

SUPREME COURT OF QUEENSLAND

CITATION: *J & E Vanjak Pty Ltd v Palmer Street Developments Pty Ltd & Anor* [2019] QSC 103

PARTIES: **J & E Vanjak Pty Ltd ACN 158 539 943**
(applicant)
v
Palmer Street Development Pty Ltd ACN 003 146 174
(first respondent)

and

Mitchell Herrett and Frank Lopilato (as the administrators of the Deed of Company Arrangement)
(second respondents)

FILE NO/S: TS No 605 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 24 April 2019

DELIVERED AT: Brisbane

HEARING DATE: 11 and 19 September 2018; Further submissions received 18 December 2018 and 14 February 2019.

JUDGE: Brown J

ORDER: **1. The applicant pay the costs of the second respondents of the application on a standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – where the sole director and shareholder of the applicant, Ms Huang, appeared on behalf of the applicant – where the applicant was ultimately unsuccessful –whether the Court should exercise its discretion to award costs against Ms Huang personally

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS - whether indemnity costs should be awarded against the applicant and Ms Huang

Knight v FP Special Assets Ltd & Ors (1992) 174 CLR 178, applied
The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd (2009) 2 Qd R 356, applied

FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340, cited
Plante & Anor v James [2011] QCA 109, cited

COUNSEL: Ms Huang (by leave, self-represented) for the applicant
Mr Parton (by leave, self-represented) for the first respondent
D Forbes for the second respondents

SOLICITORS: Ms Huang (by leave, self-represented) for the applicant
Mr Parton (by leave, self-represented) for the first respondent
Thomson Geer for the second respondents

- [1] Judgment in this matter was handed down on 7 December 2018. At that hearing Ms Huang appeared on behalf of the applicant. Submissions for costs were provided on 18 December 2018 by the second respondents and on approximately 14 February 2019 by the applicant and Ms Huang (insofar as costs were sought against her personally). The delay arose as a result of Ms Huang, the applicant's representative, being away overseas.
- [2] The second respondents submit that they should be awarded their costs to be paid by both the applicant and Ms Huang personally jointly and severally. They also seek that their costs be paid on an indemnity basis. Ms Huang contends that the costs should not be paid by the applicant or Ms Huang because the administrators did not pay for their legal costs, costs agreements have not been disclosed by the second respondents, the applicant has not been paid under the DOCA and the applicant has appealed. She contends the applicant is not insolvent and can satisfy a costs order. She also challenges the amount of costs said to have been incurred by the second respondents. She contends only the applicant is liable for any costs order and that she should not be liable personally as she represented the applicant as a self-litigant.
- [3] Ms Huang is the sole director and shareholder of J & E Vanjak Pty Ltd ACN 158 539 943 ('Vanjak'). Ms Huang appeared on behalf of the applicant at the hearing of the application and that appearance was not opposed by either of the respondents.
- [4] The second respondents submit that Ms Huang was the moving party who stood to benefit from the success of the application and has made serious and sometimes

scandalous allegations against the second respondents. It relies on correspondence from Ms Huang on the day judgment was handed down stating that Vanjak did not hold any assets other than the expected dividend under the deed of company arrangement (DOCA) and the personal insolvency agreement of Mr Parton. Mr Herrett of the second respondents estimates that the total amount of the dividends would be approximately \$29,000. He estimates that the costs incurred by the second respondents are well in excess of that. The second respondents therefore consider that the costs order will be well in excess of the assets of Vanjak. The second respondents had made enquiries of Vanjak in August 2018. Following Ms Huang indicating on behalf of Vanjak that she would not provide that information the second respondents wrote to Ms Huang on 22 August 2018 putting her on notice that costs would be sought from her personally. It is surprising that the second respondents did not choose to protect their interests by applying for security for costs.

- [5] The second respondents also seek to rely on serious and scandalous allegations including of fraud made by the applicant through Ms Huang in relation to the second respondents' conduct of the administration and recommendation of the DOCA,¹ which the Court found were unsubstantiated and in some cases unsupported by any evidence. The second respondents submit that the fact that the applicant was not legally represented does not protect Ms Huang from indemnity costs if the circumstances of the case otherwise warrant it.² That of course is accepted.

Consideration

- [6] The applicant was not successful and its application was dismissed. Costs usually follow the event and should do so in this case. None of the matters raised on behalf of Vanjak support a contrary costs order. Vanjak seeks to raise matters to impugn the judgment or raise further evidence in relation to the substance of the application in light of further financial statements for Palmer Street Developments Pty Ltd prepared by the second respondents up until 7 December 2018. Those matters are not relevant for this Court to consider in relation to the question of costs. Vanjak also asserts that legal costs of the second respondents have been paid by the applicant by reference to those

¹ Second Respondents' submissions, [15].

