

SUPREME COURT OF QUEENSLAND

CITATION: *Flying Fighters Pty Ltd v Official Trustee in Bankruptcy* [2019]
QSC 155

PARTIES: **FLYING FIGHTERS PTY LTD (ACN 067 895 005) (RECEIVERS AND MANAGERS APPOINTED) AS TRUSTEE FOR THE FLYING FIGHTERS DISCRETIONARY TRUST**

(Applicant)

v

OFFICIAL TRUSTEE IN BANKRUPTCY

(First Respondent)

AND

COMMONWEALTH OF AUSTRALIA

(Second Respondent)

AND

NIGEL MARKEY

(Third Respondent)

AND

ANN FORDYCE

(Fourth Respondent)

BS No 4275 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 June 2019

DELIVERED AT: Brisbane

HEARING DATE: On the papers, without oral hearing

JUDGE: Brown J

ORDER: **The order of the Court is that:**

- 1. The respondents pay two third of the applicant's costs of the application.**
- 2. The parties have liberty to apply on three days' notice.**

COUNSEL: KN Wilson QC with J O'Connor for the applicant
PD Hay for the respondents

SOLICITORS: James Conomos Lawyers for the applicant
HopgoodGanim for the respondents

[1] Following delivery of reasons for judgment on 10 May 2019,¹ the parties were invited to make submissions as to costs and as to any further final relief that may be required arising out of the decision.

[2] Both parties have made submissions.

Costs

[3] Flying Fighters submits that as it has succeeded in obtaining the relief sought, it is entitled to have its costs and the appropriate order is that the respondents pay the applicant's costs of and incidental to the proceeding on a standard basis. That accords with the general rule as to costs in r 681 of the *Uniform Civil Procedure Rules 1999* (Qld), although the Court maintains its discretion in relation to costs. Flying Fighters also points to the authorities which support the principle that a successful party should be awarded its costs and that the fact that an ultimately successful applicant fails on particular arguments or issues does not mean that it should be deprived of some of its costs or an apportionment of costs between issues is required.²

[4] Flying Fighters submits that if the Court was minded to make an order other than that the applicant be paid its costs by the respondents, the applicant should be entitled to a significant proportion of its costs for at least four reasons:

- (a) The majority of submissions made prior to the hearing and at the hearing itself were directed to the lengthy and complex history of the proceedings relating to the *Proceeds of Crime Act 2002* (Cth), described as the "POCA proceedings";
- (b) While ultimately the applicant succeeded on an additional argument raised on the day of the hearing, that argument was contested and additional submissions were filed;
- (c) While the applicant was unsuccessful on a number of arguments, some of the arguments raised by the respondent were similarly unsuccessful; and
- (d) While the applicant raised a number of arguments in its primary written submissions, during its oral submissions and in its submissions in reply, the applicant indicated that a number of the arguments would not be pressed and therefore the Court was not required to adjudicate on those arguments.

¹ *Flying Fighters Pty Ltd v Official Trustee in Bankruptcy* [2019] QSC 120.

² See, for example: *McMurdo J in Whiting v Somerset Regional Council (No 2)* [2010] QSC 329, [3]; *Muir JA in Alborn & Ors v Stephens & Ors* [2010] QCA 58, [7]-[8].

- [5] Flying Fighters submits that if a proportionate costs order is to be made, the respondents should pay two thirds of the applicant's costs.
- [6] The respondents submit that as the respondents were only notified of the argument as to merger upon which Flying Fighters was ultimately successful at the hearing, the additional arguments raised should be treated in the same way as a late amendment of a pleading. In particular, it referred to the authority of *Beoco Ltd v Alfa Laval Co Ltd*³ where the Court of Appeal stated that:⁴
- “As a general rule, where a plaintiff makes a late amendment as here, which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the costs of the action down to the date of the amendment.”
- [7] That authority has been referred to with approval by the Court of Appeal of the Supreme Court of New South Wales, and the principle accepted by that Court.⁵
- [8] In the present case, the additional arguments raised were essentially matters of law. In that respect, it is quite different to a late amendment of a pleading which substantially alters the case that a party must meet. No additional factual evidence was required to support the additional arguments raised, which relied on the same evidence as had been relied upon to support the other arguments raised in the originating application.
- [9] The respondents seek an order that the Court make no order as to costs. Given the fact that Flying Fighters has ultimately been successful, I do not accept that would be an appropriate way to exercise the Court's discretion. Nor do I think it would appropriate to make the alternative costs order sought by the respondents, namely that the applicant pay the costs of the respondents which were incurred prior to 16 June 2018 on a standard basis, and the respondents pay the costs of the applicant incurred on or after 16 June 2018 on a standard basis. The present case is not analogous to a late amendment which substantially altered the case that had to be met given that, as I have set out above, the additional arguments were matters of law and construction based on the factual evidence that had already been filed.
- [10] Taking account of the late raising of the arguments upon which the applicant was ultimately successful, which had to then be responded to by the respondents by way of detailed legal submissions and the lack of success in its primary arguments originally raised, the appropriate course is to make a proportionate costs order. In the circumstances, I order that the respondents pay two thirds of the applicant's costs of the application.

Further order

³ [1995] QB 137.

⁴ At 154.

⁵ *Cellarit Pty Ltd v Cawarra Holdings Pty Ltd (No 2)* [2018] NSWCA 266, [40]; *Vero Insurance Ltd v Australian Prestressing Services Pty Ltd (No 2)* [2014] NSWCA 8, [7]; *Phillips v James (No 2)* [2014] NSWCA 135, [20]-[21], although not actually applied.

- [11] Flying Fighters seeks two further orders, namely:
- (1) That, within 14 days, the respondents deliver possession of the aircraft, together with the respective log books, ownership and operational documents to the applicant at an address to be nominated by the applicant's solicitors to the respondents' solicitors; **(first order)** and
 - (2) That, within seven days of the delivery of the aircraft, the third and fourth respondents lodge all necessary documents with ASIC to record their removal as receivers. **(second order)**
- [12] The first order sought mirrors order 10 of the orders made by the Court of Appeal in the POCA proceedings.⁶
- [13] The respondents have submitted there is no need for the Court to make any orders which facilitate the handover of the aircraft. The respondents have stated that they are ready, willing and able to arrange for handover on a date to be chosen by the applicant, provided they are given at least seven days' notice. In those circumstances, I do not consider it necessary to make the first order sought by Flying Fighters, and therefore do not need to consider whether such an order would be appropriate given the Court of Appeal's order.
- [14] As to the second order sought by Flying Fighters, the order of the Court was that the appointment of the receivers was invalid. I do not consider that the further order sought is necessary given that the receivers would be required to fulfil any requirements of the *Corporations Act 2001* (Cth) in terms of lodging any necessary paperwork with ASIC following the Court's order. In the unlikely event that they are not willing to take any steps to give effect to the order of the Court, I will make an order that the parties have liberty to apply on three days' notice.

Orders

- [15] I order that the respondents pay two thirds of the applicant's costs of the application.
- [16] I further order that the parties have liberty to apply on three days' notice.

⁶ *Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Anor; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors* [2016] QCA 284.