SUPREME COURT OF QUEENSLAND

CITATION:	*Jones & Anor v Aussie Networks Pty Ltd & Ors* [2019] QSC 111
PARTIES:	**RHYS EDWARD JONES** (first plaintiff) **AUSTRALIAN SHAREHOLDER CENTRE PTY LTD** ABN 53 138 723 412 (second plaintiff) **v** **AUSSIE NETWORKS PTY LTD** ABN 44 124 401 734 (first defendant) **JOSEPH KEITH EIBY** (second defendant) **and** **RICHARD KENNETH WHITE** (respondent)
FILE NO/S:	BS No 12056 of 2013
DIVISION:	Trial Division
PROCEEDING:	Costs Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2019
JUDGE:	Douglas J
ORDER:	**1. The plaintiffs pay the defendants' costs of and incidental to the proceedings including reserved costs.** **2. The respondent pay 90% of the defendants' costs of and incidental to the proceedings including reserved costs and 100% of the costs of this application on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – NON-PARTIES GENERALLY – OTHER PARTICULAR CASES – Where defendant applicants successful at trial – where costs awarded against plaintiffs – where defendant applicants sought non-party costs order against respondent – whether respondent's involvement in conduct of litigation and his potential interest in plaintiffs' claims

for damages for defamation and injurious falsehood justify making of costs order against him on principles discussed in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178

Arawak Holdings Pty Ltd v King Tide Company Pty Ltd [2018] QCA 148
Ballantyne Suites Pty Ltd v Ballantyne Chambers Pty Ltd (in liq) (No 2) [2014] VSC 147
Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807
Ipex ITG Pty Ltd (in liq) (receivers appointed) v Victoria [2014] VSCA 315
Ipex ITG Pty Ltd v Victoria [2011] VSCA 134
Jeffery & Katauskas v SST Consulting Pty Ltd (2009) 239 CLR 75
King Tide Company Pty Ltd v Arawak Holdings Pty Ltd (No 2) [2017] QSC 199
Knight v FP Special Assets Ltd (1992) 174 CLR 178
Murphy v Mackay Labour Hire Pty Ltd [2018] QCA 90
The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2009] 2 Qd R 356

COUNSEL:	No appearance for the plaintiffs P L Somers for the defendants M J Eastwood for the respondent
SOLICITORS:	No appearance for the plaintiffs McBride Legal for the defendants JHL Lawyers for the respondent

[1] The trial in this matter was resolved against the plaintiffs and I have previously ordered that they pay the defendants' costs of and incidental to the proceedings.

[2] This application is for an order that the respondent, Richard Kenneth White, although not a party to the initial proceedings, also be ordered to pay the defendants' costs of and incidental to the proceedings. The defendants' submission is that, on the available evidence, the plaintiffs are not able to meet adverse costs orders against them and that Mr White's involvement in the conduct of the litigation and his potential interest in the plaintiffs' claims for damages for defamation and injurious falsehood justify the making of a costs order against him on the principles discussed in *Knight v FP Special Assets Ltd*.[1]

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[1] (1992) 174 CLR 178. See also *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 94-95 at [31]; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807, 2817 at [29]; *Murphy v Mackay Labour Hire Pty Ltd* [2018] QCA 90 at [19]; *Arawak Holdings Pty Ltd v King Tide Company Pty Ltd* [2018] QCA 148 at [13].

[3] The relevant passage in *Knight v FP Special Assets Ltd* reads as follows:[2]

> "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."

[4] There was no issue raised in this application about the expression of the principle nor whether the plaintiffs were able to pay the costs. The evidence established that they appeared to be unable to meet the adverse costs orders against them. The issues debated before me related to the extent of Mr White's involvement in the matter and the nature of his interest in it. There were also submissions related to the extent of the notice that Mr White had that an application of this nature may be brought against him.

Mr White's involvement in the proceedings

The provision of instructions by Mr White to the plaintiffs' solicitors

[5] The plaintiffs' former solicitors, Minter Ellison from the Gold Coast, had earlier sought leave to withdraw from acting for them. Leave was granted. In that application, Mr Scott Reid, one of the firm's partners, swore an affidavit deposing to the firm's receipt of instructions on behalf of the plaintiffs from Mr White as well as from Mr Jones and other identified people. Mr Reid said that he was in frequent contact with Mr White in order to obtain instructions on behalf of the plaintiffs and would contact Mr Jones as and when he was required to obtain instructions from him personally as a named plaintiff in the proceedings. He said that the firm had terminated the relationship as a result of Mr White's and Mr Jones' failure to pay invoices rendered by the firm in breach of the terms of their costs agreement. Mr Reid had also attempted to contact Mr White but not Mr Jones to obtain instructions shortly before the delivery of the judgment in the matter.

