correct to say that the fact that (ultimately) the principal proceeding would be discontinued was not then known to the judge then managing the principal proceeding – as it could not then have been. It is also correct to say that the discontinuance of the principal proceeding is a relevant matter to the respondent's application to vacate the Indemnity Costs Order.

50 The next step in the sequence of propositions put to, and accepted by, the primary judge is that it would be unfair to permit the applicant to discontinue the primary proceeding but to retain the benefit of the Indemnity Costs Order. In our view, that does not necessarily or routinely follow.

51 The applicant contends that the proper starting principle is that, in circumstances such as the present, the discontinuing party should in the normal course be entitled to tax and enforce any outstanding interlocutory costs orders in that party's favour. The authorities relied on for that proposition are *O'Neill v Mann* [2000] FCA 1680 (*O'Neill*) and *Fastlane Australia Pty Ltd v Nolmont Pty Ltd* [2007] FCA 492 (*Fastlane*).

52 It is helpful to understand the context in which *O'Neill* was decided. That applicant commenced proceedings for defamation, and the respondent pleaded the defence of absolute privilege. The availability of that defence was tried as a separate question. The defence was rejected, both in the Full Court of this Court (reversing the trial judge): *O'Neill v Mann*

(1994) 54 FCR 212 and by the High Court: *Mann v O'Neill* (1997) 191 CLR 204. Consequently, the Full Court orders as to costs, namely that the costs of the appeal and the costs of the trial of the separate question at first instance be paid by that respondent, stood. After that decision, that applicant purported to discontinue the defamation action by filing a notice of discontinuance, but leave to do so had not been given so it was ineffective: O 22 r 2 of the then Rules. He also then filed in the initial action a bill of costs for taxation for the costs of the trial of the separate question.

53 The respondent applied for a permanent stay of the taxation, and of the defamation action, as an abuse of process and challenged the jurisdiction of this Court to have entertained the action at all. That challenge was unsuccessful: *O'Neill v Mann* (2000) 101 FCR 160.

54 Subsequently, that applicant applied for leave to discontinue the principal proceeding and, in essence, to retain the benefit of the costs order (made by the Full Court) concerning the separate trial of an issue. There had been no order for the taxation of those costs: see O 62 r 3(3) of the then Rules, which therefore precluded that process of taxation until the principal proceeding itself had been concluded in the absence of some contrary order. The detailed history is set out in *O'Neill* at [2]-[6].

55 The issue in *O'Neill* was whether that applicant, accepting that he should pay costs thrown away by reason of the proposed discontinuance, should nevertheless be permitted to enforce the earlier costs order of the separate trial of an issue made by the Full Court. That respondent submitted that the discontinuance should be permitted on the basis that each party should bear his own costs of the action, including the costs of the hearing of the preliminary issue: see at [8]-[9].

56 In *O'Neill*, Finn J at [19] said:

> I earlier indicated that, when an applicant seeks leave to discontinue, a consideration of which account is taken is whether the grant of leave would deprive a *respondent* of an advantage already obtained. The present case is the converse of that. Mr O'Neill wants the advantage of discontinuance and the shelter it incidentally provides from a significant adverse costs award in the event that the defamation action would have been unsuccessful in the event. But he seeks to retain the benefit of the Full Court's cost order. In my view, he seeks too much. He fought and won a preliminary skirmish which resulted in a costs order but which did not cast light on his prospects of success in the proceeding. He now seeks to leave those prospects forever unresolved. Dr Mann did not act unreasonably in defending the claim by having the separate question determined. And he may ultimately have been successful in his defence of the claim at trial. It is not my function to make a prediction about that. What I consider to be unfair is for Mr O'Neill to seek the benefit of his interlocutory

> "spoils" while seeking to terminate prematurely the contest he initiated and which already has occasioned cost to Dr Mann and has exposed him to a costs liability. What may have been appropriate for him to have had at the end of the day and as an element in a larger reckoning as to costs is, in my view, quite inappropriate when he seeks to walk away from litigation he initiated.

