SUPREME COURT OF QUEENSLAND

CITATION:	*Murphy v Mackay Labour Hire Pty Ltd* [2018] QCA 90
PARTIES:	**GEOFFREY JOHN MURPHY** **(appellant)** **v** **MACKAY LABOUR HIRE PTY LTD** ACN 130 813 295 (respondent)
FILE NO/S:	Appeal No 5383 of 2017 DC No 84 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Mackay – [2013] QDC 84 (Clare SC DCJ)
DELIVERED ON:	18 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2017
JUDGES:	Fraser and Philippides JJA and Boddice J
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – where a proprietary limited company was a defendant in proceedings for breach of contract – where the proceedings did not proceed to judgment because the defendant company was placed into liquidation after the hearing of the evidence in the trial – where a non-party costs order was made against the company's sole director and secretary – whether the trial judge erred in finding insolvency of the defendant company – whether the trial judge erred in finding there was a positive obligation on the defendant company's sole director and secretary to warn of the defendant company's insolvency – whether the trial judge erred in finding impropriety in those circumstances – whether the trial judge erred in the application of *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 in failing to consider the issues of the non-party's involvement or interest in the litigation *Civil Proceedings Act* 2011 (Qld), s 15

Corporations Act 2001 (Cth), s 1335
Queensland Building and Construction Commission Act 1991 (Qld), s 56AC
Uniform Civil Procedure Rules 1999 (Qld), r 670, r 671, r 681(1)

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Bischof v Adams [1992] 2 VR 198; [1992] VicRp 61, cited
FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340, cited
International Cat Manufacturing (in liq) v Rodrick (2013) 97 ACSR 200; [2013] QCA 372, cited
Keith Smith East West Transport Pty Ltd (in liq) v Australian Taxation Office (2002) 42 ACSR 501; [2002] NSWCA 264, cited
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, applied
Owners of Strata Plan No 23007 v Cross (2006) 153 FCR 398; [2006] FCA 900, cited
Plante v James [2011] QCA 109, applied
R v Noonan (2002) 127 A Crim R 599; [2002] NSWCCA 46, cited
TQM Design and Construct Pty Limited v Golden Plantation Pty Limited [2011] NSWSC 500, cited
Walsh v Natra Pty Ltd (2000) 1 VR 523; [2000] VSCA 60, cited

COUNSEL: J W Peden for the appellant
M T de Waard for the respondent

SOLICITORS: Mahoneys for the appellant
Macrossan & Amiet Solicitors for the respondent

[1] **FRASER JA:** For the reasons given by Philippides JA (in [2]-[47]) the appellant has not established that the primary judge erred in making a non-party costs order against the appellant. I agree that the appeal should be dismissed.

[2] **PHILIPPIDES JA:**

Issue

[3] The appellant, Mr Murphy, appeals against a non-party costs order made against him in relation to proceedings involving a company of which the appellant was the sole director. The proceedings did not proceed to judgment because, after the hearing of evidence in the trial, the company was placed into liquidation.

Background

[4] The appellant was, at all material times, the sole director of Collhart Investments Pty Ltd, formerly known as JM Kelly (Project Builders) Pty Ltd, a construction company. That company was the defendant in a District Court proceeding brought by the respondent, Mackay Labour Hire Pty Ltd, as plaintiff, for $288,242.54 for

labour hire provided under various contracts. The respondent's proceeding was commenced in August 2013. In July 2015, the defendant counterclaimed for recovery, by way of restitution, of $131,178.05 as money paid under a mistake of law. The trial commenced on 13 June 2016 with evidence being finalised on the afternoon of 15 June 2016 and the matter being adjourned by the primary judge (Clare DCJ) for submissions.

[5] On 15 July 2016, the respondent brought an application seeking costs against the appellant returnable on 9 August 2016. The application was filed with a supporting affidavit of Mr Naylor. It deposed to liquidators being appointed to the defendant on 20 June 2016 (five days after the close of evidence) and that that matter had only come to the respondent's (Mackay) solicitors attention the following day as a result of a report in a Rockhampton newspaper.

