



## Common Law Division Supreme Court New South Wales

Case Name:	<b>Al Haje v Elassaad</b>
Medium Neutral Citation:	[2021] NSWSC 1437
Hearing Date(s):	22 October 2021
Date of Decision:	22 October 2021
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	<ol style="list-style-type: none"><li>(1) Direct the defendant to seek any particulars he proposes to seek of the statement of claim on or before 17 November 2021.</li><li>(2) Direct the plaintiff to respond to the request for particulars on or before 2 December 2021.</li><li>(3) Direct the defendant to file and serve a defence to the statement of claim by 9 December 2021.</li><li>(4) Dismiss the plaintiff's notice of motion filed on 20 October 2021.</li><li>(5) Order that the costs of the notice of motion be costs in the cause.</li><li>(6) Stand the matter over for further directions at 9.15am on 13 December 2021.</li><li>(7) Grant liberty to the parties to restore the matter to the list on two days' notice.</li></ol>
Catchwords:	<p>CIVIL PROCEDURE — Application for stay of proceedings — Concurrent civil and criminal proceedings — Not necessary to direct the defendant to seek particulars of plaintiff's statement of claim prior to conclusion of criminal proceedings — Notice of motion dismissed and directions made</p> <p>COSTS — Party/Party — Costs orders in interlocutory proceedings — Costs in the cause</p>
Legislation Cited:	<i>Civil Procedure Act 2005</i> (NSW)
Category:	Procedural rulings

Parties: Wisam Al Haje (Plaintiff)  
Mohammad Elassaad (Defendant)

Representation: Counsel:  
J Sheller SC (Plaintiff)  
A Boland (Defendant)

Solicitors:  
Greg Walsh & Co (Plaintiff)  
Kiki Kyriacou Lawyers (Defendant)

File Number(s): 2021/219805

## **JUDGMENT: EX TEMPORE**

- 1 By notice of motion filed 20 September 2021, Mohammad Elassaad (the defendant) seeks an order that the proceedings against him be temporarily stayed pending conclusion of criminal proceedings which are listed for final hearing on 15 November 2021 at Bankstown Local Court.
- 2 The proceedings in this Court arise out of an alleged assault by the defendant against the plaintiff which is said to have occurred on 24 January 2021. The plaintiff commenced proceedings in this Court on 2 August 2021.
- 3 The events of 24 January 2021 were also the subject of a court attendance notice in which the defendant was charged with a number of offences, including: assault causing grievous bodily harm of the plaintiff; assault occasioning actual bodily harm of the plaintiff's father; intimidation; and malicious damage relating to damage caused to the plaintiff's father's car.
- 4 The allegations in the statement of claim are, in substance, that the defendant assaulted the plaintiff on 24 January 2021 and that the plaintiff suffered injuries which have resulted in loss, including non-economic loss (pain and suffering); loss of earning capacity; and out of pocket expenses. The plaintiff also claims exemplary and aggravated damages.
- 5 Mr Boland, who appears for the defendant, submits it would be inappropriate to require the defendant to advance the civil proceedings in any way until the conclusion of the criminal proceedings.
- 6 The plaintiff's solicitor, Greg Walsh, suggested to Kiki Kyriacou, the defendant's solicitor, that an appropriate way forward was for the defendant to be required to seek particulars of the statement of claim prior to 15 November 2021, but that the defendant not be required to file a defence until after 15 November 2021.
- 7 The defendant rejected this offer. In his oral submissions in this Court, Mr Boland resorted to high principle regarding the defendant's right to silence in

the criminal proceedings, and the need for that not to be inhibited in any way. Furthermore, Mr Boland submitted that the defendant should not be depleted by the civil proceedings while he is preparing for criminal proceedings, either in terms of time, attention or money, as well as substantive legal rights.

