SUPREME COURT OF QUEENSLAND

CITATION:	*Elliott Harvey Securities Ltd v Raynel & Anor* [2015] QSC 212
PARTIES:	**ELLIOTT HARVEY SECURITIES LIMITED** (applicant) **v** **NORMAN RAYNEL** (first respondent) and **NORMAN RAYNEL** (second respondent)
FILE NO/S:	BS6265/15
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	28 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2015
JUDGE:	Bond J
ORDER:	**The order of the court is that Elliott & Harvey Solicitors and Attorneys pay the respondents' costs of the applicant's application filed 24 June 2015 to be assessed on the indemnity basis.**
CATCHWORDS:	
	Procedure – Costs – Departing from the general rule – Order for costs on indemnity basis – Argument having no basis – application proceeding in wilful disregard of the known facts or clearly established law
	Procedure - Costs – Against solicitors personally – Failure to to give reasonable or proper attention to the relevant law and facts
COUNSEL:	Applicant appeared in person C M Muir for the first and second respondents
SOLICITORS:	Applicant appeared in person

Archibald & Brown Lawyers for the first and second respondents

[1] BOND J: In this matter the applicant applied pursuant to s 459G of the *Corporations Act 2001* (Cth) for an order setting aside a creditor's statutory demand issued by the respondents.

[2] The application came before the Court in the applications list on 16 July 2015.

[3] At the callover the applicant's director, Mr Birt, sought leave to represent the applicant on the basis that the applicant had been informed on the previous evening that its solicitors, Elliott & Harvey Solicitors and Attorneys had withdrawn. Mr Birst provided to counsel for the respondents a written submission, signed by him, which stated amongst other things:

> I advise that, in respect to this matter, I have attended a series of meetings with Counsel and Solicitors for the Applicant.
>
> My advice up until yesterday was that Counsel was strongly supportive of the Application but at about that time he advised that he would be making no submission to the Court on "technical" grounds that he must have overlooked for four (4) weeks.
>
> In any event, at approximately 5:30pm last night, I was advised by telephone that Counsel had withdrawn as had the Solicitors for the Applicant.

[4] Elliott & Harvey had not appeared to seek leave to withdraw and were still the applicant's solicitors on the record. The matter was stood down until later that afternoon to enable the applicant to secure the appearance before the Court of its solicitors.

[5] When the matter came before me, a solicitor employed by Elliott & Harvey did appear. She was the solicitor within the firm having the carriage of the matter. She stated that the firm had received instructions that morning that the applicant wished to be self-represented and, on the firm's behalf, sought leave to withdraw as the solicitors on the record for the applicant. That course was not opposed by either counsel for the respondents or Mr Birt.

[6] However prior to my granting that leave:

(a) counsel for the respondents had in the presence of Elliott & Harvey's representative submitted that the respondents' solicitors had by correspondence to Elliott & Harvey–

  (i) pointed out that the application was fatally flawed because it had not been served within the time limit specified by s 459G;

  (ii) flagged the respondents' intention was to seek a costs order against Elliott & Harvey personally; and

(b) I drew that fact to the attention of Elliott & Harvey's representative.

[7] I gave Elliott & Harvey leave to withdraw as solicitors on the record for the applicant. I indicated that, if Elliott & Harvey's representative wished she could remain to resist the foreshadowed application for a costs order against her firm and that I would be ruling on the application one way or the other. Elliott & Harvey's representative chose to withdraw completely from the matter and was not present for the remainder of the argument, either on the substantive matter or, subsequently, on costs. I gave Mr Birt leave to appear on behalf of the applicant.

[8] After hearing argument from counsel for the respondents and from Mr Birt, I gave an *ex tempore* judgment dismissing the s 459G application on 16 July 2015. I found that *David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation* (1995) 184 CLR 265 made it very clear that strict compliance with statutory requirements for filing and service within time was required.

[9] I then received submissions from counsel for the respondent, advancing the foreshadowed application for an indemnity costs order against Elliott & Harvey personally. I did not receive any submissions from Elliott & Harvey, because the firm's representative had chosen not to participate in the hearing. I reserved the question whether I would make the costs order which the respondents sought.

[10] The chronology of events which is relevant to the question whether or not I should make the indemnity costs order sought is as follows:

(a) The deadline for service of the applicant's material in relation to the s 459G application expired at midnight on 25 June 2015.

(b) At 4:51 pm on 25 June 2015 the respondents' solicitors sent an email to Elliott & Harvey which advised:

> A search of the Supreme Court records reveals that [the applicant] has filed an application to set aside the statutory demand issued by our clients. We have instructions to accept service. The documents are not to be personally served on our clients. Please email the application documents to us by midday tomorrow 26 June 2015, otherwise we will obtain copies of the documents from the Court file.

(c) At about 11:29 am on 26 June 2015 Elliott & Harvey served the material on the respondents' solicitors by email.

(d) At about 12:11 pm on 26 June 2015 the respondents' solicitors responded to Elliott & Harvey by email. They pointed out that the material had not been served within the time limit specified by s 459G, referred to *David Grant*, and indicated that that failure was fatal to the application. The email invited the applicant to discontinue otherwise indemnity costs would be sought.

(e) That request was repeated in email correspondence sent to Elliott & Harvey on 29 June 2015 and 6 July 2015. On the latter occasion the respondents' solicitors –

(i) recapitulated the effect of the correspondence which had been sent;

(ii) stated that the respondents held grave concerns about the applicant's solvency, noting that it did not trade and had no assets;

(iii) contended that the applicant s 459G application had no prospects of success;

(iv) repeated the invitation to the applicant to dismiss its s 459G application before the respondents had to incur unnecessary costs;

(v) indicated that if a response was not received by midday on 7 July 2015 the respondents would be left with no option other than to brief counsel and warned that if the matter proceeded to the hearing on 16 July 2015 they would seek orders to the effect that the application be dismissed and that Elliott & Harvey itself, or alternatively its client, pay the respondents' costs to be assessed on an indemnity basis.