[6] Attwood Marshall Lawyers had also previously acted for the plaintiffs in the proceedings. They had advised that there was a delay in obtaining instructions at one stage because their clients were overseas on holidays at a time when Mr White appeared to be on holidays in the United States of America.

[7] Mr White's response to that evidence was that he was providing instructions to Minter Ellison because of his access to the second plaintiff's financial records including his provision of client relationship management software to the second plaintiff which gave him the ability to provide information to Minter Ellison in relation to the plaintiffs' claims. He says that he had authority from Mr Jones to provide those records to Minter Ellison such that it could not be

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[2] (1992) 174 CLR 178, 192-193 in the reasons of Mason CJ and Deane J.

said that he initiated and controlled the proceedings; rather, he assisted in the provision of evidence when the evidence sought related to information in his possession.

[8] He concedes that he was on holidays in December 2015 (the time referred to by the solicitor from Attwood Marshall Lawyers) but pointed out that there was no evidence to suggest that Mr Jones was not also on holidays at that time. I was asked to draw adverse inferences from the failure of the respondent to lead evidence on this and other issues from two former solicitors, one apparently still employed by Minter Ellison, and one from Attwood Marshall Lawyers who had acted for the plaintiffs in the proceeding. I am reluctant to draw the inference that their evidence would not have assisted Mr White's case when one considers that there could well be other reasons why the solicitors would be reluctant to give evidence such as continued employment with Minter Ellison or inability to refresh memory from the relevant files.

[9] I am quite sceptical, however, that Mr White was merely providing information, particularly having regard to the evidence which I shall deal with later of his participation in a mediation of the proceedings before the matter came to trial.

Mr White was funding the plaintiffs in the proceeding

[10] The evidence relevant to this allegation by the defendants is that Minter Ellison have commenced proceedings in the District Court of Queensland seeking the recovery of unpaid legal fees against both Mr White and Mr Jones. The allegations in the firm's statement of claim include assertions that both Mr White and Mr Jones provided instructions to the firm and that Mr White paid some of the invoices rendered. The firm was also a party to an agreement with Mr White for the payment of the outstanding legal fees which he has failed to honour according to the allegations in those proceedings. The costs agreement was in evidence before me and was addressed to Mr Jones "C/- Mr Richard White" and signed by Mr White as the "owner of associated companies".[3]

[11] An email was sent by Mr White to Mr Eiby on 28 July 2016. I shall refer in greater detail to its contents later. It is relevant to the mediation to which I have referred. The email and other documents make it clear that Mr White, personally, made offers to transfer funds in an attempt to resolve the proceedings. A proposed deed of settlement and release offered as part of the mediation process associates Mr White, Mr Jones and the second plaintiff with the description "The White Party" in the deed which is executed by Mr White individually.

[12] The argument that Mr White was not funding the proceedings was that the allegations contained in Minter Ellison's statement of claim had not yet been determined and that Mr White had defended those proceedings. The file from Minter Ellison was also not available except on payment of money by Mr White where Minter Ellison had refused to provide it without the plaintiffs' consent or an order of the court.

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[3] See Mr White's affidavit filed 1 February 2019 at pp 99-115 of the exhibits.

[13] The terms of the email dated 28 July 2016[4] are certainly consistent with Mr White being in charge of the conduct of the litigation and the source of funds, reflected, in particular, in his statement in an earlier email of 22 July 2016 to Mr Eiby where he said: "I will pay you immediately …".[5] In those circumstances, it does seem probable to me that Mr White was the likely source of funds for the proceedings.

The proceedings were commenced on Mr White's instructions

[14] The evidence the defendants point to in respect of this issue, that the proceedings were commenced on Mr White's instructions, consists principally of an email dated 22 August 2013 before proceedings were commenced from Mr Jones to the defendants where Mr Jones says:[6]

> "I had been instructed by our shareholders to pursue all avenues including legal proceedings to have all defamatory posts removed from your forum …"

[15] In the trial the reference to "our shareholders" was made clearer when Mr Jones gave evidence that he was the trustee of a trust that owned shares in the second plaintiff and that he held those shares for the benefit of Mr White. I shall refer in greater detail shortly to the evidence relating to Mr White's interest in Share Express Pty Ltd, the trustee company that was the sole shareholder of the second plaintiff. In this context it is worth noting also that Mr White had been the sole director of that trustee company until May 2013 and his wife became its director then until December 2014. He was also the principal and primary beneficiary named in the trust deed.[7] That proceedings could not have been commenced or prosecuted without the non-party's authority is a relevant factor in making a non-party costs order.[8]

[16] Mr White's response to this issue was that he denied providing instructions other than on the basis of assisting with evidence but it was made clear during the hearing of the application that the trust of which he was the primary beneficiary was the sole shareholder in the second plaintiff.