[6] When the matter came before the primary judge on 9 August 2016, the liquidator consented to an order dismissing the defendant's counterclaim against the respondent, with costs in favour of the respondent. Submissions were also made, orally and in writing, concerning the non-party costs application, with her Honour reserving her decision on that application.

[7] It seems that the file was marked as settled but subsequently, in April 2017, it became apparent that the non-party costs application remained on foot. An inquiry was made as to whether the respondent wished to offer any evidence on the question of the defendant's insolvency and the matter was adjourned to 2 May 2017. An affidavit deposed to by the appellant on 28 April 2017 was filed.

[8] Thereafter, on 2 May 2017, her Honour determined the application for non-party costs and ordered[1] that the appellant pay the respondent's costs of the proceedings (including trial and reserve costs and costs of the application) incurred from 17 March 2016. The appellant appeals against that costs order.

The decision of the primary judge

[9] The following factual background, derived from Mr Naylor's supporting affidavit, was referred to by the primary judge:[2]

- Mr Murphy, in addition to being the sole director and secretary of the defendant and the nominee for the defendant's building licence, was also the sole director and secretary of Murphy International Pty Ltd and JM Kelly Group of Companies Pty Ltd.
- Mr Murphy's building licence was used for JM Kelly Group of Companies Pty Ltd as well as related companies.
- On 9 June 2016, all three companies changed their names by resolution. (The new names did not reference Kelly or Murphy or construction.)

---

1 *Mackay Labour Hire Pty Ltd v Collhart Investments Pty Ltd* [2013] QDC 84 (Reasons).

2 Reasons at [4].

- On 10 June 2016, the Friday before the commencement of the trial on the following Monday, the name changes for two of the companies, Murphy International Pty Ltd and JM Kelly Group of Companies Pty Ltd, were registered with ASIC but not for the defendant.
- Also on 10 June 2016, Mr Murphy executed a series of detailed deeds transferring the productive resources and contracts of the defendant to a related company. There were separate deeds for the sale of assets and the transfer of employees and construction contracts to JM Kelly Builders Pty Ltd.
- On 20 June 2016, Mr Murphy made a resolution to wind up the defendant.
- The liquidator's report (exhibited to the affidavit of Mr Naylor) indicated that the defendant had ceased business on 17 June 2016 (two days after the evidence closed), which was also the day the defendant's change of the name was lodged.[3]
- Upon the liquidation of his companies, Mr Murphy was disqualified by law from further acting as nominee for any building company.[4] The Queensland Building and Construction Commission (the QBCC) was notified of a change of nominee for JM Kelly Builders Pty Ltd on the day that the defendant's name change was registered.
- The firm of solicitors used to register the name change for all three companies and prepare the deeds was different to the solicitors representing the defendant at trial.

[10] The primary judge summarised the background to the making of the application as follows:[5]

> "The trial of this matter was effectively brought to an end by the voluntary liquidation of the defendant company. The [respondent] applied to recover its costs from ... Mr Murphy [who] was not a party to the action, but … was the sole director of the defendant. He wound up the company almost immediately after the close of evidence. He admitted details of a serious insolvency. He did not answer an inference that his company conducted the litigation while insolvent. The presumption of continuance ought to apply. The interests of justice strongly favour a costs order."

[11] The primary judge observed that the defendant ceased business on 17 June 2016, two days after the close of evidence in the trial and stated:[6]

---

3 Reasons at [9].

4 Section 56AC of the *Queensland Building and Construction Commission Act* 1991.

5 Reasons at [1].

6 Reasons at [9].

> "…At that time it had 3 construction contracts. The deeds for the assumption of employees, asset sales & construction contracts were executed before the liquidators were appointed. They were to be the subject of review. The liquidator's report also included a Form 509 summary of the defendant's affairs, apparently signed by Mr Murphy. There was no challenge to the authenticity of that document. It represented that as at 20 June 2016 the defendant company had debts of $ 4.5 million, and assets worth less than a tenth of that. The form suggested assets given a book value of $7.2 million had a market value of less than $426,000."