(f) On 8 July 2015 Elliott & Harvey wrote to the respondents' solicitor by post and facsimile. Elliot & Harvey –

(i) recapitulated the events to which I have adverted at [10](b)and [10](c) above;

(ii) stated that "having induced our client to act in a certain manner and having changed your position to our client's detriment, we would argue that your client is estopped from relying on the legislation in this regard";

(iii) stated that Elliott & Harvey solicitor having the carriage of the matter would be filing an affidavit in relation to this issue.

(g) On 9 July 2015 the respondents' solicitors responded to Elliott & Harvey pointing out that the estoppel argument had no legal basis and reiterated that a costs order against Elliott & Harvey on an indemnity basis would be sought upon the application being dismissed. (I observe that in my *ex tempore* judgment I found that the discussion of principle in *David Grant* and by Austin J in *MGM Bailey Enterprises v Austin Australia* [2002] NSWSC 259 at [17] demonstrated the legislative policy did not admit the availability of any estoppel argument, even if the evidence had otherwise made good the elements of estoppel.)

(h) The affidavit which Elliott & Harvey had foreshadowed in its letter of 8 Jul 2015 referred to at [10](f) above was filed on 14 July 2015. I observe:

(i) The deponent was the Elliott & Harvey solicitor having the carriage of the matter on behalf of the applicant. Her affidavit simply recorded the fact of the two items of correspondence to which I have adverted.

(ii) The affidavit did not, as one would expect it would have if inducement was to be demonstrated, state that the reason there was no service before midnight on 25 June was because she was acting in reliance on the email received on 25 June.

(iii) The affidavit only adverted to the email being received at 4.51 pm on 25 June by the solicitor's "assistant". It did not even say whether either she or her assistant had read the email before the deadline for service expired.

(i) Elliott & Harvey behaved in the way I have described at [2] to [7] above.

(j) Mr Birt's signed written submission referred to at [3] above was provided to the Court and referred to by both he and counsel for the respondents in oral argument, including during argument as to costs.

[11] Having succeeded in obtaining the dismissal of the s 459G application, the respondents are entitled to a costs order in their favour. The further questions which arise are whether –

(a) costs should be assessed on the indemnity basis; and

(b) costs should be paid not by the applicant, but by the applicant's solicitors.

[12] As to the former question:

(a) Counsel for the respondents drew my attention to *Colgate-Palmotive Company v Cussons Pty Ltd* (1993) 46 FCR 225 and other like authorities which articulate the principles governing the exercise of that jurisdiction.

(b) I am satisfied that the only application which was advanced before me (namely the s 459G application) was doomed to failure and that continuing the application should be regarded as proceeding in wilful disregard of the known facts or clearly established law.

(c) An indemnity costs order is appropriate.

[13] As to the latter question, counsel for the respondents also drew my attention to the observations made in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 239 (emphasis added):

> This analysis of the cases makes it clear that **the jurisdiction to order costs against an unsuccessful party's solicitors is enlivened when they have unreasonably initiated or continued an action when it had no or substantially no prospects of success but such unreasonableness must relate** to reasons unconnected with success in the litigation or to an otherwise ulterior purpose or **to a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice**. Further, the cases establish the proposition that **it is a relevant serious dereliction of duty or misconduct not to give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success**."

[14] My conclusion on the indemnity costs question means that the first part of the test is satisfied. Elliott & Harvey has unreasonably continued the s 459G application when, it not having been served within time, the application had no worthwhile prospects of success. (I express no view on whether, if factual inducement or reliance could be established, the applicant might have any other remedy open to it to prevent the respondents relying on failure to comply with the statutory demand or otherwise prosecuting any application for winding up of the applicant. *MGM Bailey* suggests some possibilities.)

[15] The more difficult question is whether the unreasonableness involved in Elliott & Harvey continuing an application which had no prospects of success related "…to a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice". That would be the case if I was prepared to infer that the unreasonableness by Elliott & Harvey related to the firm's failure "…to give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success."

[16] Elliott & Harvey has chosen not to appear to resist the respondents' application - whether by submission or by adducing any evidence - despite the application having been foreshadowed both in correspondence and at the time the firm sought leave to withdraw as solicitors on the record. It seems to me these propositions follow:

(a) the firm's conduct justifies my drawing the inference that such evidence as it might have been able to adduce would not have assisted the firm's ability to resist the order; and

(b) whilst I cannot use the firm's failure to adduce evidence to fill gaps in the evidence, it entitles me the more readily to draw any inference fairly to be drawn from the other evidence by reason of the firm being able to prove the contrary had it chosen to resist the order or to adduce evidence.

[17] It seems to me that the other circumstances adverted to at [10] above, but in particular -

(a) the contents of Elliott & Harvey's email of 8 July 2015 quoted at [10](f) above; and

(b) Mr Birt's statement that prior to Elliott & Harvey advising him on the eve of the hearing that the firm intended to withdraw, the applicant's legal advice was supportive of the application,

mean that an inference of the nature of that to which I have referred at [15] is open. In light of the firm's failure to appear to resist the order or to adduce any evidence on the question, I am prepared to draw that inference.

[18] It follows that I agree with the submission advanced by counsel for the respondents that this case is one of the rare occasions in which an order ought be made against the solicitors for a litigant. I agree that it is appropriate that Elliott & Harvey should pay the respondents' costs of the s 459G application to be assessed on the indemnity basis. I so order.