SUPREME COURT OF QUEENSLAND

CITATION:	*Posgate & Anor v Hanson & Anor* (*No 2)* [2018] QSC 120
PARTIES:	**DARRYL WILLIAM POSGATE** (*First Applicant*) and **BROKEN COMPASS PTY LTD ACN 131 839 239** (*Second Applicant*) **v.** **MATTHEW GUY HANSON** (*First Respondent*) and **MATAMA PTY LTD ACN 105 777 820** (*Second Respondent*)
FILE NO/S:	S188/17
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	29 May 2018
DELIVERED AT:	Townsville
HEARING DATE:	16 March 2018, 4 May 2018
JUDGE:	Henry J
ORDERS:	**1. Application dismissed.** **2. The respondents will pay the applicants' costs of the application incurred up to and including 6 June 2017 to be assessed on the standard basis if not agreed.** **3. The applicants will pay the respondents' costs of the application incurred after 6 June 2017 to be assessed on the standard basis if not agreed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURTS – COSTS – whether costs follow the event – where the initiating application was brought when there was no realistic alternative remedy - where the remedy of a share valuation and buy-out emerged later making it unreasonable per s 467(4) *Corporations Act* to continue to seek to have the companies wound up – from what point the respondents should have their costs – whether costs should be on the indemnity basis.

Corporations Act 2001 (Cth) s 467(4)
Uniform Civil Procedure Rules 1999 (Qld) r 681

Maclag (No 11) Pty Ltd as trustee for the Burns Family Trust & Anor v Chantay Too Pty Ltd as trustee for the Chantay Trust (No 2) [2010] QSC 396, cited.
Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd (No 3) [2016] QSC 150, cited.
Posgate & Anor v Hanson & Anor [2018] QSC 51, cited.

COUNSEL: C J Ryall for the applicants
P J Roney QC for the respondents

SOLICITORS: Preston Law for the applicants
Morrow Petersen for the respondents

[1] By the time of this matter's return before me on 16 March 2018 for the hearing of submissions as to final orders arising from my decision of 12 March 2018,[1] it was confirmed the offer of 7 November 2017 ("the most recent offer"), remained current. However, due to some uncertainty between the parties, about a now resolved issue, argument as to the final orders was instead heard on 4 May 2018.[2]

[2] It is inevitable the application ought now be dismissed. Costs remain in issue.

[3] The uncontroversial starting point, pursuant to r 681 *Uniform Civil Procedure Rules 1999* (Qld) is that the costs of a proceeding "are in the discretion of the court but follow the event, unless the court orders otherwise".

[4] Because the application is to be dismissed the respondents contend they ought have their costs. They emphasise the usual rule that costs follow the event is not easily displaced and it is for the applicants to demonstrate that the departure is justified.[3] They contend there are no reasons to depart from the general rule in this case.

[5] The applicants contend to the contrary, emphasising that the application is only being dismissed in circumstances where there was good reason for the making of the application for a winding-up order, where the prima facie requirements of such an application had been met and the application was only unsuccessful because of the

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1 *Posgate & Anor v Hanson & Anor* [2018] QSC 51 ("reasons").

2 By that date the parties had entered into an agreement providing for a buy-out of shares ("the settlement"). The settlement is consistent with the terms of the most recent offer, save that the provisions requiring the question of costs to be left until after the buy-out process was completed were not included. This result was achieved by the applicants making a counteroffer and the respondents accepting the offer.

3 Citing *Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd (No 3)* [2016] QSC 150*; Maclag (No 11) Pty Ltd as trustee for the Burns Family Trust & Anor v Chantay Too Pty Ltd as trustee for the Chantay Trust (No 2)* [2010] QSC 396.

emergence of an alternative remedy subsequent to the filing of the application. The alternative remedy was a share valuation and buy-out.

[6] The share valuation and buy-out remedy had been readily recognisable as a potential remedy to the impasse between Mr Posgate and Mr Hanson prior to the filing of the application. Unfortunately, their respective behaviours had seemingly made it an unrealistic alternative. It did not emerge as a realistic alternative remedy to be pursued until during the life of the application.

[7] Against that background, and my finding that the prima facie requirements of s 467(4) *Corporations Act 2001* (Cth) had been met by the applicants, the applicants should, in an exception to the usual rule, have their costs associated with the initial advancing of the application.

[8] In a similar vein, the most recent offer was a development I identified as allowing me to conclude the applicants were acting unreasonably in continuing to seek to have the company wound up instead of pursuing a remedy of the kind exemplified by the recent offer. It is uncontroversial in light of that finding that the respondents should have their costs from at least that point in time.

[9] The real issue is how costs ought be determined in respect of the interim period, that is, the period between the initial advancing of the application and the most recent offer. During that time, when was the tipping point of relevance to the costs discretion?

[10] The applicants contend that prior to the most recent offer, which was three months after the first day's hearing of the application and three days before the hearing was due to resume, they were not acting unreasonably in persisting in applying to have the company wound-up. They in effect submit that prior to that point there was no alternative remedy available to them.

[11] That view of the matter does not follow from my reasons. The conclusion I reached regarding the most recent offer determined the fate of the application. It was unnecessary for my reasons to explore whether the tipping point of relevance to the costs discretion had been reached at some earlier time.

