Article Information

Authors: McKenzie Moore, Lewis Ringwaldt, Xavier Caputo
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When Costs Don't Follow the Outcome: A Cautionary Tale from the NSW Supreme Court

The adage that "costs follow the event" is entrenched in the idea of fairness and efficiency. In its simplest form, it requires a losing party to pay the winning party's legal fees. However, litigation is rarely as clear cut, so what happens in proceedings that involve multiple parties, procedural hurdles, and early exits?

This issue was considered in the costs decision of *Giabal Pty Ltd v Gunns Plantations Ltd (in liq)* [2023] NSWSC 184 where the NSW Supreme Court was required to determine whether revoking leave to commence proceedings against a party was an "event" to which costs follow.

Background

This matter concerned a class action led by Piper Alderman, involving failed timber plantation investments managed by the Tasmanian forestry company Gunns Ltd (**Gunns**) and their subsidiary Gunns Plantation Ltd (**GPL**) which were both placed into liquidation in 2013.

Prior to liquidation, Gunns was Australia's largest hardwood and softwood producers and operated numerous managed investment schemes through GPL called Woodlot Projects. Effectively, these schemes allowed investors, who were called "growers", to invest in eucalyptus wood which GPL managed and harvested. As part of the scheme, Gunns agreed to purchase the wood each grower produced. The scheme ultimately ended up with the growers suffering substantial losses due to the financial collapse of Gunns and GPL.

Piper Alderman represented the growers in the class action against Gunns, GPL and KPMG (who were the auditors of the scheme's compliance plans) to recover the loss and damage the growers suffered due to the alleged contravening conduct of those parties. As part of that process, the growers applied to the Court for leave to commence proceedings against GPL and Gunns due to the appointment of liquidators (collectively, **the Liquidators**).

Leave granted and then revoked

On 13 April 2018, Justice Hammerschlag granted the growers leave to proceed against the Liquidators to recover the loss and damage stemming from the Woodlot Projects. However, leave was subsequently revoked on 4 December 2019 as the funds under Gunns' primary insurance policy became exhausted in defending the proceeding, preventing the recovery of any losses.

During the period that the Liquidators were involved in the proceeding, they issued multiple *Calderbank* offers to settle the dispute with the growers. A *Calderbank* offer is a without prejudice offer by one party to settle the dispute which, if not accepted, can be used in support of an application for indemnity costs. Prior to the leave being revoked, the growers rejected these *Calderbank* offers.

Costs

Upon successfully settling the class action with the remaining defendants, the Liquidators submitted that an order for costs should be made in their favour due to the revocation of leave. They sought to rely on the principle that "costs follow the event" under rule 42.1 of the Uniform Civil Procedure Rules, which states that:

> *Subject to this Part, if the court makes any order as to costs, the court is to order that the* ***costs follow the event*** *unless it appears to the court that some other order should be made as to the whole or any part of the costs.*

The Liquidators relied on the previously issued *Calderbank* offers to seek recovery of the costs for defending the proceedings. The Liquidators submitted that their *Calderbank* offers should have been accepted by the plaintiffs, as it was more favourable than the final outcome, being the revocation of leave.

In seeking costs under rule 42.1, the Liquidators further submitted that the relevant "event" for the purposes of costs was the revocation of leave for the plaintiffs to proceed against them. The Liquidators submitted that this ought to be the correct position even though there had not been any final determination on the merits and referred to Beazley JA's decision in *Commonwealth v Gretton* [2008] NSWCA 117 at [40] in which it was held that an "event" is a shifting concept depending on the circumstances.

Conversely, Piper Alderman argued on behalf of the growers, that there was no final "event" in the Liquidator's favour. While the growers conceded that the decision to revoke leave was a discrete "event" for the purposes of costs, the fact that a settlement between the remaining parties occurred after the leave was revoked meant that the Court was in no position to know how the claims against the Liquidators would have been determined. The growers relied on the judgment of *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624 that Courts should not stray into examining merits where the parties have settled.

Piper Alderman further submitted that even if there was an "event" for the purposes of costs, it would have been unreasonable to accept the *Calderbank* offers as it would have compromised part of the grower's claims against the other defendants, which eventually settled in favour of the class.

Decision of Darke J

His Honour did not view the revocation of leave as constituting an "event" as neither party was successful or unsuccessful in relation to the contentious issue. His Honour, therefore, held that there had been no relevant "event" for the purposes of the UCPR and dismissed the application for costs by the Liquidators. It was found that in the absence of a determination on the merits due to revoking leave, the plaintiff and the Liquidators are to bear their own costs.

While his Honour considered the *Calderbank* offers in the present circumstances, the revocation of leave resulted in a "nil outcome" (at [13]):

> *The revocation did not effectively make the first and second defendants the winner and the plaintiffs the loser in relation to the issues in contention between them. I am therefore unable to see this as a case where there has been an event decided in favour of one party and against another.*

In considering the grower's rejection of the *Calderbank* offer, his Honour held that they did not act unreasonably because at the time of the *Calderbank* offer, the proceedings were in an early stage, and a large volume of discovery was yet to occur. As a result, despite issuing *Calderbank* offers throughout the course of the proceedings, revoking the leave to proceed against GPL and Gunns could not constitute an "event" which would trigger indemnity costs in favour of the Liquidators.

Takeaways

This decision serves as a stark reminder for parties involved in complex litigation that cost outcomes are not always predictable and due care is required when considering, rejecting and/or issuing *Calderbank* letters.