Accordingly, his Honour gave leave to discontinue on the condition that that applicant undertake not to take steps to tax the costs of the earlier order. No other order for costs was made (as that respondent accepted that no other order should be made).

57 There are two features of that decision of particular significance to the present application. First, it was accepted that that respondent had acted reasonably in pleading, and seeking to have separately resolved, the defence of absolute privilege: see also *O'Neill* at [17]. Second, but less important, that respondent did not otherwise seek an order that the discontinuance should be on the basis that he recover the costs of the action.

58 We do not consider that decision supports the principle (or more accurately, the proposition) for which the applicant contends as set out in [51] above. That is also the view taken by the primary judge in his reasons at [27]. *O'Neill* was a decision in its context, namely where an applicant was not pursuing the claim (for whatever reason) but having in effect had the principal defence struck out, and where the respondent not seeking any costs of the discontinuance but seeking in effect to offset the costs of the issue which was separately tried and on which he failed against the costs of the claim where it was not clear that the claim itself would be successful.

59 In *Fastlane*, the plaintiff had been given leave to discontinue by consent on the papers under O 35 r 10 of the then Rules. No notice of discontinuance was then filed, it was filed only after the issue as to the plaintiff's claimed entitlement to tax costs arose. Earlier in the proceeding, on two separate interlocutory applications, the defendants had been ordered to pay the plaintiffs their costs. The plaintiffs submitted for taxation their bill of costs in relation to the two interlocutory orders. The consent to the discontinuance did not address that issue and obviously, the plaintiff and the defendants had not jointly addressed it when the consent was given. It may be expected that that was through oversight rather than a lack of candour.

60 Unlike the position in *O'Neill*, where the issue arose in relation to the terms upon which discontinuance of the proceeding should be permitted, the Court was confronted with the fact

of discontinuance under a settlement (which, it was found, did not deal with the effect of the earlier interlocutory costs orders) and the claim to enforce those orders.

61 In *Fastlane*, Jessup J at [12]-[13] first noted that, by reason of O 62 rr 4(1) and 7(1)(a), subject only to O 62 r 3(3), the two interlocutory costs orders entitled the plaintiff to have its costs taxed and as the proceeding had been discontinued, O 62 r 3(3) was no longer an impediment to enforcing that entitlement. His Honour did not regard the then O 62 r 14 as altering that position, and as that rule was not said to be relevant in the present circumstances, it is not necessary further to refer to it. It is noted that it provided that all costs to which a party is entitled under an interlocutory order shall be included in the final order unless the costs have already been paid.

62 Then, at [15], Jessup J said:

> Far from constituting an authority for the proposition that, without the leave of the court, a party who discontinues by leave cannot secure the taxation of costs already ordered in his favour, Finn J's judgment in *O'Neill v Mann* is intelligible only by reference to a contrary proposition, namely, that, in the absence of some special order, a party who discontinues by leave would in the normal course be entitled to proceed to taxation with respect to any interlocutory costs orders which had been made in his favour. It was because Finn J did not consider it just or appropriate that the applicant in *O'Neill v Mann* should have the benefit of such orders, while at the same time avoiding the scrutiny of the merits of his substantive claims, that his Honour extracted an undertaking from him. Absent that undertaking, the applicant would have been entitled to proceed to taxation with respect to the interlocutory costs orders in his favour.

63 It is apparent that [15] in the reasons of Jessup J in *Fastlane* provides the foundation for the proposition asserted by the applicant, and set out at [51] above. His Honour decided that the plaintiff was entitled to have its bills of costs of the interlocutory hearings taxed.

64 His Honour took the view that, unless the terms of the agreement resulting in the consent to the discontinuance precluded it, there was no reason in principle why the "vested" right to costs of the interlocutory orders should not be able to be enforced: at [22]. There was no impediment in the then Rules to doing so. The leave to discontinue the proceeding did not itself extinguish that right.