[12] The primary judge referred to Mr Murphy's affidavit evidence and his statement therein that "he had not made the decision to wind up the company *until the very last moment*", observing that it did not address the real issue of the defendant's insolvency. Her Honour also made the following observations in relation to that affidavit:[7]

> "Mr Murphy's affidavit does not offer evidence of any sudden financial collapse. Mr Murphy swore that the decision to liquidate '*was made as a consequence of the financial impact of a separate piece of litigation concerning a one off project at Burleigh Heads*'. He deposed the defendant had sued another company, Toga Developments No 31 Pty Ltd [(Toga)], for a claim for $ 30 million, there was a counter claim and the litigation spanned approximately 10 years. The defendant had lost many of its claims and litigation costs were 'enormous' (dates and amounts were not specified in the affidavit). Costs orders were made against the defendant. Mr Murphy tried to negotiate a commercial resolution from 'early 2016' until 'late May 2016'. That was unsuccessful. He attested '*up to that time I continued to ensure there was support available to the [defendant] so as to enable it to continue with the litigation in these proceedings*'. In the following weeks he obtained legal advice and considered his options."

[13] The primary judge noted that, on 12 May 2016, the defendant received a statutory demand from Toga for $170,000, in consequence of the costs order.

[14] The primary judge outlined[8] the respondent's contentions as being that Mr Murphy was the person behind the defendant and that, at some point prior to the 9 June 2016, he made the decision to wind up the defendant and that he had actively concealed that fact from the respondent, leaving it to expend further legal costs on a claim which would be unenforceable and in defence of the counterclaim.

---

7 Reasons at [10].

8 Reasons at [5].

[15] Her Honour referred to the submission[9] on behalf of the appellant that there was no evidence or allegation of impropriety by the appellant and, specifically, no evidence the defendant was insolvent at the time of the trial. It was submitted that the liquidation was a good thing. Further, although the application for costs and supporting affidavit had been served two weeks before the hearing of the application, he had not appreciated any implication of impropriety and sought time to address it.

[16] The primary judge observed[10] that neither party argued the merits of the claim or counter-claim. The focus was on the appellant's responsibility for the conduct of the litigation in the context of the defendant's financial predicament.

The primary judge's findings

[17] The primary judge made the following findings as to the defendant's insolvency:[11]

> "Mr Murphy's own Form 509 showed the defendant was hopelessly insolvent on 20 June 16. Such serious insolvency was highly unlikely to arise overnight. It was not explained by the costs order for $ 170,000. The strong inference is that the defendant was insolvent for a significant time before the trial. If there was another explanation, it was solely within the knowledge of Mr Murphy & his company. Mr Murphy did not offer a contrary explanation. The irresistible conclusion from the totality of the evidence is that the defendant had been insolvent for a significant time prior to trial. Mr Murphy, as sole director, was the controlling mind of the defendant. If he genuinely believed he could avoid liquidation it was hopeless optimism.
>
> Mr Murphy did not disclose the defendant's financial position to the [respondent]. His company avoided an application for security for costs."

[18] In considering the costs application, the primary judge referred to the appellant's argument that a non-party costs order ought not to be made given the respondent's failure to forewarn him of the potential for such an application. In rejecting the submission, her Honour stated:[12]

> "…The facts which would make Mr Murphy liable to such an application were concealed from the [respondent], and only discovered after the costs were incurred. The [respondent] responded promptly with this application. The impropriety was plain enough from the supporting affidavit."

---

9 Reasons at [6].

10 Reasons at [7].

11 Reasons at [12]-[13].

12 Reasons at [14].

[19] The primary judge noted that the jurisdiction to make an order for costs against a non-party is rarely exercised. Her Honour considered the present circumstances fell within the category of case contemplated by Mason CJ and Deane J, in *Knight v FP Special Assets Ltd*,[13] as appropriate for the making of a non-party costs order in the following passage:

> "For our part, we consider it appropriate to recognize a general category of case in which an order for costs should be made against a non-party… 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 a 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."