- 8 I am not persuaded that to require the defendant to request particulars of the statement of claim would in any way infringe the accusatory principle or the defendant's right to silence. However, having regard to the imminence of the criminal proceedings in the Bankstown Local Court, it is not necessary to direct the defendant to seek particulars of the plaintiff's statement of claim prior to that date since the purpose of facilitating the just, quick and cheap resolution of the proceedings could also be advanced by requiring this to be done shortly after 15 November 2021.
- 9 Accordingly, I have proposed orders which would have the defendant seek particulars by 17 November 2021, the plaintiff respond by 2 December 2021, and the defendant file a defence by 9 December 2021. The matter could be brought back before the Court on 13 December 2021. I would also make provision for liberty to apply to restore the matter to the Court on two days' notice, lest the guilt or innocence of the defendant not be determined finally on 15 November 2021.
- 10 Mr Boland has informed me that, if the defendant were convicted, he would exercise his right of appeal to the District Court, a process which may well take between six and eight weeks. Mr Boland has confirmed that, if the applicant were convicted in the District Court, he would not seek any delay in this Court pending sentence by the District Court.
- 11 Substantial agreement having been reached as to the appropriateness of the orders proposed, the only outstanding issue is who should bear the costs of the defendant's notice of motion.

- 12 Mr Boland seeks costs on the basis that his client has had substantial success. In the alternative, he says, either that costs should be costs in the cause, or that there be no order as to costs.
- 13 He points to an offer made by Mr Kyriacou to Mr Walsh on 22 September 2021, in which Mr Kyriacou suggested that the civil proceedings be adjourned for directions to 17 November 2021. At that point, that date was some eight weeks away. As referred to above, Mr Walsh refused the offer and proposed that the defendant be required to seek particulars before 15 November 2021 but that the filing of his defence be deferred until after 15 November 2021
- 14 Mr Boland submitted that, in light of this proposal made on behalf of the defendant on 22 September 2021, it would be unfair to make the defendant liable for the costs of the notice of motion. He submitted that it would have been open to the plaintiff to agree to that proposal. In that event, all the costs of the notice of motion would have been avoided.
- 15 Mr Sheller SC, who appears on behalf of the plaintiff, has submitted that the plaintiff has had substantial success, and that accordingly, the notice of motion should be dismissed, and that the defendant should be ordered to pay the plaintiff's costs of the notice of motion.
- 16 I raised the issue of whether the costs should be the plaintiff's costs in the cause, but neither Mr Boland nor Mr Sheller accepted that there was any particular justice in that proposal, although both I think accepted that it would be open to me to make that order.
- 17 Both parties have had a measure of success. Although the defendant has been unsuccessful in his application for a stay, the offer made by Mr Kyriacou on 22 September would, if accepted, have obviated the need for the notice of motion and the hearing today.
- 18 Having said that, the attitude taken by the plaintiff, which was to endeavour to advance the proceedings, is consistent with the underlying purpose of the *Civil*

*Procedure Act 2005* (NSW), namely, to facilitate the just, quick and cheap resolution of the proceedings.

- 19 There are points to be made in favour of either party in relation to the notice of motion. In my view, had good sense prevailed earlier, the motion would have been resolved. In all the circumstances, I consider that the appropriate order is that the costs of the motion be costs in the cause.

## **Orders**

20 For the reasons I have given, I make the following directions and orders:

- (1) Direct the defendant to seek any particulars he proposes to seek of the statement of claim on or before 17 November 2021.
- (2) Direct the plaintiff to respond to the request for particulars on or before 2 December 2021.
- (3) Direct the defendant to file and serve a defence to the statement of claim by 9 December 2021.
- (4) Dismiss the plaintiff's notice of motion filed on 20 October 2021.
- (5) Order that the costs of the notice of motion be costs in the cause.
- (6) Stand the matter over for further directions at 9.15am on 13 December 2021.
- (7) Grant liberty to the parties to restore the matter to the list on two days' notice.

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I certify that this and the five preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Adamson.



DATED: 8 November 2021

Associate