SUPREME COURT OF QUEENSLAND

CITATION:	*Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor (No 2)* [2017] QSC 241
PARTIES:	**BEENLEIGH HOUSING & DEVELOPMENT COMPANY LTD ACN 066 813 401** (plaintiff) **v** **ISAIAH JUMEIRAH KAHRTER PTY LTD ACN 154 830 092 AS TRUSTEE FOR THE ISJUKA TRUST** (first defendant) **v** **NELSON LEON** (second defendant)
FILE NO/S:	BS No 5594 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2017
DELIVERED AT:	Brisbane
HEARING DATES:	21 August 2017 and 18 October 2017
	Plaintiff's submissions received on 31 August 2017; defendants' submissions received on 31 August 2017; second defendant's submissions in reply received on 8 September 2017
JUDGE:	Burns J
ORDER:	**The further orders of the court are that:** **1. Leave be granted to the plaintiff to read the affidavit of David Alastair Graham filed on 31 August 2017;** **2. The cross-application brought by the plaintiff is**

dismissed;

3. **Save for the costs reserved on 15 September 2016 and 14 October 2016, the defendants pay the plaintiff's costs of the application and the cross-application, as follows:**

    (a) **the costs payable by the first defendant, Isaiah Jumeirah Kahrter Pty Ltd, shall:**

        (i) **be calculated on the standard basis and limited in such amount, if any, as may be agreed by the plaintiff and the first defendant or determined at trial; and**

        (ii) **not be assessed, or payable, until the proceeding ends;**

    (b) **the costs payable by the second defendant, Nelson Leon, shall be calculated on the indemnity basis.**

4. **The parties shall have liberty to apply regarding the costs reserved on 15 September 2016 and 14 October 2016 on the giving of three days' notice.**

CATCHWORDS: PROCEDURE – COSTS – PARTIES AND NON-PARTIES – NON-PARTIES GENERALLY – GENERAL PRINCIPLES – where the plaintiff commenced a proceeding by the filing of a claim and statement of claim against the defendants – where the defendants brought an application to dismiss the plaintiff's claim – where the second defendant elected not to proceed as a party to the dismissal application by the time of hearing – where the plaintiff cross-applied for a declaration pursuant to s 1322(4) of the *Corporations Act* 2001 (Cth) – where the first defendant's application was dismissed – where the plaintiff sought costs of the application and cross-application from the first defendant on the standard basis – where the plaintiff sought costs of the application and cross-application from the second defendant on the indemnity basis – where the defendants contended that there should be no order as to costs because of the late service of material by the plaintiff – where the defendants contended in the alternative that the costs should be reserved until the proper construction of a limitation of liability provision contained in a deed of agreement between the plaintiff and the first defendant is determined at trial – whether there should be no order as to costs – whether costs should be reserved to the trial – whether any costs order against the second defendant

should be limited to the costs incurred up to and including the date on which he elected not to proceed as a party to the application – whether the interests of justice require the making of a costs order against the second defendant with respect to the costs incurred after the date on which he elected not to proceed as a party to the application

PROCEDURE – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS – where the plaintiff commenced a proceeding by the filing of a claim and statement of claim against the defendants – where the defendants brought an application to dismiss the plaintiff's claim – where the second defendant elected not to proceed as a party to the dismissal application by the time of hearing – where the plaintiff cross-applied for a declaration pursuant to s 1322(4) of the *Corporations Act* 2001 (Cth) – where the first defendant's application was dismissed – where the plaintiff sought costs of the application and cross-application from the second defendant on the indemnity basis – where the defendants contended that there should be no order as to costs because of the late service of material by the plaintiff – where the defendants contended in the alternative that the costs should be reserved until the proper construction of a limitation of liability provision contained in a deed of agreement between the plaintiff and the first defendant is determined at trial – whether any costs order against the second defendant should be limited to the costs incurred up to and including the date on which he elected not to proceed as a party to the application – whether the interests of justice required the making of a costs order against the second defendant with respect to the costs incurred after the date on which he elected not to proceed as a party to the application – whether the second defendant should be ordered to pay costs on the indemnity basis

PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – COSTS RESERVED – OTHER MATTERS – where the plaintiff commenced a proceeding by the filing of a claim and statement of claim against the defendants – where the defendants brought an application to dismiss the plaintiff's claim – where the second defendant elected not to proceed as a party to the dismissal application by the time of hearing – where the plaintiff cross-applied for a declaration pursuant to s 1322(4) of the *Corporations Act* 2001 (Cth) – where the first defendant's application was dismissed – where the plaintiff sought costs of the application and cross-application from the first defendant on the standard

basis – where the plaintiff sought costs of the application and cross-application from the second defendant on the indemnity basis – where the defendants contended that there should be no order as to costs because of the late service of material by the plaintiff – where the defendants contended in the alternative that the costs should be reserved until the proper construction of a limitation of liability provision contained in a deed of agreement between the plaintiff and the first defendant is determined at trial – whether a determination of the proper construction of the limitation of liability provision should be deferred until the trial – whether the court should order that costs be reserved