[20] Her Honour observed that extracted passage was considered in *Plante v James*.[14] Her Honour held[15] that, unlike the position in *Plante*, there was compelling evidence before the Court of insolvency at the time the litigation was conducted from the appellant's own Form 509. Further, in the absence of an alternate explanation for the timing of the collapse, her Honour drew the inference that the defendant must have been insolvent for three months prior to the day it ceased trading on 17 June 2016.[16]

[21] Her Honour concluded[17] that the appellant, as the director of the insolvent company, allowed the trial to run without disclosure to the respondent. In the circumstances, the interests of justice required that the appellant personally pay the costs of the respondent incurred from 17 March 2016. Her Honour was not persuaded that there were exceptional features that warranted a departure from the ordinary rule for costs on the standard basis. In rejecting the respondent's submission that costs be on an indemnity basis, her Honour noted[18] that the merits of the claim and counterclaim had not been argued.

Grounds of appeal

[22] The appellant contended that the primary judge committed various errors in making the costs order, which were distilled into the following five grounds:

---

13 (1992) 174 CLR 178 at 192-193 per Mason CJ and Deane J with whom Gaudron J agreed at 205.

14 [2011] QCA 109.

15 Reasons at [16].

16 Reasons at [16].

17 Reasons at [17].

18 Reasons at [18].

1. error in the finding of insolvency from March 2016 in that there was no evidence for such a finding (ground 2.1);

2. error in what was said to be a finding that there was a positive obligation to warn of the defendant's insolvency (ground 2.2) and an error in finding of impropriety in those circumstances (ground 2.3);

3. error in the application of *Knight*[19] in failing to consider, in addition to the question of insolvency, the issues of the non-party's involvement or interest in the litigation and the lack of evidence as to those matters (ground 2.4);

4. error in reliance on what were said to be irrelevant matters and failure to take relevant matters into consideration (grounds 2.6 and 2.7); and

5. error in certain minor factual errors (ground 2.5).

[23] Although the appellant's written submissions, and those of the respondent, proceeded on the basis that the grounds of appeal were to be addressed by the five issues referred to above, before this Court the appellant's oral talking points focused on three contentions; that the primary judge erred, firstly, in the approach taken in considering the non-party costs application, secondly, in the misapplication of *Knight* and thirdly, in relation to the respondent's failure to give a warning to the appellant. These reasons adopt that approach.

Error in the approach taken by the primary judge

[24] The appellant's contention that the primary judge adopted an erroneous approach in determining the application proceeded on the following premises:

1. The appellant submitted that the respondent's submissions at first instance disavowed the conventional category identified in *Knight* as to jurisdiction to make a non-party costs order. Instead, the respondent argued that the categories of case enlivening the Court's jurisdiction to award non-party costs was not closed and relied on timing of three factual matters (the application by the appellant's son for a builder's licence; the change of the defendant and related company names; and the execution of the various deeds) as indicative of impropriety by the appellant, as the controlling mind of the defendant, in the conduct of the litigation.

2. It was contended by the appellant that the primary judge partially adopted the submissions of the respondent as to the Court's jurisdiction to award non-party costs but also referred to the test in *Knight* put forward by the appellant, which raised the issue of the defendant's insolvency. It was submitted that her Honour's approach was to consider the issue of insolvency as well as the appellant's conduct in allowing the trial to run when the defendant was insolvent but did so in the context that there was a duty to make disclosure as to what was said to be impropriety in concealing the defendant's insolvency from the respondent.

---

19 (1992) 174 CLR 178.

3. The primary judge erred in her application of the principle in *Knight* in finding insolvency and in failing to also address the issues of the appellant's involvement and interest in the proceeding.

[25] The appellant complained that her Honour had regard to irrelevant matters, put forward by the respondent, as invoking the jurisdiction to make a non-party costs order and failed to consider relevant ones.[20] Those matters said to be irrelevant were the name changes of the various companies[21] and the timing of lodgement of ASIC forms.[22] Those matters were of no import, being unrelated to the conduct of the litigation and, in any event, explained by the appellant in his affidavit.[23] In addition, it was submitted that the primary judge approached her consideration of the deeds as though there was something sinister in their creation,[24] when, on their face, they were all on commercial terms. Nor was it relevant that different solicitors acted for the appellant in relation to the deeds and the primary proceedings.[25] What was said to be relevant, but not taken into account, was the appellant's responsibility for the conduct of the litigation, a matter referred to in her Honour's reasons[26] but said not to be the subject of analysis.