[12] As my reasons demonstrate, from the time of the first relevant offer, on 29 May 2017, through to the most recent offer, on 7 November 2017, the obvious alternative remedy to a winding-up, namely a share valuation and buy-out, was pursued in varying ways and degrees by both parties. It will be recalled s 467(4) provides that, if the prima facie elements have been met, the court:

> "must make a winding-up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting

> unreasonably in seeking to have the company wound up instead of pursuing that other remedy" (emphasis added)

[13] The provision's use of the word "pursuing" brings focus to the present task. The provision contemplates that the "other remedy" is available but its use of the word "pursuing" indicates the "other remedy" does not have to be finalised or settled in final form. The provision assesses the applicants' unreasonableness by reference to the applicant not "pursuing" the other remedy.

[14] The parties' approach to the present argument tended to focus upon a comparison of the respondents' offers prior to their most recent offer. The court's attention was drawn to variations as between the offers. The respondents on one hand contended there were not many differences. The applicants on the other hand pointed out that there were differences and that there had been nothing stopping the respondents from proffering an offer of the kind they proffered in their most recent offer at an earlier stage. Each of those submissions were in their own respect correct. However, the focus now ought not be whether the applicants were acting unreasonably in not "accepting" one of the respondents' earlier offers. Rather, the focus ought be on whether they were acting unreasonably in not "pursuing" the remedy of a share valuation and buy-out. In that regard much turns upon the apparent prospects of success of such a pursuit, that is, whether it was objectively likely or unlikely to succeed. In the context of the costs discretion that informs the decision as to when it became unreasonable to continue to put the respondents to cost in respect of an application which, when instituted, had seemed the only realistic option.

[15] The determinative question then is, when should it have been apparent to the applicants that the successful pursuit of a share valuation and buy-out settlement agreement had become a sufficiently likely prospect as to make it unreasonable to continue with the cost incurring process of the winding-up application rather than pursuing that other remedy?

[16] That determinative costs tipping point was reached soon after the respondents made their share valuation and buy-out offer of 29 May 2017. This offer heralded a new approach, doubtless prompted by the wake-up call of the applicants initiating the winding-up application. Of course, there may have been elements of the offer which the applicants would have preferred to vary. However, its essential elements were sufficiently realistic and reasonable as to indicate a successful share valuation and buy-out settlement agreement was a likely prospect if pursued.

[17] The offer of 20 May 2017 was open for 14 days. It was rejected on 6 June 2017, in a letter concluding with the assertion the winding-up of the companies would provide "a far more expedient, cost effective and just and equitable resolution of the ongoing

disputes".[4] This represents the determinative costs tipping point. The remedy of a share valuation and buy-out settlement agreement had become a sufficiently likely prospect as to make it unreasonable to continue with the cost incurring process of the winding-up application rather than pursuing that other remedy. Yet the letter of 6 June made plain the applicants intended to continue with the winding up application.

[18] It follows the respondents should only pay the applicants cost to 6 June 2017 and the applicants should pay the respondents costs after 6 June 2017.

[19] The respondents contend they ought have their costs on the indemnity basis, from two alternative dates. The first date is 17 July 2017. On that date the respondents sent the applicants a letter marked "without prejudice save as to costs". The letter asserted the respondents' offer of 29 May 2017 and its revised offer of 21 June 2017 were remedies of a kind referred to in s 467(4) and proposed that "in order to move matters forward" the parties consent to orders adjourning the winding-up application. The premise identified for the adjournment was to enable the progression of the respondents' modified settlement proposal or to permit the applicants time to reconsider their previous rejection of it. The second date is the date of the most recent offer.

[20] The argument that the persistence with the application after those alternative dates was so unreasonable as to warrant an indemnity costs order relied to a large extent upon the fact the applicants were acting unreasonably in the sense contemplated by s 467(4). However that reference to acting unreasonably goes to the issue of whether an otherwise meritorious application ought be granted. A finding of unreasonableness in the context of s 467(4) will not invariably equate with a finding that a party's conduct in respect of a proceeding has been so unreasonable as to warrant an order for indemnity costs. Much will depend on the circumstances of the case.

[21] In this case it should be borne in mind the application had been instituted at a time when the prevailing circumstances appeared to involve no other realistic remedy to resolve the impasse which had been reached. Those circumstances included Mr Hanson's previously unrealistic and unproductive approach to resolving the parties' problem. That unhelpful approach had been prolonged and, only shortly before the filing of the winding up application, had included the litigious posturing discussed in my reasons. It was a history so lacking in trust and co-operation in pursuing a realistic settlement as to have meant that there was apparently no realistic alternative to the filing of the application. While the applicants' entitlement to relief pursuant to the application was not absolute, I have found that the prima facie elements of its entitlement to relief were present. Against that background, the decision to press on with the application rather than adjourn it by consent to attempt to resolve a settlement was not so unreasonable as to warrant an order for indemnity costs.

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[4] Affidavit of Glen Morrow court doc 22 GMM12.

[22] In a similar vein, by the time of the making of the most recent offer on 7 November 2017 in circumstances where the hearing was well advanced and only due to resume on the closing day three days later, the decision to press on and complete the hearing was not so unreasonable as to justify an order for costs on the indemnity basis.

[23] In reaching these conclusions about indemnity costs I have also had regard to the fact that in the interim period between the first relevant offer and the most recent offer, the applicants had not been unresponsive to the respondents overtures and had also advanced offers.

Orders:

[24] My orders then are:

1. Application dismissed.

2. The respondents will pay the applicants' costs of the application incurred up to and including 6 June 2017 to be assessed on the standard basis if not agreed.

3. The applicants will pay the respondents' costs of the application incurred after 6 June 2017 to be assessed on the standard basis if not agreed.