65 For reasons which are not relevant for present purposes, Jessup J then considered, and rejected, the proposition that the agreement resulting in the consent to the discontinuance did not address the status of, or the enforceability of, the earlier costs orders. It provided for there to be no order as to costs with respect to the discontinuance of the proceeding itself.

66 That case is clearly distinguishable from the present circumstances. That is because the parties in this matter have specifically addressed the enforceability of the Indemnity Costs Order. The present case is, in a sense, a hybrid because, when the discontinuance was permitted, the parties expressly agreed to preserving the applicant's claim to be entitled to enforce the Indemnity Costs Order and on the other hand the respondent's claim to have that order vacated.

67 In that circumstance, we agree with the approach of the primary judge at [25] that the question whether the Indemnity Costs Order should be vacated is to be determined as if it were being addressed at the same time as the question of whether leave to discontinue should be given, and if so on what terms. In effect, whether a term should be imposed that the order not be enforced (or the order vacated) was simply deferred. That was a sensible approach. Each of the applicant and the respondent, in substance, agreed to the terms on which leave to discontinue was given, including that they would accept the Court's ruling on whether the Indemnity Costs Order should be vacated.

68 The case is unlike *Fastlane* where the existence of the "vested" right to costs was not addressed (and found not to have been disturbed) by the agreement leading to the discontinuance of the proceeding. In this matter, that "vested" right was recognised and addressed, and as the primary judge observed at [5] the parties "took their chances" as to whether that costs order would be vacated.

69 The primary decision therefore represents the exercise of a judicial discretion as to the terms which should be imposed upon the grant of leave to discontinue a proceeding, otherwise without costs, where the discontinuance would mean that the defence of the respondent to the claims of the applicant had not been, and would not be, addressed.

70 The Full Court, therefore, applies the well-known test expressed by Dixon J in *House v R* (1936) 55 CLR 499 at 504-505 in considering whether to grant leave to appeal and to allow the appeal. To that may be added reference to the observation of the Full Court (Jacobson, Siopis and Foster JJ) in *Rickus v Motor Trades Association of Australia Superannuation Fund Pty Ltd* (2010) 265 ALR 112 at [13] where it was said that there is no doubt that appellate courts are loath to overturn discretionary costs orders made by single judges, reflecting "a history of caution expressed by appellate courts when asked to overturn discretionary judgments generally."

71 The primary judge, in addition to his adoption in [23] of his reasons of "that submission" in [22] and quoted above, said at [26]:

> ... there is considerable merit in a proposition that a party who seeks to discontinue a proceeding should not normally be permitted to retain the benefit of prior interlocutory costs orders.

72 In our view, there is an arguable proposition that the primary judge at [22] and [26] may have erred in considering whether, in the circumstances, it was appropriate to vacate the Interlocutory Costs Order by starting with the proposition that the fact of discontinuance gives rise to an injustice in respect of earlier costs orders (if not discharged) which should generally lead to the discontinuing party not being entitled to the benefit of earlier costs orders. For the purposes of the leave application, it is not necessary to parse and analyse his Honour's comments too carefully, to determine whether that view was actually taken by his Honour. That step is addressed later in these reasons. In our view, that arguable proposition is sufficient to warrant the grant of leave to appeal from the order vacating the Indemnity Costs Order. The second criterion for the grant of leave, namely substantial injustice, would be met by the loss of the vested right to costs under the Indemnity Costs Order. The respondent did not argue that they were so small as not to qualify as a substantial injustice, although he addressed other matters raised by the applicant.

73 Having taken that step, it is for the Court to determine whether the exercise of the discretion by the primary judge miscarried so that the Indemnity Cots Order should be re-instated.

(3) The further evidence

74 The application to adduce further evidence on the appeal is made by interlocutory application of 12 June 2015 and relates to the affidavit of Michael Harmer of 12 June 2015.