[26] Although the respondent's submissions focused on allegations of impropriety, the issue of insolvency was also raised by the respondent, especially by reference to the appellant's Form 509, as was the appellant's failure to provide an explanation as to the circumstances leading to the liquidation of the defendant. In determining the application, the primary judge adopted, as the basis of the jurisdiction, the criteria set out in the conventional category outlined in *Knight*, which raised as a relevant consideration the issue of insolvency, as to which the appellant had been given an opportunity to adduce evidence.

[27] The appellant does not argue any procedural unfairness in relation to the primary judge's consideration of the issue of insolvency. It would be impossible to do so since that matter was raised in the appellant's submissions and the appellant took up the opportunity to provide additional affidavit evidence before the application was determined.[27] The appellant's approach at first instance was initially to contend, amongst other matters, that there was no basis for the making of the order in that there was no evidence for findings of insolvency as at 20 June 2016, nor that the appellant had an active involvement or interest in the litigation as required. The appellant then put

---

20 This reflects grounds 2.6 and 2.7.

21 Reasons at [4(iv)].

22 Reasons at [4(vi)].

23 Affidavit of Murphy, AB at 251-252 paras [25]-[29].

24 Reasons at [4(vi)].

25 Reasons at [4(vii)].

26 Reasons at [7].

27 Appellant's submissions before the District Court para 8(c).

further material before the Court on the matter of insolvency (some nine months later).

[28] There was no error in the approach taken by the primary judge in adopting the conventional category of case set out in *Knight*.

Error in finding of insolvency - ground 2.1

[29] The issue that then arises is whether there was error in the primary judge's finding that the defendant was insolvent at the time of the appointment of the liquidators and, applying the doctrine of presumption of continuance, was so for at least some significant time before the trial

[30] The appellant challenged the finding of insolvency arguing the primary judge erred in relying on the following three findings:

(a) The appellant's Form 509 completed upon liquidation on 20 June 2016 showed the defendant was "hopelessly insolvent" as of that date.[28]

(b) The existence of a costs order for $170,000 and associated statutory demand in May 2016.[29]

(c) The failure by the appellant to provide an explanation of the company's insolvency.[30]

[31] The matter of the statutory demand may be dealt with immediately. The primary judge's reference to the statutory demand of 12 May 2016 for $170,000 in respect of a costs order was criticised on the basis that her Honour had struck out the relevant paragraph of Mr Naylor's affidavit relating to the statutory demand as inadmissible. It was, however, the appellant himself who thereafter raised the fact of the statutory demand. In responding to the affidavit of Mr Naylor, the appellant identified that the statutory demand related to the Toga litigation and, specifically, costs orders made against the defendant in that litigation. The appellant contended that the statutory demand, without further evidence of service or whether it was paid, did not provide evidence of insolvency. However, the primary judge did not rely on the statutory demand in that manner. Rather, her Honour referred to it in the context of having set out the appellant's affidavit evidence concerning the impact of the Toga litigation and the costs orders made against the defendant on the defendant's general financial circumstances (which included potentially crippling costs) and on the appellant's decision to place the defendant into liquidation.

[32] The appellant also challenged her Honour's reliance on the Form 509 in the finding that the defendant was insolvent on 20 June 2016, the date the appellant executed the form, contending that it indicated the reverse. The Form 509 contained two

---

28 Reasons at [12].

29 Reasons at [11] and [12].

30 Reasons at [12].

columns, one being a book valuation, and the other, an estimated realisable values. The appellant accepted that on the basis that the Form 509 recorded total assets valued at $7,242,707 but with an estimated realisable value of $426,955, compared with liabilities to creditors valued at $4,223,680,[31] there was a *prima facie* shortfall on the face of that document. It was argued, however, that, when the entries were looked at within their separate columns, the position was otherwise. The book *values* showed total assets of $7,242,707 and liabilities to creditors of $4,223,680, resulting in a balance sheet surplus. Further, as for the estimated realisable value column, while the entry for total assets was $426,955, there was *no figure for liabilities*, which it was submitted should be understood as meaning "nil" liabilities. It was submitted that that interpretation was explicable by the existence of the deeds of assumption of liabilities entered into by the defendant (by which, the new company assumed the liabilities of the defendant under various building projects[32]). It was said that, by those deeds, the defendant ceased to have responsibility for those liabilities.