Australian Solicitors Conduct Rules, r 22.5.2
Corporations Act 2001 (Cth), s 249H(1), s 249J(1), s 1322, s 1322(4)
Trusts Act 1973 (Qld), s 72
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 681(2), r 698, r 703

Astram Financial Services Pty Ltd v Bank of Queensland Ltd [2010] FCA 1010, cited
Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor [2017] QSC 170, cited
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Commissioner of Stamp Duties v Westleigh Management Services Pty Ltd [2001] QSC 176, cited
Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd & Ors (1987) 78 ALR 193; [1987] FCA 332, cited
General Credits Limited v Tawilla Pty Ltd [1984] 1 Qd R 388, followed
Helvetic Investment Corp Pty Ltd v Knight (1984) 9 ACLR 773, cited
Helvetic Investment Corporation Pty Ltd v Knight (1982) 7 ACLR 225, cited
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, followed
Naomi Marble and Granite Pty Ltd v FAI General Insurance Co Ltd (No 2) [1999] 1 Qd R 518; [1998] QSC 18, cited
Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360; [1979] HCA 61, cited
Re Chapmans Ltd (2015) 108 ACSR 564, cited
Re Cloudzillr Pty Ltd (in liq) [2017] QSC 25, cited
Re Convector Grain Pty Ltd (in liq) [2017] VSC 473, cited
Re Interwest Hotels Pty Ltd (in liq) (1993) 12 ACSR 78, cited

Re Johnson (1880) 15 Ch D 548, cited
Re Talk Finance and Insurance Services Pty Ltd [1994] 1 Qd R 558, cited
Reece Pty Ltd v Lister Davey & Ors (Unreported, Supreme Court of Queensland, Martin J, 25 February 2010), cited
Robsyn Pty Ltd (in liq) v O'Brien (No 2) [2012] QSC 367, cited
Ron Kingham Real Estate Pty Ltd v Edgar [1999] 2 Qd R 439, cited
Schuhmacher v Emmerson (No 2) [2013] QSC 235, cited
Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 319; [1945] HCA 37, cited
Vetris v Cashman (1998) 72 SASR 449, cited
Yamacoe Pty Ltd v Michel Survey Group Pty Ltd [2002] QSC 393, cited

COUNSEL: P L O'Shea QC with C Harding for the plaintiff
M Callanan for the defendants

SOLICITORS: Mitchells Solicitors for the plaintiff
Stokes Moore for the defendants

[1] By this application, the first defendant, Isaiah Jumeirah Kahrter Pty Ltd, contended that the claim was commenced without the authority of the plaintiff, Beenleigh Housing & Development Company Ltd, and sought an order dismissing it. In opposing the relief sought by IJK, BHDC cross-applied for an order declaring that the instructions to its solicitors to commence the proceeding were not invalid by reason of any contravention of a provision of the *Corporations Act* 2001 (Cth) or of its constitution.

[2] The application for dismissal of the claim was filed on behalf of both defendants. That occurred on 13 September 2016 but, on 14 October 2016, the solicitors for the defendants wrote to BHDC's solicitors in terms advising that, although IJK intended to press the application, the second defendant, Nelson Leon, no longer wished to do so.[1] That remained the position at the hearing on 3 November 2016; although Leon is a defendant to the claim and was a party to the application when filed, he was no longer a party to the application by the time it came on for hearing. Nonetheless, as I previously observed,[2] Leon supported IJK's application through the provision of two affidavits on which he was cross-examined at the hearing.

[3] On 21 August 2017, IJK's application was dismissed and the parties were directed to file and serve written submissions as to (1) what, if any, orders should be made with

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1 Affidavit of David Alastair Graham filed on 31 August 2017, ex DAG-1.

2 *Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor* [2017] QSC 170, [3].

respect to the cross-application and (2) the costs of the application and cross-application.[3]

The cross-application

[4] The cross-application brought by BHDC was for a declaration pursuant to s 1322(4) of the *Corporations Act*. Relevant for present purposes was an argument IJK advanced to the effect that there was non-compliance with the notice requirements contained in ss 249H(1) and 249J(1) of the *Corporations Act*, but that argument was rejected because neither provision applied to BHDC given its status as a body corporate registered under the *Australian Charities and Not-for-profits Commission Act* 2012 (Cth).[4]

[5] Because a question was raised about the requirements of the Act, submissions were sought in case a declaration regarding the inapplicability of ss 249H(1) and 249J(1) was considered to be of some utility. The usual position is that the presumption of validity enshrined in s 1322 is such as to make a declaration of validity unnecessary because the relevant meeting – here, the AGM – will not be invalidated unless the court declares that to be so. But there are cases where some utility is seen, and a declaration is made, because an order under s 1322(4) is the proper and desirable means of providing finality over the question.[5] However, in submissions received from BHDC on 31 August 2017, it was submitted that, in light of the dismissal of IJK's application, the relief it had sought under the cross-application was no longer necessary.[6] IJK took the same position, noting that the cross-application was essentially "defensive".[7] As such, and without more, the appropriate order would be that the cross-application be dismissed.