75 The affidavit comprises two elements (apart from its introductory paragraphs): the first is paras 13 and 16 being the annexure of certain affidavits filed in the principal proceeding and the transcript of the hearing before the primary judge; the second are what Mr Harmer says in para 9 and in paras 10-12 and 14-25 [noting he refers in para 6 to paras 10-127, but the affidavit only has 25 paragraphs] about the grounds of appeal.

76 We do not receive para 9, or para 14-25 of the affidavit. Para 9 is not received because it is not relevant. The legal costs "incurred for the period to which" the Indemnity Costs Order relates does not recognise the limited terms of the Indemnity Costs Order as noted above. It does not cover all the work done between the date of the points of claim and 17 August 2012.

It makes no attempt to identify the costs thrown away by reason of the amendment allowed on 17 August 2012. It is simply wrong for counsel to have made the submission that it shows the amount of costs likely to be payable under the Indemnity Costs Order. Even if it did so, there is no reason why, if relevant, an estimate of those costs could not have been given to the primary judge.

77 We also do not receive paras 10-12 and 14-25 of the affidavit. They are not evidence. They are submissions about potential evidence (that is the annexures) sought to be introduced. It is only necessary to make references to "pivotal evidence" or "fundamental allegations" to describe the effect of the annexure or of the material to which they were apparently responsive to make the point. In a real sense, they attempt to put what might have been put to the primary judge by counsel (but was apparently not put to his Honour) and to now put those submissions only on appeal. If the annexures had been put before the primary judge, what is now said in those paragraphs of the affidavit might have been said by way of submissions to the primary judge.

78 The written submissions of the applicant acknowledge that. They describe the annexures (as explained in the submissions in the affidavit) as showing factual misrepresentations by the respondent made in oral submissions to the primary judge, taken into account by the primary judge, and repeated to the Full Court on this application.

79 There is a passage from the transcript of the hearing before the primary judge quoted in the applicant's submissions where counsel for the respondent says:

> Your Honour can, we think, take it as uncontroversial that, by his defence and by the evidence that he filed, Mr Slipper put in issue each of the allegations that Mr Ashby made against him. The trial was Mr Slipper's opportunity to seek and obtain findings of fact dismissing those allegations. I can tell your Honour that – I don't think this is properly a matter of evidence but if your Honour or our learned friend regarded it as so, then I will need to withdraw it.

80 There is no suggestion that counsel for the applicant controverted that, or sought that it be withdrawn. There is no explanation why that opportunity clearly invited, was not taken up. There is the additional factor in the competing submissions about whether the annexures would demonstrate the misrepresentation asserted. That potential dispute may have informed a decision of counsel for the applicant not to take up the invitation recorded in the transcript referred to. In those circumstances, we do not propose to admit the annexures to try and make out a proposition which should properly have been explored before the primary judge.

81 There is a significant onus on a party to justify the adducing of evidence on an appeal where that evidence could have been adduced at first instance: *Autodesk Inc v Dyason (No 2)* (1992) 176 CLR 300 per Mason CJ at 303 and per Gaudron J at 322. We are not persuaded that the interests of justice mean we should exercise the discretion to admit the annexures as evidence on the application (or the appeal).

82 It has not been necessary to explore the extent to which, if at all, that material is capable of informing the question whether the Indemnity Costs Order should have been made.

(4) The merits of the appeal

83 Whether the Indemnity Costs Order should have been vacated is to be decided in the particular circumstances of the case.

84 The fact of the proposed discontinuance of the principal proceeding is not of itself a reason why, or a premise upon which, the discontinuing party should normally not be entitled to retain the benefit of prior interlocutory costs orders, as Jessup J decided in *Fastlane*. It is neither appropriate nor useful to endeavour to stipulate the circumstances in which that might be the case. Clearly, *O'Neill* was one such case. Equally, we do not consider that there should be a predisposition by the operation of the Rules themselves that existing interlocutory orders for costs should be preserved when leave to discontinue the proceeding is sought by their beneficiary, and the Court is required to fix the terms on which leave to discontinue is given.