[33] The difficulty with these submissions is that the relevant part of the Form 509 was not filled out as "nil", rather, it was simply left blank. A further obstacle is that the appellant elected to adduce further evidence on the issue of insolvency when provided with that opportunity before the determination of the matter, yet the appellant chose not to depose to the defendant liabilities being "nil" at the time he executed the Form 509, nor did he depose to the financial situation of the defendant in terms of its liabilities as a result of the execution of the deeds.

[34] The appellant also submitted that, while the creditors were listed as "$4,223,680" in the Form 509, the creditor listing document also attached to the liquidator's report recorded creditors with claims of a total between $2,731,866 and $2,775,222.[33] It was submitted that the report made it unclear how many of the creditors had been assumed by the associated company under cl 3(f) of the contract assumption deed. It was also unclear from the Form 509 where the payments for the assets, under the asset sale deed ($527,667)[34] and aircraft sale deed ($1,118,707)[35] were recorded. In that regard, it was submitted[36] that the primary judge erred[37] in referring to various deeds, as "transferring the productive resources and contracts of the defendant to a related company" and failed to recognise also that the transfer was for significant consideration, amounting to at least $1.6m.[38] The difficulty that arose concerning

---

31 Plus, it seems, preferential creditors of between $10,774 and $23,722: AB at 125.

32 Respondent's outline at para [49].

33 AB at 130.

34 AB at 182.

35 AB at 204.

36 See ground 2.5.

37 Reasons at [4](vi)].

38 It was submitted that the clauses in the deeds that provided for an adjustment of the purchase price in the event that there was any subsequent allegation by any party that the transfer was for an under-value, with the adjustment to be by way of an independent expert. See affidavit of Naylor; AB at 55-62 and 204.

the previous submissions are also relevant in respect to these submissions. The appellant dealt with none of these matters in his affidavit, notwithstanding the considerable time that had elapsed since he had executed the Form 509 and notwithstanding specifically being provided with an opportunity to adduce evidence on the issue of insolvency.

[35] A further criticism made by the appellant in respect of the insolvency finding was that her Honour only considered "balance sheet" insolvency, as opposed to the "cash flow test", which considers the viability of a company's business, including in meeting its present demands and debts as a going concern, and other indicia of insolvency. It was submitted by the appellant that, although "balance sheet" insolvency was a relevant consideration, the issue of insolvency was to be considered in light of the financial position of the company as a whole and taking into account "commercial realities".[39] It was submitted that, in addition to realisable assets of $426,955 referred to in the Form 509, the defendant's assets disposed of under the asset sale deeds (which were not suggested to have been transferred at an undervalue) need to be taken into account. In those circumstances, a shortfall of assets to liabilities indicated by the Form 509 as at 20 June 2016 did not justify the finding of the company being "hopelessly insolvent" nor led to the strong inference that the company was insolvent for a significant time before the trial.

[36] The submission would have had some weight if it had been the subject of evidence. The appellant took the opportunity to address the matter of solvency, but chose not to depose to any of the matters now argued as indicating solvency. Further, although the appellant deposed to having ensured that there was "support available" to the defendant for the costs of its litigation involving the respondent, he made no similar indication of there being support available to the defendant so that it was able to meet its ongoing debts and obligations required for it to operate as a going concern.

[37] While the primary judge did not specifically refer to the "balance sheet test" or to the "cash flow test", her Honour was assessing the issue of insolvency in the context of the defendant having already been placed into voluntary liquidation and in circumstances where there was nothing to suggest that the financial situation of the defendant had altered precipitously or because of some temporary situation. To the contrary, the Form 509 executed by the appellant revealed a huge disparity between the value of the defendant's debtors ($6,920,468) and the realisable value of those debts ($104,716). That contradicts the appellant's submission that there was "no suggestion that the actual business was suffering or that the work being done was unprofitable"[40] and indicated a deeply unsustainable situation.

