

# SUPREME COURT OF QUEENSLAND

CITATION: *Williams v Nathan* [2019] QSC 150

PARTIES: **Daniel WILLIAMS**  
(Plaintiff)  
v  
**Julian NATHAN**  
(First Defendant)  
And  
**NATHAN LAWYERS BRISBANE PTY LTD (IN LIQUIDATION)**  
**ACN 1540104425**  
(Second Defendant)

FILE NO/S: BS No 12663 of 2018

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 June 2019

DELIVERED AT: Brisbane

JUDGE: Boddice J

ORDER: **I make orders in terms of the amended draft which I initial and place with the papers.**

CATCHWORDS CORPORATIONS – WINDING UP – GENERALLY – whether the plaintiff ought to receive an order that the first defendant pay his costs of the proceeding on an indemnity basis – whether the first defendant ought pay the second defendant’s costs – whether liquidator ought pay to personally pay the plaintiff’s costs of specified events – whether the liquidator ought be entitled to be indemnified by the second defendant for specified costs

COUNSEL: A Crowe QC, with L Copley, for the plaintiff  
P O’Brien for the first defendant  
C A Wilkins for the second defendant

SOLICITORS: Clarke Kann Lawyers for the plaintiff  
Mullins Lawyers for the first defendant  
K&L Gates for the second defendant

[1] On 23 May 2019, reasons for judgment were delivered in this proceeding. The parties were directed to prepare draft orders in accordance with those reasons and given leave to file submissions in respect of costs.

- [2] The parties have been able to largely agree the terms of those orders, other than costs.
- [3] In respect of costs, the plaintiff seeks orders that the first defendant pay his costs of the proceeding, and those of the second defendant, on an indemnity basis; that the liquidator personally pay the plaintiff's costs of specified events; and that the liquidator otherwise not be entitled to be indemnified by the second defendant for specified costs.
- [4] The first defendant does not oppose an order that he pay the plaintiff's costs of the proceeding but opposes an order for those costs to be assessed on an indemnity basis. The first defendant also opposes orders requiring that he pay the second defendant's costs.
- [5] The liquidators for the second defendant oppose the costs orders sought by the plaintiff.
- [6] Having regard to the conclusions reached in the proceeding, there is no reason why the plaintiff ought not to receive an order that the first defendant pay his costs of the proceeding.
- [7] The plaintiff's contention for an entitlement that those costs be assessed on an indemnity basis lies in the conduct of the first defendant, an officer of the court, both in bringing the application for an order that the second defendant be wound up on the just and equitable ground and in the present proceedings.
- [8] Those actions include a lack of candour in the material initially relied upon in support of the winding up application and his insistence that funds he had withdrawn from the practice operated by the first defendant without authority were used to meet liabilities of the second defendant, a claim he knew to be false.
- [9] An award of costs on an indemnity basis is not to be made routinely. There needs to be special circumstances warranting a departure from the ordinary rule that costs between parties be assessed on the standard basis.<sup>1</sup> Special circumstances include impropriety on the part of a litigant in the bringing or conduct of the legal proceeding.
- [10] Here, there was a lack of candour by the first defendant when bringing the winding up application. There was also a claim to funds he did not have authority to withdraw, in circumstances where he, as a legal practitioner practicing in commercial law, ought to have known those claims lacked merit.
- [11] Whilst those circumstances do no credit to the first defendant, the central issue in the proceeding was the terms of the agreement reached between the parties and the proper characterisation of an agreement to operate separate practices through the second defendant, an incorporated legal practice.
- [12] I decline, in the exercise of my discretion, to order the payment of costs on an indemnity basis because the first defendant's defence of that central allegation did not involve conduct of a nature warranting an order for costs, assessed on an indemnity basis.

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<sup>1</sup> *Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2009] Qd R 356.