Mr White portrayed himself as the individual with the ultimate control of the proceedings for the plaintiffs

[17] The evidence in respect of this came particularly from the email to which I have already referred. It was sent a week after the mediation on 21 July 2016. Mr White had attended and participated in the mediation. The relevant passages from the email, which was apparently not then copied to Mr Jones, were as follows:[9]

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4 See the affidavit of Peter Sams filed 13 October 2018 at pp 64-66.

5 See Mr Eiby's affidavit filed by leave on 8 February 2019 at p 11 of the exhibits.

6 See the affidavit of Peter Sams filed 13 October 2018 at p 246.

7 See the affidavit of Peter Sams filed 13 October 2018 at p 218.

8 *Ballantyne Suites Pty Ltd v Ballantyne Chambers Pty Ltd (in liq) (No 2)* [2014] VSC 147 at [14].

9 See the affidavit of Peter Sams filed 30 October 2018 at pp 64-66 of the exhibits (emphasis added).

"Can you please call me on 1300 123 345 to discuss whether we are to continue to mediate this situation or if we should both just proceed with the court proceedings?

I was also just forwarded the deed from Minters that is now also signed as previously agreed and attached for your consideration.

As for the mediation, I am open to fine tune the mediation between ourselves however what has been offered by Potts is simply laughable and I will never do anything like that and out of principle id (sic) rather take it to court as I originally wanted to seek the due damages owed.

…

To be honest, I originally went in to the mediation thinking that there would not be chance in hell of us mediating other than the fact that you may pay us for the damages you have done via your stock forum website.

Surprisingly all of us (except Potts) we actually did start to get the lines of communication open and I thought that we could have resolved the matter there and **I still can't believe I agreed to pay a single cent to you to have the content removed**.

…

So **I'm going to make an offer** and that is if you want to try and resolve this it will be up to you and I to resolve, this means **there will be no need to involve my legal team** until we both have an agreement and then we get them to finalise a deed of settlement.

Or the alternative is I agree that I will transfer 150K today as previously requested into a trust account to get the new proceedings on the way as fast as possible however as mentioned we will be aggressively changing and including X other entities that have been slandered on your forum in these proceedings.

This brings up the next point of why I too felt remorse after that the mediation as I too will look like a total sell out in regards to the other X companies we have arrangements with in regards to pursing (sic) this case further. Most of these companies have since contacted me since the mediation asking for updates as to what's going on and at this stage I have simply stated that I am still in mediation and will let them know.

So my concern is if I do settle with you then those companies will be pissed off that I have not taken this the full way and the resources and further evidence supplied will be wasted.

…

As for Share prices advertising on your website. **The only reason as to why I agreed to pay the sum of $130,000 to resolve this issue was because it ensured the advertising would ensure that you would not maliciously proceed to bag my companies on your site or any other site** while you showed support for the

> share prices website and I figured that you would not proceed to bag a company that you also support and use on your own website.
>
> …
>
> **I as previously mentioned I have no intention on discontinuing any of these proceedings or giving up pursuing you personally for the damages that you have caused to any of my companies or affiliated companies.** (I will not give up)
>
> I was under the understanding that we had mediated and worked out a way that would prevent you from further cyber bulling myself or any of my other companies.
>
> …
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> **If you decide to act on the agreed deed attached, then sign it and send it back and I will have payment to you tomorrow**."

[18] It was submitted for Mr White that that email should be considered in the light of a number of circumstances, including that it was sent after the mediation which Mr White had attended to give him an opportunity to mediate not only these proceedings but also his and his wife's concerns regarding negative tags in posts by the defendants affecting him and his wife and, apparently other companies owned by him. He had also been requested by Minter Ellison to provide evidence of a telephone conversation he had held with the second plaintiff which I referred to in my earlier reasons. It was also submitted for him that the first defendant, Mr Eiby, indicated to Mr White and Mr Jones after the mediation that he was amenable to settling the matter without his solicitor and that Mr Reid of Minter Ellison had asked him to communicate directly with the first defendant because he and Mr Jones believed there was a better rapport between Mr White and Mr Eiby.