---

39 See *International Cat Manufacturing (in liq) v Rodrick* [2013] QCA 372; (2013) 97 ACSR 200 at 222.

40 Appellant's outline of argument in reply at para [14].

[38] The primary judge relied on the presumption of continuance in finding that the defendant was insolvent for up to three months prior to the date it ceased trading. That presumption was referred to in *R v Noonan*[41] as "no more than a convenient way of describing a process of logical reasoning involving the drawing of inferences from established facts". The appellant pointed to the difficulties in applying the presumption in cases of insolvency recognised in *Keith Smith East West Transport Pty Ltd (in liq) v Australian Taxation Office*.[42] In any event, the appellant argued that it was open to a party to challenge the operation of the presumption by showing that other circumstances occurred to raise a probability of change.[43] In the present case, it was submitted that the appellant's evidence indicated that the pertinent change occurred in the days between 16 and 20 June 2016 when the appellant made the decision to no longer support the defendant and the presumption was thus rebutted. I do not accept that submission. The appellant did not depose the absence of such support as impacting on the defendant's financial position. What he explained[44] was that the costs orders and litigation costs associated with the defendant's Toga litigation were "enormous", that the defendant had been largely unsuccessful in the litigation and, if the litigation continued, the defendant faced the prospect of potentially crippling costs and that, by late May 2016, he took the view that it might not to be able to be resolved. In that environment, he "continued to ensure that there was support available to [the defendant] so as to enable it to continue with the litigation in these proceedings". This explanation said nothing of the state of affairs revealed in the document the appellant executed on 20 June 2016 when placing the defendant into liquidation.

[39] Her Honour had sufficient evidence to support a finding of insolvency as at 20 June 2016 and for a period of up to three months before the defendant ceased trading on 17 March 2016. Her Honour's findings were made in the context of the defendant having already gone into liquidation, the unchallenged evidence from the Form 509 from which it was open to infer that the defendant faced an unsustainable position with respect to the valuation of its debtors compared with the estimated realisation of those debts and that it was hopelessly insolvent. There was no evidence of any "sudden financial collapse" before the primary judge. Rather, the appellant explained that his decision to cease ensuring that support was available to the defendant to continue the litigation was influenced by the Toga litigation, in respect of which it was unable to reach a settlement and which would have involved multimillion dollar litigation costs,[45] exposing the defendant to the prospect of having to pay "potentially crippling legal costs if the litigation continued".[46]

---

41 [2002] NSWCCA 46 at [18].

42 (2002) 42 ACSR 501 at 512; see also *Walsh v Natra Pty Ltd* (2000) 1 VR 523 at 532.

43 See Edmonds J in *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398 at 415-416.

44 Affidavit of Murphy AB at 251 at [24].

45 Affidavit of Murphy AB at 250 at [14].

Error in the application of *Knight* - ground 2.4

[40] The appellant submitted that, while the primary judge referred to the passage from *Knight* which contemplates three elements as being required to be demonstrated, her Honour failed to address the matter of the appellant's involvement and interest.

[41] It was argued that there was no evidence of the appellant's active involvement in the litigation. Further, nothing in the reasons suggests that that matter was considered by her Honour, notwithstanding the primary judge's observation[47] that "the focus [of argument] was on Mr Murphy's responsibility for the conduct of the litigation in the context of the [defendant's] financial predicament". The appellant submitted that, although the primary judge referred to *Plante* as relevant authority, her Honour failed to apply the principle identified therein[48] that directors will not be liable simply because they have "actively promoted the company's interests in pursuing litigation".

[42] It was open to her Honour to find that the appellant, as the director of an insolvent company, had "allowed" the trial to run on. The appellant, however, did more than actively promote the defendant's interests by pursuing litigation. In his affidavit, to which the primary judge referred,[49] the appellant stated, "I continued to ensure that there was support available to [the defendant] so as to enable it to continue with the litigation in these proceedings".[50] The clear implication from the appellant's affidavit is that without that support the defendant would not have been able to pursue the litigation and that the appellant involved himself in providing such support for the defendant to pursue the litigation, although the appellant did not elaborate as to what the precise nature of the support was. Ensuring that there was a means of financial support to continue litigation went beyond the position considered in *Plante*.

