

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : WESTPAC BANKING CORPORATION -v-
PALANIAPPAN [No 3] [2015] WASC 403

CORAM : TOTTLE J

HEARD : 21 OCTOBER 2015

DELIVERED : 21 OCTOBER 2015

PUBLISHED : 28 OCTOBER 2015

FILE NO/S : CIV 1307 of 2014

BETWEEN : WESTPAC BANKING CORPORATION
Plaintiff

AND

KASI PALANIAPPAN
Defendant

Catchwords:

Application for security for costs - Requirement to file memorandum of conferral in accordance with O 59 r 9 *Rules of the Supreme Court 1971 (WA)* and Consolidated Practice Direction 4.3.2

Legislation:

Rules of the Supreme Court 1971 (WA), O 59 r 9

Result:

Memorandum of conferral uplifted
Parties to confer face-to-face
Application adjourned

Category: B

Representation:

Counsel:

Plaintiff : Mr A J Papamatheos
Defendant : Mr J M Healy

Solicitors:

Plaintiff : Lavan Legal
Defendant : Cullen Babington Macleod

Case(s) referred to in judgment(s):

Westpac Banking Corporation v Palaniappan [2014] WASC 475
Youlden Enterprises Pty Ltd v Health Solutions WA Pty Ltd [2006] WASC 161

TOTTLE J:

(This judgment was delivered extemporaneously on 21 October 2015 and has been edited from the transcript.)

1 By a chamber summons issued on 14 October 2015, the defendant by counterclaim, (the Bank), seeks an order that the plaintiff by counterclaim, (Mr Palaniappan), provides security for the costs of the counterclaim and ancillary orders. The Bank sought to have the application for security heard today.

2 The background to the dispute between the parties is summarised in the reasons for decision of Master Sanderson on the Bank's application for summary judgment, *Westpac Banking Corporation v Palaniappan* [2014] WASC 475. Judgment was entered for the Bank on its primary claim. Mr Palaniappan has appealed against that judgment, and I have been told that the appeal is due to be heard in December 2015.

3 These reasons are confined to a discrete procedural issue - namely, the Bank's solicitors' approach to the requirements of conferral pursuant to O 59 r 9 of the *Rules of the Supreme Court 1971* (WA) and, more specifically, the requirement to file a memorandum of conferral in accordance with that rule and in accordance with Consolidated Practice Direction 4.3.2.

4 The requirements for conferral are well known but, as his Honour the Chief Justice observed in *Youlden Enterprises Pty Ltd v Health Solutions WA Pty Ltd* [2006] WASC 161 at [4]: 'In far too many cases the Rule is complied with in form rather than substance.'

5 This is one such case.

6 At the risk of repetition of what is, or should be, well known to practitioners and what is recorded in Consolidated Practice Direction 4.3.2:

- Practitioners, as officers of the court, have a duty to approach the conferral process to achieve the spirit encapsulated in the practice direction and in O 59 r 9.
- Conferral is required no matter how unlikely it is that the parties will reach agreement or even narrow the issues between them.
- Conferral must occur shortly prior to the making of an application and

must relate to the application itself rather than simply to the issue that is the subject of the application.

- Practitioners with authority to resolve the interlocutory dispute must confer either face-to-face or by telephone.
- A memorandum of conferral must follow form 108.
- The memorandum must set out, **briefly**, the facts relied upon to show conferral.

7 With respect to those who prepared the memorandum in this case, the memorandum is in terms which are calculated to obscure rather than illuminate precisely what conferral has taken place.

8 At the risk of understatement, it is difficult to conceive a document which is further removed from the spirit and intent of the requirements of O 59 r 9 and the consolidated practice direction.

9 The memorandum's distinguishing feature is that, together with its attachments, it extends to 463 pages and comprises three volumes. The memorandum lists 112 separate communications exchanged between April 2014 and October 2015. A cursory examination of these communications suggests that many are irrelevant to the question of security for costs.

10 The memorandum does not record whether there have been any oral communications between the parties' lawyers of the nature required for effective conferral.

11 The memorandum does not follow form 108. It does not set out the information required to be included in the form as specified by par 3 of form 108.

12 To prepare a document in the form of the memorandum of conferral in this case is unhelpful. It is an extravagant waste of time. If the solicitors were permitted to charge for the preparation of this document, and in my view they should not, it would amount to a waste of the client's money.

13 I make the following orders:

1. The Bank's solicitors uplift the memorandum of conferral filed on 15 October 2015.

2. Counsel for the parties confer face-to-face in relation to the Bank's application for security for costs and the programming of that application.
3. Following conferral in accordance with order 2 the Bank's solicitors file and serve a memorandum of conferral in accordance with the rules and the Consolidated Practice Direction.
4. The Bank's chamber summon issued on 15 October 2015 be adjourned to Wednesday, 28 October 2015, at 9.15 am.
5. The costs of today be reserved.

CatchwordArray: Application for security for costs - Requirement to file memorandum of conferral in accordance with O 59 r 9 Rules of the Supreme Court 1971 (WA) and Consolidated Practice Direction 4.3.2