² *du Boulay v Worrell & Ors* [2009] QCA 63 at [69].

financial statements. That is not in fact substantiated by those financial statements. While there is reference to legal costs being paid to Thomson Geer they are a considerably smaller amount than those Mr Herrett has estimated have been incurred in relation to this application and are likely connected to the finalisation of the administration. Challenges as to the amount of the costs incurred and attempts to seek disclosure of documents are irrelevant to the determination of the appropriate costs order. Those are matters which may be relevant in the context of any taxation of costs. As to the applicant not being paid the dividend under the DOCA, this again is not relevant to the question of the appropriate costs order to be made in the context of this application.

- [7] Vanjak should pay the costs of the second respondents of the application.
- [8] As to whether any costs order should extend to Ms Huang personally, the Court's discretion does extend to awarding costs against a non-party. The second respondent referred to the High Court decision of *Knight v FP Special Assets*, which held that where a non-party (in that case, receivers) has played an active part in the conduct of the litigation, 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, and the party is insolvent, the non-party may be ordered to pay costs if the interests of justice favour such an order.³ The approach with respect to non-party costs orders was conveniently summarised by Martin J in *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*.⁴ In particular, his Honour noted that "a court will ordinarily not make a non-party costs order unless the interests of justice justify a departure from the general rule that only parties to proceedings are subject to costs orders".⁵ His Honour referred at [42] to the New South Wales Court of Appeal decision *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*,⁶ which summarises the relevant principles which have been applied where costs orders have been made against non-parties. As is correctly acknowledged by the second respondents, non-party costs orders are exceptional and

³ *Knight v FP Special Assets Ltd & Ors* (1992) 174 CLR 178 at 193.

⁴ (2009) 2 Qd R 356 at [38].

⁵ (2009) 2 Qd R 356 at [38].

⁶ [2005] NSWCA 340 at 210.

directors of companies will not be subject to them simply because they have promoted the company's interests in litigation.⁷

- [9] I am not satisfied that the circumstances of the present case are such that I should exercise my discretion to order that costs be paid by Ms Huang personally. Ms Huang appeared on behalf of the applicant, which was a large creditor of Palmer Street Developments Pty Ltd ACN 003 146 174 (Palmer St). Palmer St appointed administrators after Vanjak issued a statutory demand following a successful claim being made against Palmer St and an unsuccessful appeal by Palmer St. As a result of the DOCA, Vanjak recovered considerably less than the amount of the judgment. While there is evidence Vanjak may not have sufficient assets to meet any costs order, although Ms Huang has sworn otherwise without any supporting factual basis, the evidence does not establish Vanjak was insolvent at the time it made the application and during the hearing of the application. That militates against the making of an order against Ms Huang. Ms Huang as the sole shareholder of Vanjak may have stood to benefit if the application was successful but the position in that regard is unclear. While a warning was given to Ms Huang by the second respondents, which is relevant to the court's discretion, other considerations weigh against the making of such an order.
- [10] The Court did find Ms Huang made a number of unsubstantiated allegations against the second respondents. However, the application was not one which was improperly made on behalf of Vanjak and although unsuccessful, Vanjak at least had a proper basis to raise some of the complaints made in relation to the DOCA, the admission of some of the proofs of debt and whether the DOCA was in the interests of the creditors as a whole. Further, Mr Herrett provided further evidence of potential uncommercial transactions which had not been investigated at the time of the DOCA, which supported the fact that if Palmer St was placed into liquidation there would be no additional recoveries by a liquidator, which was relevant to the Court's determination that the placing of Palmer St into liquidation was not in the interests of the creditors as a whole. Although this Court does not condone in any way the making of allegations which impugn the professional conduct of administrators seeking to carry out their role, to the extent that such allegations were made, I do not find that Ms Huang made them recklessly. Rather, I consider that the basis of the allegations was misconceived. I am

⁷ *Plante & Anor v James* [2011] QCA 109 at [4].

not satisfied that in the present case, Ms Huang was acting other than to represent and actively promote the interests of Vanjak which was a creditor in pursuing the application. The application was not unreasonably made even though unsuccessful. I do not find that in the circumstances of the present case the interests of justice favour the exercise of the Court's discretion to order Ms Huang pay the costs of the second respondents personally.

- [11] While I accept that some of the allegations made by Ms Huang against the second respondents were egregious and unjustified, as I have stated above, I do not find that the application as a whole was made unreasonably or constituted an abuse of process. While there was an allegation of fraud made, I do not consider that the allegations were made by Ms Huang knowing them to be false, nor in wilful disregard of known facts.⁸ I do not consider that the Court should exercise its discretion to order the second respondents' costs be paid on an indemnity basis.

Conclusion

- [12] I consider that the appropriate costs order is that that the applicant pay the costs of the second respondent given its lack of success. I refuse the application for a costs order to be made against Ms Huang personally. The appropriate order is that costs be ordered on a party to party basis.

Orders

- [13] I order that the applicant pay the second respondents' costs of the application on a standard basis.

⁸ When objections were made to matters in the affidavit of Ms Huang they were treated as submissions, not evidence, eg T-14/27-35.