[43] As to the third element of the general category identified in *Knight*, the appellant submitted that the only evidence of any *interest* in the subject of the litigation was that the appellant was a director. It was submitted, relying on *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*[51] and *Plante*,[52] that the appellant's position as director would not be enough to invoke the jurisdiction to award non-party costs. There was no evidence or suggestion that he was a direct or indirect

---

46 Affidavit of Murphy AB at 250 at [18]. Future events are to be considered in determining insolvency: *TQM Design and Construct Pty Limited v Golden Plantation Pty Limited* [2011] NSWSC 500.

47 Reasons at [7].

48 *Plante v James* [2011] QCA 109 at [4].

49 Reasons at [10].

50 Affidavit of Murphy AB at 251 at [24].

51 [2005] NSWCA 340 at [198]-[219].

52 [2011] QCA 109 at [4].

shareholder, nor did he stand to profit from any result one way or the other. However, the appellant was not only the sole director, he also deposed that it was *his* decision to put the defendant into liquidation, a matter that lies only in the hands of the members of a company. It was clearly implicit, from the appellant's affidavit, that the appellant, as the primary judge stated, was not only the sole director but that the defendant was "his company".[53]

The failure to warn of insolvency and finding of impropriety - grounds 2.2 and 2.3

[44] The appellant referred to the three "findings" made by the primary judge being that the appellant "did not disclose the defendant's financial position" to the respondent;[54] the defendant "avoided an application for security for costs";[55] and the facts which would make the appellant liable to an application for a non-party costs order "were concealed" from the respondent.[56]

[45] As to the first matter, it was argued that, even if the defendant was insolvent, there was no *duty or obligation* on the part of a director to say anything to a plaintiff about the defendant's financial position. However, the primary judge did not find that there was an "obligation" as alleged by the appellant but simply that there had been no disclosure of the defendant's financial position. Her Honour did so in the context of an argument by the appellant that no warning was given prior to the bringing of the respondent's application.

[46] As to the second matter that the defendant "avoided an application for security for costs", it was argued that there was no evidence of any such application having been brought against the defendant and, given that r 670 and r 671 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR) and s 1335 of the *Corporations Act* 2001 (Cth) permit applications by defendants, not plaintiffs, it was not likely. The submission misses the point that the respondent may have chosen to bring a security for costs application in respect of the counterclaim brought by the defendant had it been alerted to matters which could have put it on inquiry as to the defendant's financial position.

[47] As to the third matter of "concealing" facts, the appellant submitted that it was this finding that constituted the impropriety that triggered the exercise of the discretion by the primary judge. It is to be observed that the primary judge's reference to impropriety was made in the context of the argument that the respondent's failure to give advance warning of the non-party costs application weighed against the making of the order sought by the respondent. Her Honour found that the defendant was not only insolvent at the time the appellant signed the Form 509 but, given the absence of explanation by the appellant in his affidavit as to the timing of the defendant's collapse, that it had been so for the previous three months. The matters

---

53 Reasons at [11] and [12].

54 Reasons at [13].

55 Reasons at [13].

56 Reasons at [14].

which may have put the respondent on guard as to the need to bring such an application were not revealed yet, perversely, it was contended advance notice ought to have been given.

Conclusion

[48] Courts are traditionally vested with an unfettered discretion as to the award of costs[57] including costs against a non-party[58] and appellate courts are reluctant to interfere with decisions of practice and procedure.[59] In the present case, there was evidence before the primary judge upon which it was open to be satisfied that the criterion referred to in *Knight* for the making of a non-party costs order had been met. It was open, in the circumstances, for her Honour to exercise the discretion as she did.

Order

[49] The appeal should be dismissed with costs.

[50] **BODDICE J:** I have read the reasons for judgment of Philippides JA. I agree no error has been established in the decision of the primary judge. I agree with the orders proposed by Philippides JA.

---

57 See *Civil Proceedings Act* 2011 (Qld) s 15; UCPR, r 681(1).

58 *Bischof v Adams* [1992] 2 VR 198 at 203.

59 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177.