[19] That having been said, however, it seems clear to me that the terms of the email are only consistent with Mr White being the person charged with authority to deal with the proceedings and to try to settle it on behalf of the plaintiffs. It shows control of the proceedings which went beyond a mere authority to negotiate. It also demonstrated that Mr White had an interest in settling this litigation because of its effect not only on the second plaintiff but on other interests affecting him and his wife, including other companies in which he had an interest.

Mr White participated in further attempts to resolve the matter in addition to that email

[20] The evidence relevant to this submission was that Mr White attended at and participated in the mediation on 21 July 2016 which is a factor that may be taken into account going to the making of a non-party costs order.

[21] The draft deed of settlement and release attached to Mr White's email also named him as a party to the deed. I have already referred to the definition of "The White Party" in the deed as including Mr White, Mr Jones and the second plaintiff. The proposed deed was one pursuant to which the defendants would release the plaintiffs and Mr White from all claims as did the plaintiffs and Mr White release the defendants from all claims. The plaintiffs and Mr White covenanted not to sue the defendants and the defendants covenanted not to sue the plaintiffs

and Mr White. Under the first schedule to the deed the defendants were required to remove all existing posts or publications on the website that identified "The White Party" and were to remove any threads, URLs or posts which "The White Party" requested and were to allow "The White Party" to advertise on the first defendant's website. The payment proposed was $130,000 apparently to the defendants.

[22] The plaintiffs' subsequent offer to resolve the proceedings also required the defendants to remove from the website any posts referring to Mr White or any company or business with which he was associated. The deed also contained a non-disparagement clause including reference to Mr White.

[23] Again, the respondent's submission in respect of this was that he attended the mediation at the behest of the plaintiffs' solicitors and in an attempt to address concerns he had in the separate dispute with the defendants about "tagging" of him and his wife on the defendants' websites. The evidence of that separate dispute was not very clear and appeared to be related to questions dealing with whether Mr Jones or Mr White controlled the second plaintiff or whether Mr White's involvement with it was principally to secure an alleged debt of $1 million said to be owed to him by the second plaintiff arising out of oral agreements described in confusing detail in Mr White's evidence, where, in truth, the second plaintiff was said to be controlled by Mr Jones.[10]

[24] Be that as it may, I remain unconvinced Mr White's participation was limited to being a potential witness uninterested in the control of the second plaintiff. The terms of the email suggest very clearly that he was the person in charge of the negotiations on behalf of the plaintiffs. Similarly, although the deed includes provisions which would have addressed Mr and Mrs White's concerns, they do so in a context which is clearly associated also with the plaintiffs' concerns in this proceeding. It is also significant, as I have mentioned earlier, that, in the email the day after the mediation, Mr White said of the proposed settlement discussed there: "I will pay you immediately …".[11]

Mr White was involved in compiling evidence for the plaintiffs

[25] This submission related to evidence that Mr White had telephoned Mr Eiby, recording the telephone conversation and producing it at trial as evidence going to Mr Eiby's malice. The plaintiffs' solicitors also sought instructions from him by email which he provided to them by email.

[26] It was accepted that the conversation between Mr White and Mr Eiby occurred in the terms of the transcript tendered at the trial as evidence of malice on the part of Mr Eiby. It was argued, however, that, by that time, Mr White had separate concerns relating to his launching of an online stock market research and information project. Nonetheless, the conversation was particularly relevant to evidence of malice alleged against Mr Eiby and led on that basis in the trial.

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[10] See Mr White's affidavit filed 1 February 2019 at paras 16-40.

[11] See Mr Eiby's affidavit filed by leave on 8 February 2019 at p 11 of the exhibits.

[27] It was submitted that the email seeking instructions from Mr White also was addressed to Mr Jones and explicable in the context of him assisting and providing evidence. The relevant reply was an email by Mr Jones of 18 March 2015.

Mr White's attendance at trial

[28] It was accepted that Mr White attended at the trial as a potential witness but it was said that he was not present during its course other than for the first 15 minutes and the last half day. This evidence does not seem to me to be significant overall in respect of the issue I have to decide.

Mr White's interest in the matter

[29] Here the defendants' submission was that Mr White stood to benefit from the proceedings as the beneficiary of the trust behind the second plaintiff's business. The second plaintiff's sole shareholder was a company called Share Express Pty Limited, formerly named Torque Securities Pty Ltd. That company was the trustee of the Jinx Trust of which Mr White was the primary beneficiary.