[6] But there was more. On 16 October 2017, the solicitors for BHDC asked for the cross-application to be re-listed for a "short hearing". They had earlier this month forwarded to the solicitors for the defendants the draft of a letter they proposed sending to the court for the purpose of seeking leave to make further submissions on this question of the relief, and sought the defendants' consent to its forwarding.[8] That was a perfectly proper course to take and accorded with the requirements of r 22.5.2 of the *Australian Solicitors Conduct Rules*. The solicitors for the defendants responded on 5 October 2017 in terms querying some matters. The solicitors for BHDC answered that correspondence later that day.[9] Nothing further was heard from the solicitors for the defendants as to their attitude, one way or the other, to BHDC's proposal. It therefore

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3 Ibid [58].

4 Ibid [54].

5 *Re Convector Grain Pty Ltd (in liq)* [2017] VSC 473, [91], citing *Re Chapmans Ltd* (2015) 108 ACSR 564, 567 [18]–[19]; *Re Cloudzillr Pty Ltd (in liq)* [2017] QSC 25, [32].

6 Plaintiff's submissions, par 22.

7 Defendants' submissions, par 40.

8 Exhibit 1 tendered at the hearing on 18 October 2017.

9 Exhibit 2 tendered at the hearing on 18 October 2017.

became necessary for the court to relist the matter, and that occurred on 18 October 2017. When asked at the hearing why no further response had been forthcoming from his solicitors after 5 October 2017, counsel for the defendants informed the court that his solicitors had been seeking instructions. Even, accepting as I do, that explanation, it is most regrettable that the defendants' solicitors failed to communicate that reason to the solicitors to BHDC. Had they done so, a further hearing could well have been avoided because the issue BHDC's solicitors wished to raise could have easily been disposed of on the papers.

[7] As to that issue, following the dismissal of its application, a notice of appeal was filed on behalf of IJK. BHDC wished to submit (and did submit at the 18 October hearing) that, because of that development, no order should be made on the cross-application other than an order adjourning it pending the outcome of the appeal. This was submitted to be desirable because it might be necessary for orders to be made in the event that the decision on the dismissal application is set aside. I do not agree. The filing of an appeal against the dismissal application is quite irrelevant to the proper disposal of the cross-application. The decision stands unless and until it is set aside and, for so long as it stands, neither party submits there is any utility in the making of a declaration. The cross-application will be dismissed.[10]

Costs

[8] BHDC seeks its costs of the application and the cross-application from both defendants, although the bases on which it claims each should be assessed are different; against IJK, an order is sought that the costs be calculated on the standard basis but, in the case of Leon, BHDC seeks costs calculated on the indemnity basis.[11] By letter dated 29 August 2017, Leon was placed on notice that such an order would be sought.[12]

[9] For the defendants, it was submitted that there should be no order as to costs of the application or the cross-application because of the late service of material by BHDC. In the alternative, it was argued that the costs of both applications be reserved pending the final determination of two issues at trial, that is to say, the proper construction of a limitation of liability provision contained in a deed of agreement between BHDC and IJK and the making of findings as to the assets of the Isjuka Trust. Lastly, it was submitted that, if costs are ordered against the defendants, the execution of any costs order against IJK be restricted in accordance with the limitation of liability provision and that any costs order against Leon be confined to those costs incurred up to and including 14 October 2016, being the date on which he elected not to proceed with the dismissal application.

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10 It should also be recorded that the court pronounced at the hearing on 18 October 2017 that there would be no order as to the costs of that appearance.

11 In support of its application for costs, BHDC sought to rely on an affidavit of David Alistair Graham filed on 31 August 2017. As neither defendant objected to that course, leave to do so will be granted.