85 The proper approach is to address the justice of the case in the particular circumstances.

86 The primary judge at [27], has in fact considered how he should exercise his discretion in accordance with "basic notions of fairness". That is an unexceptionable approach.

87 It is not necessary to refer in detail to his Honour's assessment of the considerations of fairness at [27]. It shows an appreciation of the nature of the case, the conflicting allegations and responses, and the publicity which any hearing would inevitably have invited. It notes that, by reason of the discontinuance, the respondent's rebuttal of the applicant's allegations and his claim that the applicant's claim itself is an abuse of the process of the Court will remain unresolved. It has regard to the costs restriction imposed by s 570 of the Fair Work Act, including by the final sentence of [27]:

> Had he been ultimately successful in respect of that contention, he may possibly have secured an order in his favour that Mr Ashby pay the costs of the proceeding,

notwithstanding s 570 of the *Fair Work Act*.

88 It is clear that the primary judge regarded *O'Neil* as merely an illustration of the exercise of the discretion about the terms of permitting a discontinuance. His Honour at [26] also said that "there is considerable merit in a proposition that a party who seeks to discontinue a proceeding should not normally be permitted to retain the benefit of prior interlocutory costs orders. But he did not treat that as his guiding principle. The succeeding [27] shows his Honour approaching the exercise of his discretion upon proper principle. We do not read his Honour's acceptance of "that submission" in the one line of [23] as referring to the final sentence of [22], which is set out above, and which invokes the assertion of fairness to the respondent. Specifically, it is clear that the primary judge looked to the specific circumstances of the case before deciding whether discontinuance on terms which preserved the Indemnity Costs Order entitlement of the applicant was unjust, rather than simply proceeding on the basis that that was routinely or necessarily the case. The "novel" principle to which the applicant refers was not adopted by the primary judge.

89 The applicant then submits that a number of other factors there wrongly considered, or not considered, by the primary judge.

90 They include the reasons for the discontinuance, which we have addressed above. They include the fact that the Indemnity Costs Order related to discrete conduct; the primary judge has recorded that in his reasons.

91 They include his Honour's reference to, and use of, the decision in *O'Neill*. In our view, there is no real basis for saying (as the applicant does) that the primary judge failed generally to take account of the differences between the present circumstances (in particular the evidence about why the applicant discontinued the primary proceeding) and those in *O'Neill*.

92 For present purposes, it may be accepted that, following the decision of the Full Court on 10 June 2014, the applicant (who was the successful party on the appeal) had to consider whether he would – even if successful in the principal proceeding – recover his costs of proceeding with the claim against the respondent (as to which, the observations of the Full Court in that decision at [76] may be apposite) and would incur significant costs in prosecuting the principal proceeding. That is saying very little – as those matters must have been in his consideration when he commenced the principal proceeding, and when he resolved his claim against the Commonwealth. They must have been in his consideration during the subsequent mediation. The primary judge specifically referred to the affidavits of

the applicant's solicitor of 18 and 20 June 2014 when giving leave to discontinue. They deal with the reasons for the applicant deciding to discontinue the principal proceeding. It is disingenuous to suggest that the primary judge then overlooked them when considering whether to vacate the Indemnity Costs Order, having regard to the connection between the two steps.

93 It is also submitted that his Honour should not have referred to the competing proposed evidence of the respondent. We disagree. He was entitled to note its existence. As he said, it would have been wrong to make any assessment of the prospects of success of either the applicant or the respondent in the principal proceeding. His Honour was not in a position to do so. He has not made any qualitative assessment of the strengths or weaknesses of the competing cases in the principal proceeding.