[30] The defendants also relied on evidence demonstrating that Mr White played an active role in the second plaintiff's business from the email which I have already set out in detail. He was also described, in the plaintiffs' opening at trial, as someone substantially concerned in the business and available to supplement Mr Jones' evidence about the second plaintiff's business.[12] Mr Jones gave evidence that Mr White had asked him to become the director of the second plaintiff, while the telemarketers the second plaintiff used in its business entered into written employment contracts with a company (of which Mr White was the sole director and secretary) where the contracts required them to report to Mr White. The defendants also relied on authorities to the effect that a beneficial interest in the trust behind a company involved in litigation has been held to be a sufficient interest for the purpose of making non-party costs orders.[13]

[31] The respondent's submission was that Mr White's beneficial interest was not sufficient in this matter for the purposes of an order being made against him. Mr Eastwood also submitted for him that the references to his business in the email of 28 July 2016 were consistent with addressing his and his wife's separate concerns and that it was hardly surprising that he might be someone who would be called to give evidence as to the nature of the losses sustained by the second plaintiff given his knowledge of the factual records relating to it and the customer relationship management software which he controls. He also submitted that Mr Jones's evidence that Mr White asked him to be a director of the second plaintiff conflicted with Mr White's evidence that Mr Jones and another man wished to acquire the company which ultimately became the second plaintiff.

Consideration

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[12] See Mr Sams' affidavit filed on 30 October 2018 at para 17 and at p 98 of the exhibits.

[13] See *Ipex ITG Pty Ltd v Victoria* [2011] VSCA 134 and *Ipex ITG Pty Ltd (in liq) (receivers appointed) v Victoria* [2014] VSCA 315 and *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd (No 2)* [2017] QSC 199 at [22].

[32] Where, as here, there was an unsuccessful attempt by the second plaintiff to claim a significant amount of damages and it is evident that Mr White was, on the face of the documents, the primary beneficiary of the discretionary trust, the trustee of which was the second plaintiff's sole shareholder, the conclusion that I draw is that this is an entirely appropriate case where it should be made the subject of a non-party costs order. Even if Mr White was in control of the second plaintiff to secure the debt of $1 million said to be owed to it, it was in his interests to keep control of the company. That potential financial interest is significant but the evidence from the email makes it very clear to my mind that he was also the controlling mind behind the litigation. He played an active part in the conduct of the litigation and had an interest in its outcome.

[33] It is also likely that the second plaintiff's action, if successful, would have been more rewarding than the personal action for damages for defamation sought by Mr Jones. On any view of the evidence, Mr Jones's personal action was worth little. It was argued, therefore, for the respondent that there was nothing to show that he would benefit significantly from any personal action by Mr Jones as there was no evidence of any agreement between him and Mr Jones to take the benefit of Mr Jones' litigation.

[34] That does seem to me to be a valid point but not one which should prevent an order that the bulk of the costs also be paid by Mr White as a non-party.[14] He was clearly heavily involved in the conduct of the proceedings by providing instructions to the plaintiffs' solicitors and taking the dominant role in an attempted settlement of the action which would have been in his interests as well as in his companies' interests. If there were to be a successful end to the action it was more likely to be financially beneficial to the second plaintiff whose claim for damages was advanced at a much higher figure than that advanced for Mr Jones. It also seems to be highly probable to me that it was he who was helping to fund the litigation by making himself at least partly responsible for the solicitors' fees.

[35] In those circumstances I conclude that it is in the interests of justice to order that Mr White pay 90% of the defendants' costs of and incidental to the proceedings including reserved costs.

Other matters

[36] It was also submitted for Mr White that the costs should only be assessable from a date in or around mid-October 2018 when Mr White swore that he first became aware that he could be held liable for the defendants' costs. That statement in his affidavit belies correspondence sent to him through his solicitors on at least four occasions from 1 June 2016 where it was made crystal clear that the defendants would be pursuing a personal costs order against him.

[37] Even if he were not aware of that possibility until mid-October 2018, that provides no sensible reason why his conduct in supporting the litigation actively where he had an interest in a favourable outcome for the second plaintiff should prevent an order for non-party costs being made against him.

Order

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[14] See and cf *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2009] 2 Qd R 356, 378 at [79].

[38] Accordingly, I order that the plaintiffs pay the defendants' costs of and incidental to the proceedings including reserved costs. I further order that Mr White pay 90% of the defendants' costs of and incidental to the proceedings including reserved costs and 100% of the costs of this application on the standard basis.