12 Graham (31 August 2017) exs DAG-2 and DAG-4.

[10] In submitting that there should be no order as to costs, IJK contended that "the plaintiff's success was on the back of material that was served at the 11th hour".[13] In that regard, directions were made by the court on the same day Leon elected not to proceed with the application (14 October 2016). They required BHDC to file and serve its affidavit material by 17 October in readiness for the hearing on 3 November. In compliance with that direction, BHDC filed a number of affidavits by that date but several additional affidavits were served either on the day prior to, or the morning of, the hearing, and then filed by leave. Of this further body of material, two affidavits sworn by Mr Davis were submitted by the defendants to have been an "indispensable part of the reasoning that led to" the rejection of IJK's principal ground for dismissal of the claim – i.e., the argument based on the alleged non-payment of membership fees – as well as being influential in the determination of a number of associated issues and arguments.[14] Similarly, an affidavit sworn by Mr Graham and served late was submitted to have supplied the basis for defeating IJK's argument about the sufficiency of the notice for the AGM.[15]

[11] It may be accepted that the affidavit material served by BHDC on the day prior to the hearing had a substantial impact on the outcome of the application and, of course, that it was served well outside the timetable ordered on 14 October. So, too, may it be accepted that the existence of some of that material had been queried in correspondence from IJK's solicitors in the weeks leading up to the hearing. But IJK did not object to the court granting leave to file and read any of these late affidavits,[16] and nor could any objection have been seriously entertained. That is because the issues to which that material responded had not been squarely raised until they appeared in IJK's written submissions, and these were not served until the afternoon before the hearing.[17] They should have been filed and served by 28 October 2016.[18] It was also open to IJK to seek an adjournment to consider its position in light of the late material, but none was sought. Instead, IJK chose to proceed in the face of that material and, in the result, its application failed. Given that state of affairs, and rather than providing some justification for the making of no order as to costs, the usual consequence under r 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) should ordinarily follow.

[12] Rule 681(1) *UCPR* provides that the costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise. In reliance on this rule, BHDC submits that IJK should be ordered to pay the costs of the application on the standard basis.[19] To this, the defendants say that

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13 Defendants' submissions, par 4.

14 Ibid pars 6-9.

15 Defendants' submissions, par 10.

16 Transcript 1-7.

17 Transcript 1-73.

18 Order (Holmes CJ); 14 October 2016, par 7.

19 Plaintiff's submissions, par 17.

"if the court does not find that there should be no order as to costs",[20] the costs should be reserved to the trial judge. The defendants argue that this should occur because cl 15 of a deed of agreement entered into by BHDC and IJK on 12 November 2014 has the effect of limiting IJK's liability to BHDC to the amount which it is entitled to be indemnified as trustee out of the assets of the Isjuka Trust.[21]

[13] Clause 15 of the deed is in these terms:

> "**15. LIMITATION OF LIABILITY**
>
> **15.1 The Trustee's Capacity**
>
> 15.1.1 Unless otherwise specifically contemplated in this Deed, and subject to clause 15.1.3, the Trustee enters into this Deed only in its capacity as trustee of the Trust and in no other capacity. A liability arising under or in connection with this Deed can be enforced against the Trustee only to the extent to which the Trustee is actually indemnified for the liability out of the property of the Trust. The Trustee will exercise its rights of indemnification in order to satisfy its obligations under this Deed. The limitation of the Trustee's liability applies and extends to all liabilities and obligations of the Trustee in any way connected with any representations, warranties, conduct, omission, agreement, or transaction related to this Deed.
>
> 15.1.2 Unless otherwise specifically contemplated in this Deed, and subject to clause 15.1.3, a party to this Deed may not sue the Trustee in any capacity other than as trustee in respect of the Trust, including seeking the appointment to the Trustee of a receiver (except in relation to property of the Trust), a liquidator, administrator or any similar person or proving in any liquidation, administration or arrangement of or affecting the Trustee (except in relation to the Trust).
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> 15.1.3 The provisions of clause 15.1 do not apply to any obligation or liability of the Trustee to the extent that it is not satisfied because under the trust deed establishing the Trust, or by operation of law, there is a reduction in the extent, or elimination of, the Trustee's right of indemnification out of the assets of the Trust, or such right does not exist at all, as a result of:
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> 15.1.3.1 the Trustee having incurred the obligation or liability as a result of fraud, gross negligence, wilful default or breach of trust by the Trustee; or

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[20] Defendants' submissions, par 19.

[21] The relevance of the deed of agreement to the claim is explained in the principal judgment: *Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor* [2017] QSC 170, [8]-[11].

> 15.1.3.2 the failure of the Trustee to exercise any right of indemnity it has under the trust deed establishing the Trust in respect of that obligation or liability.
>
> 15.2 Definitions
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> In this clause … :
>
> **Trustee** means Isaiah Jumeirah Kahrter Pty Ltd ; and
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> **Trust** means Isjuka Trust."[22]

[14] A trustee who incurs a debt in the course of acting as trustee is personally liable for the debt but may be indemnified out of the assets of the trust with respect to the debt if it was properly incurred.[23] However, where the trust property is insufficient to cover the debt, the trustee will be personally liable for that part of the debt which remains unpaid unless it can be established that the trustee was not contracting personally. Otherwise, a trustee's liability to creditors will not be limited or quantified by reference to the extent of the trust assets.[24] As McPherson J remarked in *General Credits Limited v Tawilla Pty Ltd*:[25]