94 The primary judge is also criticised for the final sentence of [27] of his reasons, set out above at [87]. It is argued that the reasons for discontinuing did not, and could not, involve the applicant seeking to "shelter from an adverse costs order", when that would have been "virtually impossible" having regard to s 570 of the Fair Work Act. The terms of the final sentence of [27] do not, as the applicant's submission suggests, involve an "inappropriate" determination of how costs "should be borne, where there has been no trial on the merits". That is simply not what his Honour did. The final sentence of [27] simply recognises that, if ultimately the primary proceeding had been found to be an abuse of the process of the Court, s 570(2) of the Fair Work Act might have been enlivened.

95 Nor is there any finding in [27] that a reason for vacating the Indemnity Costs Order – as asserted in the written submissions of the applicant – was to deny the respondent the opportunity to present his case. Again, that is not what the primary judge said. That was (as his Honour made plain) a possible consequence of giving leave to discontinue the primary proceeding. The same comment can be made about the assertion in the written contentions that:

> ... the mere fact that allegations were left unresolved should not have been the basis for the primary judge to vacate a previous costs order that had been properly made as a direct result of the Respondent's own unreasonable conduct.

That is a simplistic observation which does not acknowledge the range of considerations the primary judge took into account.

96 The "fairness" assessed related to whether it was appropriate to allow the applicant to discontinue the primary proceeding, without a condition that he not enforce the Indemnity Costs Order. That was the course adopted by Finn J in *O'Neill*. Because that order had not been sealed, r 39.04 of the Rules was available to vacate that order, rather than such a term being imposed. Clearly, as we have noted above, the two steps were interdependent, not independent. It was therefore entirely appropriate to assess "fairness" in the context the primary judge did so.

97 For those reasons, we do not consider that the primary judge is shown to have exercised his discretion to vacate the Indemnity Costs Order in error.

98 Having granted leave to appeal, the appeal is to be dismissed. The applicant should pay to the respondent his costs of the application for leave to appeal, and of the appeal. Those costs include the costs of the interlocutory application of 12 June 2015.

A technical observation

99 One submission of the applicant was that the primary judge should not have acted under r 39.04 of the Rules to vacate the Interlocutory Costs Order in the present circumstances. The point was expressed as follows:

> The use of FCR 39.04 (or even FCR 39.05) after a case has concluded to vacate an interlocutory indemnity costs order, not because of any mistake or inadvertent failure to have regard to something to which regard should have been had at the time the order was made, but on the basis of subsequent events, appears to be without precedent. If the judgment in *Ashby v Slipper* [2014] FCA 973 were permitted to stand, it would significantly undermine the public interest in the finality of litigation, because it would make orders, in relation to which there was no question of error at the time they were made, forever vulnerable to subsequent re-agitation.

100 This is an application, both before the primary judge and the Full Court, in very peculiar circumstances. As we have said, the real judgment the primary judge was required to make was whether, at the time he was asked to give the applicant leave to discontinue the principal proceeding with no order as to costs (by consent), he could and would have required an undertaking from the applicant not to enforce the Indemnity Costs Order. The parties agreed to defer the resolution of that issue, as they were not agreed, and to abide the ruling of the Court in due course. The power to make such an order was preserved as the Indemnity Costs Order had not been drawn up and sealed. If the order is "without precedent", it is because the parties asked for that possibility to be addressed. The reasons of the primary judge at [15]-[17] as available are entirely appropriate.

Orders

101 The orders of the Court, on the application of the applicant of 24 September 2014, are:

(1) Leave be granted to appeal from the order made on 11 September 2014 vacating the order made on 17 August 2012 that the respondent pay the applicant's costs thrown away by reason of the amendment of the respondent's amended points of claim of 26 June 2012 (pursuant to leave to amend given on 17 August 2012) on an indemnity basis.

(2) The appeal be dismissed.

(3) If either party seeks an order for costs of the said application and of the appeal, direct that he file and serve his written submissions within seven days and that any responsive submissions be filed and served within a further seven days from service of these submissions, to the intent that the Court will determine any application for costs on consideration of the written submissions.

I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield, Siopis and Gilmour.

Associate: 

Dated: 21 April 2016