

# Case Alert

Shaping the future of insurance law

11 DECEMBER 2019

## Federal Court orders defendant to pay indemnity costs for misconduct

***BAM Property Group Pty Ltd as trustee for BAM Property Trust v Imoda Group Holdings Pty Ltd (No.2) [2019] FCA 2072***

### AT A GLANCE

- On 9 December 2019, the Federal Court ordered the unsuccessful defendants in a shareholder oppression action to pay the plaintiffs' costs of the entire proceedings on an indemnity basis.
- The indemnity costs order was sought on the basis of the defendants' "misconduct" in the proceedings, including their persistent failure to comply with court orders.
- For insurers and insureds, this decision provides a useful reminder of the Court's broad discretion regarding costs and the severe consequences of wasting the court's time and that of other parties.

### CASE OVERVIEW

On 2 August 2019, judgment was delivered in favour of the plaintiffs in *BAM Property Group Pty Ltd as trustee for BAM Property Trust v Imoda Group Holdings Pty Ltd*<sup>1</sup>, a shareholder oppression action.

The plaintiffs then sought, amongst other things, an order that the defendants pay the plaintiffs' costs of the entire proceedings on an indemnity basis.<sup>2</sup> The plaintiffs submitted that the defendants' conduct in the proceedings justified such an order, consistent with the principles on indemnity costs set out in *Colgate-Palmolive Co v Cussons Pty Ltd*<sup>3</sup>.

In support of their application, the plaintiffs relied on various observations about the defendants' conduct in the primary judgment, including that:

- "...at every step in the proceeding, the defendants sought to obfuscate and delay its progression"<sup>4</sup>
- the defendants "...frequently failed to comply with the Court's directions and orders..."<sup>5</sup>, including orders to file statements of evidence and expert reports, and
- "No proper explanation was provided by the defendants as to why they had not complied with the timetable set by the Court for the filing of material"<sup>6</sup>.

The plaintiffs submitted that those observations constituted "evidence of particular misconduct that causes loss of time to the Court and to other parties", warranting the exercise of the Court's discretion to award indemnity costs, and that the "consistent and unexplained misconduct on behalf of all defendants" warranted an award of indemnity costs for the entirety of the proceedings.

<sup>1</sup> [2019] FCA 1192 (the primary judgment).

<sup>2</sup> The plaintiffs also sought an order for indemnity costs from the date of a settlement offer made under the *Federal Court Rules 2011* (Cth).

<sup>3</sup> [1993] FCA 536; (1993) 46 FCR 225 (*Colgate-Palmolive*) at 233-234.

<sup>4</sup> Primary judgment, at [4].

<sup>5</sup> Primary judgment, at [5]–[6].

<sup>6</sup> Primary judgment, at [11].

## The costs decision

The Court accepted the plaintiffs' submissions and ordered the defendants to pay the plaintiffs' costs of the entire proceedings on an indemnity basis.<sup>7</sup>

In particular, the Court held that:

- “The defendants’ obstructive conduct extended throughout the entire proceeding, and reflected the absence of a viable defence”<sup>8</sup>, and
- “It would be a miscarriage of justice were the plaintiffs to be denied the order sought”<sup>9</sup>.

Justice Derrington stated that the indemnity costs award reflected the Court’s disapproval of the way the defendants conducted themselves in the litigation.

<sup>7</sup> BAM Property Group Pty Ltd as trustee for *BAM Property Trust v Imoda Group Holdings Pty Ltd (No.2)* [2019] FCA 2072 (the costs judgment).

<sup>8</sup> Costs judgment, at [10].

<sup>9</sup> Costs judgment, at [10].

## LESSONS FOR INSURERS

This decision is an important reminder to litigants and their insurers of the Court’s broad discretion regarding costs and the potentially severe consequences of wasting the court’s time by failing to comply with court orders without any, or any proper, explanation.

Importantly, the decision also highlights the Court’s broad discretion to award indemnity costs independent of any settlement offers made in the proceedings.

While it is more common to see awards of indemnity costs from the date of a more favourable settlement offer, the BAM decision shows that persistent failures to comply with court orders can be construed as evidence of the absence of a viable defence, sufficient to warrant an indemnity costs award of the entire proceeding.

## NEED TO KNOW MORE?

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