> "It makes no difference that he is described in the contract as 'trustee' except in those rare instances, of which *Helvetic Investment Corporation Pty. Ltd. v. Knight* (1982) 7 ACLR 225 is an example, where that description can be interpreted as meaning that the liability of the trustee is limited to the trust assets; or, what is the same thing, that the trustee's personal assets are not to be available for payment of the debt."[26]

[15] Clear words are necessary to "achieve a result whereby what is prima facie the unlimited personal liability of a trustee" becomes limited.[27] Here, the defendants contend that the terms of cl 15.1 of the deed are effective to limit IJK's liability to BHDC to the assets of the Isjuka Trust and that cl 15.1.3, providing as it does that the

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22 Affidavit of David Alastair Graham filed on 29 August 2016, ex DG-3.

23 *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 444 (McPherson JA). And see s 72 of the *Trusts Act* 1973 (Qld), a provision that allows a trustee to "reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers".

24 *Re Johnson* (1880) 15 Ch D 548, 552; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324-325; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367.

25 [1984] 1 Qd R 388.

26 Ibid 389. And see *Re Interwest Hotels Pty Ltd (in liq)* (1993) 12 ACSR 78, 83 (Eames J); *Astram Financial Services Pty Ltd v Bank of Queensland Ltd* [2010] FCA 1010, [369] (Buchanan J).

27 *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd & Ors* (1987) 78 ALR 193, 253 (Gummow J), citing *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 ACLR 773 (NSWCA). And see the decision at first instance (reversed, but not on this point), *Helvetic Investment Corporation Pty. Ltd. v. Knight* (1982) 7 ACLR 225, 229.

limitation extends to "all liabilities and obligations of [IJK] in any way connected with any representations, warranties, conduct, omission, agreement, or transaction related to" the deed, is broad enough to apply to a liability for costs in a proceeding taken in connection with the deed. As to the exclusion (from the operation of cl 15.1.1) that appears in cl 15.1.3 with respect to obligations or liabilities arising "as a result of fraud, gross negligence, wilful default or breach of trust", the defendants submitted that it is "presently irrelevant".[28] Of course, that would not be so if the court was being asked to decide now whether cl 15 has the effect contended by the defendants but, instead, they submit that is something best left to the trial judge because that very issue is likely to assume importance in the determination of the claim.

[16] That seems to me to be right. There will in addition need to be a factual determination as to the extent of the trust assets and, although the solicitor for the defendants has sworn that the trust fund consists of $10.00,[29] that is something which BHDC may very well wish to investigate at the trial. It is therefore appropriate to defer the question whether any limitation of liability for costs serves to protect IJK and, if so, to what extent, until the trial.

[17] However, merely because these issues will be determined later does not mean that the court should accede to the submission made on behalf of the defendants to reserve the costs until the trial.[30] In the first place, if the limitation applies, it will only protect IJK; not Leon. Second, IJK is entitled to a costs order in its favour regardless of what is subsequently determined about the extent of its protection (if any) under cl 15. By r 682(2) *UCPR*, if the court awards the costs of an application in a proceeding, the court may also order that those costs not be assessed until the proceeding ends. There is accordingly no reason why an order for costs should not now be made against IJK with an accompanying order that they be assessed at the end of the proceeding. That is what will be done.

[18] As to the other defendant, Leon, the position is different. BHDC submits that Leon should be ordered to pay the costs of the application and, further, that they be assessed on an indemnity basis. For Leon, it was submitted that any order as to costs ought be limited to the costs incurred up to and including the date on which he elected not to proceed with the dismissal application (14 October 2016).[31]

[19] That Leon should pay BHDC's costs up to and including 14 October 2016 cannot be doubted – he was a party to the dismissal application until that point in time and it did not succeed – but the real questions are whether he should be ordered to pay the costs incurred after that date and, if so, whether the costs he is ordered to pay should be assessed on the indemnity basis.

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28 Defendants' submissions, par 24. And see: cl 20.1 and cl 20.2 of the deed.

29 Affidavit of Ashley Moore filed on 14 September 2016, par 3.

30 Citing *Reece Pty Ltd v Lister Davey & Ors* (Unreported, Supreme Court of Queensland, Martin J, 25 February 2010), where that approach was taken.