- [13] The other matters relied upon, whilst relevant to the exercise of that discretion, ultimately do not persuade me that it would be appropriate to depart from the ordinary rule and order that costs be paid on an indemnity basis.
- [14] For similar reasons, I decline, in the exercise of my discretion, to order that any order for costs in respect of the second defendant be assessed on an indemnity basis. I am, however, satisfied the first defendant should be ordered to pay the costs of the second defendant, on a standard basis.
- [15] The liquidator of the second defendant had a responsibility to protect the interests of all creditors of the second defendant. They had only recently been appointed as liquidators. There was, understandably, uncertainty as to the liabilities of the second defendant.
- [16] Against that background, a resistance to leave being granted to the plaintiff to bring the proceeding, even if unwise in the circumstances, cannot be said to have been unreasonable.
- [17] Similarly, having regard to the first defendant's assertions in relation to the conduct of the plaintiff, and his assertion that funds he withdrew from the Oxley practice general account, without authority, were used for payment of debts of the second defendant, it was not unreasonable for the liquidators of the second defendant to take an active part in the proceeding.
- [18] The major asset held in the name of the second defendant was the practice operated by the plaintiff at Oxley. The practice operated by the first defendant at West End had limited value. It was not unreasonable for the liquidators of the second defendant to determine that it was not a sufficient protection of the interests of the creditors of the second defendant to allow a defence to the plaintiff's claim to rest solely in the control of the first defendant.
- [19] That conclusion also supports a conclusion that it would be unfair for the legal costs associated with the second defendant's involvement in the proceeding to be met out of the assets of the second defendant. A defence of that proceeding was undertaken in reliance upon the assertions made by the first defendant. Those assertions having failed it is appropriate, in the exercise of my discretion, to order that the first defendant pay the second defendant's costs of the proceeding, on a standard basis.
- [20] The remaining issue is the plaintiff's contention that the actions of the liquidators were unreasonable such that they ought personally to pay specified costs and not be entitled to indemnity from the assets of the second defendant in respect of other costs.
- [21] Liquidators will not ordinarily be ordered to personally pay costs incurred in a proceeding in which a company in liquidation is a party unless the liquidators have acted unreasonably in the defence of that proceeding.<sup>2</sup> Further, a liquidator would normally be entitled to indemnity from the assets of that company for legal expenses properly incurred, that is, costs reasonably and honestly incurred in the defence of a proceeding.<sup>3</sup>

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<sup>2</sup> *Lum v M V Developments (Lane Cove) Pty Limited (in liquidation)* [2016] NSWSC 1248.

<sup>3</sup> *Mead v Watson* [2005] NSWCA 133 at [12]-[13].

- [22] In the present case, the action of the liquidator in actively opposing the plaintiff's application for leave to proceed against the company in liquidation was not unreasonable. The liquidators had separate interests, namely, the interests of creditors as a whole.
- [23] I am also not satisfied there was, at that stage, a necessary conflict of interest in the liquidator instructing the same solicitor as acted for the first defendant. There was, having regard to the nature of the allegations being made by the first defendant, a reasonable basis to conclude there would be a saving of costs without a necessary conflict of interest.
- [24] Once the trial was about to commence and it was apparent there were actions of the first defendant which were likely to be in contention at trial, the liquidators appropriately recognised the potential for conflict and arranged for separate representation. Such a course was not unreasonable.
- [25] It was also not unreasonable for the liquidators to rely upon defences in the proceeding. The unusual nature of the claim being advanced by the plaintiff, together with the potential consequences of any order on the available assets on liquidation, justified the raising of issues which were potentially relevant to a just determination of the proceeding.
- [26] As the actions of the liquidators were not unreasonable I decline, in the exercise of my discretion, to make any order in respect to the payment of costs by the liquidators personally or in respect of denying the liquidators an entitlement to an indemnification for the legal costs incurred in the second defendant's defence of the proceeding.
- [27] I make orders in terms of the amended draft which I initial and place with the papers.