31 Defendants' submissions, par 33.

[20] In support of the submission that Leon pay the costs of the application without limitation, BHDC contended that the dismissal application was pressed at the hearing by IJK on one main ground, that is to say, the alleged non-payment of membership fees. Because the "factual premises upon which [that argument] was based were not made out",[32] it was rejected. The court's findings, BHDC submitted, were "based largely on the contents of a membership list emailed by" Leon.[33] Because it was expressly found that, when Leon emailed the membership list, "he was conveying a belief he held at that time that the list of financial members was current" at the time when he sent the email, he "must have known that the case being advanced by [IJK] … was untenable and had no basis in fact".[34] Further, it was submitted that:

> "[I]t can be inferred that it was [Leon's] willingness to disregard the truth for his own benefit, including by his denial of the accuracy of the membership details contained in that list, that led to the primary application being prosecuted".[35]

[21] BHDC relied on the settled proposition that costs orders can, in appropriate circumstances, be made against non-parties.[36] Particular reliance was placed on the "general category of case" discussed by Mason CJ and Deane J in *Knight v FP Special Assets Ltd*:[37]

> "That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of the case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."[38]

[22] It was submitted by BHDC that Leon's evidence was relied on by IJK to supply much of the foundation for the dismissal application, with the only other supporting evidence coming from IJK's solicitor, Mr Moore, and a short affidavit from a Ms Rogers. To be contrasted is the position of the sole director of IJK, Sue-Ellen Pascoa. She has been the

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32 Plaintiff's submissions, par 4.

33 Plaintiff's submissions, par 4.

34 Ibid par 5.

35 Ibid par 6.

36 Citing *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 190 and *Commissioner of Stamp Duties v Westleigh Management Services Pty Ltd* [2001] QSC 176, [18] and [19].

37 (1992) 174 CLR 178.

38 Ibid 192-193.

de facto partner of Leon for some 21 years.[39] She did not swear an affidavit in support of the application. She is "possibly" a beneficiary of the Isjuka Trust and Leon certainly is.[40] BHDC contended that Leon played an active part in the conduct of the application and was "in reality the only party pressing" it, that he had a "significant interest in the outcome", that IJK was a "man of straw" (given what its solicitor swore as to the value of the trust fund) and that it could be inferred that Leon "did not formally press the application in an attempt to evade the potential consequence of an adverse costs order, while actively supporting the application in an endeavour to obtain considerable benefit for himself if the application was successful".[41]

[23] On that last point, Leon was cross-examined at the hearing about his decision not to press the application. He said that he could not recall discussing his decision with Pascoa,[42] but maintained that he had "personal reasons for withdrawing".[43] He denied that he did so to avoid personal exposure to a costs order.[44] For the reasons I have previously expressed,[45] it is impossible to place much faith in the accuracy of any of Leon's evidence but his denial of the proposition put to him as to the reason for not pressing ahead with the application was curious. Success on the application would have been to his benefit, but that benefit could have been secured without him as a party. In that sense, it may have been thought that his presence as a party was not needed but, as against that, his evidence must have been considered essential to the challenge and, as BHDC submitted, Leon supplied the bulk of the evidence in that regard. It is therefore difficult to conceive of a reason why, in such circumstances, Leon would not remain as a party to the application unless it was, as was put to him, to avoid a costs order. However, despite what is submitted by BHDC, it is to my mind unnecessary to draw any inference about Leon's true motive; a costs order may be made against him regardless, provided the interests of justice require such an order to be made.

[24] That said, the argument advanced by BHDC to justify an order for indemnity assessment relied on the rule – r 703 *UCPR* – and the frequently cited observations of Shepherd J in *Colgate-Palmolive Company v Cussons*[46] as to some of the circumstances that might warrant an order for indemnity costs. Reference was also made to *Re Talk Finance and Insurance Services Pty Ltd*[47] (where Moynihan J ordered indemnity costs against the two directors of the unsuccessful company who had persisted in raising

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39 Transcript 1-55.

40 Ibid.

41 Plaintiff's submissions, par 19(d).

42 Transcript 1-56.

43 Ibid 1-58.

44 Ibid 1-58.

45 *Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor* [2017] QSC 170, [42].

46 (1993) 46 FCR 225, [24].

47 [1994] 1 Qd R 558.

deliberately false issues as to the execution of documents and the authenticity of their signatures) and *Yamacoe Pty Ltd v Michel Survey Group Pty Ltd*[48] (where Fryberg J ordered the principal officer and shareholder of the plaintiff company to pay costs on an indemnity basis because he "resolved not to tell the truth on [a critical] issue and … did not do so"[49]).

[25] BHDC maintained that, had Leon "acted honestly and provided truthful instructions it could be expected that the application would never have been made".[50] Of course, one problem with that submission is that it assumes that Leon (and not Pascoa) was providing instructions on behalf of IJK but, that aside, the gist of the submission was that, without Leon's preparedness to give an untruthful account, the application would not have been pursued.

[26] For the defendants, it was submitted that, before an order for indemnity costs can be made, it is necessary for BHDC to establish that the "conduct in question" was "egregious".[51] That, it was submitted, cannot be established.[52] It was also submitted that the "court ought not rush to order indemnity costs in circumstances where one of the well established categories is not made out".[53] Further, the point was made that, because the submissions on this issue were by exchange, Leon would be unable to reply to the submissions made by BHDC.[54]

[27] In light of the point just mentioned, Leon was given leave to make any submissions he wished to make by way of reply. This he did through the provision of written submissions on 8 September 2017.

[28] Apart from repeating, in different ways, the submissions previously made on behalf of the defendants, Leon submitted that the circumstances in which an order for costs should be made against a non-party did not arise. Too much was made, he submitted, of his relationship with Pascoa, her status as a sole director of IJK and his standing as a beneficiary of the trust. The small amount of money in the trust fund meant that "there is nothing for him to gain or stand behind by the defendant trustee winning or losing the proceeding" and "the only liability that can flow to the trust is the extent of the assets …

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48 [2002] QSC 393.

49 Ibid [17]. His Honour referred to (at [18]), and regarded as "analogous", the decision of Shepherdson J in *Naomi Marble and Granite Pty Ltd v FAI General Insurance Company Limited (No 2)* [1999] 1 Qd R 518.

50 Plaintiff's submissions, par 21.

51 As authority for this proposition, *Schuhmacher v Emmerson (No 2)* [2013] QSC 235, [17] and *Robsyn Pty Ltd (in liq) v O'Brien (No 2)* [2012] QSC 367, [8] were cited.

52 Defendants' submissions, par 37.

53 Ibid par 39.

54 Ibid.

which stand at $10.00".[55] It was argued that no useful analogy can be drawn between his position and the position of a company receiver who litigates in the name of the company. It was "history" that "dictated" that he was the individual to give the relevant evidence.[56] That did not mean that Pascoa did not play any part in the application; she was the sole director of the company bringing the application. Nor could it be said that, on the evidence, Leon was the "controlling mind and will" of that company in respect of the litigation. It was also submitted by Leon that the "general category of case" discussed by Mason CJ and Deane J in *Knight v FP Special Assets Ltd*[57] contains "conjunctive considerations"[58] which cannot all be made out and that, in any event, the interests of justice do not require an order for costs to be made against him. Lastly, it was submitted that he had no financial interest in the outcome of the application although it was conceded that "he would have benefited from the dismissal of a proceeding he was a defendant to".[59]

[29] As to the question of whether costs, if awarded, should be assessed on an indemnity basis, the submission was made by Leon that most of the categories of case highlighted by Shepherd J in *Colgate-Palmolive Company v Cussons*[60] could not be said to arise here. Of the categories that arguably arose – wilful disregard of known facts or the making allegations which ought never to have been made – it was submitted that the adverse findings concerning Leon were "limited to the issue of the email and the list attached to it"[61] and there was otherwise "significant documentary evidence" that allowed IJK to advance its case.[62] Also, it was submitted, the relevant finding in favour of BHDC depended on the acceptance of other evidence, namely from Mr Davis. As such, Leon submitted it could not be said that the evidence he gave constituted a wilful disregard for known facts or the making of allegations which ought never to have been made and, further, that he was "entitled to, notwithstanding any belief he was found to have had at an earlier time, give the evidence that he did by reference to … documents subsequently obtained".[63]

[30] In my view, the interests of justice require an order for the costs of the application to be made against Leon, and not merely one limited to the costs incurred up to and including 14 October 2016. He was an obvious promoter of the application by IJK, and he attempted to do that through the provision of false testimony. As I found, he was a "man

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55 Second defendant's response to the plaintiff's submissions on costs, par 7.

56 Second defendant's response to the plaintiff's submissions on costs, par 8.

57 Supra.

58 Second defendant's response to the plaintiff's submissions on costs, par 13.

59 Ibid par 16.

60 Supra.

61 Second defendant's response to the plaintiff's submissions on costs, par 20.

62 Ibid par 22.

63 Second defendant's response to the plaintiff's submissions on costs, par 27, and referring to pars [27] to [35] of his affidavit filed on 28 October 2016.

who, with little or no regard for the truth, did his level best to avoid saying anything he perceived might assist BHDC while at the same time being prepared to advance a version that he must have believed might enhance IJK's application and, in turn, its prospects of securing an order for dismissal of the proceeding".[64] Leon stood to benefit, in the sense conceded in his submissions of 8 September 2017, if the dismissal application he supported with that evidence succeeded.[65] By that evidence, he sought to undermine the provenance of the membership list that he emailed on 5 November 2014 and he did that in part by attempting to distance himself from having occupied any position of responsibility within BHDC. Had he succeeded, the reliability of the two lists Mr Davis subsequently prepared, based as they were on the list emailed by Leon, would have then been seriously affected. There would then have been a real absence of membership records and that would have significantly bolstered IJK's argument, based as it was on that very contention. Furthermore, I cannot accept that the dismissal application would have been pursued had Leon given a truthful account to those instructing counsel for IJK and, in particular, confirmed that the membership list he emailed on 5 November 2014 was to his belief at that time a current list of the financial members of BHDC. By failing to do so, the case proceeded and BHDC was put to the expense of defending its solicitors' retainer. I agree that Leon must have known that the case then advanced by IJK was "untenable and had no basis in fact[66] and, although I am not persuaded that it is necessary in every case to establish that the conduct in question was "egregious"[67] before indemnity costs may be awarded, in this case that description is met.

[31] The discretion as to costs vested in the court is not one that is confined by categories. Rather, it is a discretion that "must be exercised judicially and in accordance with general legal principles pertaining to the law of costs".[68] Even though an order for costs against a non-party may be regarded as extraordinary, that "provides no justification for the imposition by the courts, by way of implication, of an arbitrary limitation upon the general jurisdiction conferred by the rule".[69] In all such cases the question is whether the interests of justice require the making of an order against the non-party. If so, then the further question is whether the circumstances are such as to take the case outside the usual rule that costs be assessed on the standard basis. In the circumstances just discussed, both questions must be answered in the affirmative. It would be quite wrong for BHDC to be left out of pocket. Leon will be ordered to pay the costs of the application to be assessed on the indemnity basis.

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64 *Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor* [2017] QSC 170, [42].

65 As to which, see the discussion in *Vetris v Cashman* (1998) 72 SASR 449, 468.

66 Plaintiff's submissions, par 5.

67 As the defendants submitted, relying on *Schuhmacher v Emmerson (No 2)* (Supra) and *Robsyn Pty Ltd (in liq) v O'Brien (No 2)* (Supra).

68 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 192 citing *Oasis Hotel Ltd v Zurich Insurance Co* (1981) 124 DLR (3d) 455, 462.

69 Knight v FP Special Assets Ltd (1992) 174 CLR 178, 185.

Other costs

[32] There is one remaining issue. The defendants made reference in their submissions to the orders made by Holmes CJ on 14 October 2016 and, in particular, to the order reserving costs. The background to the making of that order was that, on 29 August 2016, BHDC filed an application for summary judgment on its claim. It was made returnable on 15 September but was overtaken, it seems, by the filing of the application for dismissal on the preceding day (14 September). Hence, when the summary judgment application came on for hearing the next day, it was adjourned by P Lyons J to a date to be fixed and directions were made to facilitate the hearing of the dismissal application on 14 October, including a timetable for the filing and service of affidavit material and written submissions. His Honour also made an order reserving the costs. Then, on the day prior to that hearing (13 October), BHDC filed the cross-application and it was made returnable the next day. When both applications came on before Holmes CJ, each was adjourned for hearing on 3 November and the timetable for the filing and service of the parties' affidavit material and submissions was adjusted.

[33] The defendants submitted that the "costs thrown away by the adjournment [on 14 October 2016] that followed the plaintiff's late [cross-application] … ought to be in favour of" them. Although they do not seek an order to that effect, it was argued that this was "another reason why, all things considered, there being no order as to costs is fair and just as between the parties".[70] I cannot see how that necessarily follows but, in any event, the defendants' submission is loaded with presumption about the reason why the applications could not be heard on 14 October 2016. The submission appears to be that the applications could not proceed because the cross-application was brought late. On the face of things, I very much doubt that an application which was responsive to the dismissal application could have that effect, but there is scant material on which that question may be decided and BHDC has not addressed the question of reserved costs in its submissions.

[34] Despite that, the position remains that the defendants lay claim to some sort of entitlement to the costs thrown away by the 14 October 2016 adjournment and, because I have rejected any such entitlement as a basis for making no order as to costs, they should have liberty to apply, should they wish, with respect to those costs. At the same time, the parties may also wish to be heard on the question of the costs reserved by P Lyons J on 15 September 2016, although that may be something better left to the trial judge.

[35] If the court reserves the costs of an application in a proceeding, the costs reserved follow the event, unless the court orders otherwise: r 698 *UCPR*. For the reasons just discussed, it is therefore appropriate to exempt the costs reserved on 15 September 2016 and 14 October 2016 from the costs orders I am about to make in favour of BHDC and to grant the parties liberty to apply regarding those reserved costs.

Orders

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70 Defendants' submissions, par 18.

[36] For these reasons, the cross-application will be dismissed and both defendants shall be ordered to pay the costs of the application and the cross-application save for the costs reserved on 15 September 2016 and 14 October 2016. In the case of BHDC, those costs will be calculated on the standard basis and limited in such amount, if any, as may be agreed with IJK or determined at trial but, in any event, they shall not be assessed, or become payable, until the proceeding ends. In the case of Leon, the costs will be calculated on the indemnity basis.