

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) & Ors* [2019] QSC 258

PARTIES: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288**
(plaintiff)

v

EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM)
(first defendant)

and

PAULA MCLUSKIE
(second defendant)

and

MICHAEL JAMES REID
(third defendant)

and

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 007 208 461
(first third party)

and

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND (RECEIVERS APPOINTED) ARSN 110 247 875
(second third party)

and

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 007 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND (RECEIVERS APPOINTED) ARSN 122 052 868

(third third party)

and

**TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS
RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE
INCOME FUND ARSN 099 857 511**

(fourth third party)

and

LISA MAREE DARCY

(fifth third party)

and

EGHARD VAN DER HOVEN

(sixth third party)

and

FRANCENE MAREE MULDER

(seventh third party)

and

JOHN FRANCIS O'SULLIVAN

(eighth third party)

and

SIMON JEREMY TICKNER

(ninth third party)

and

GRANT PETER FISCHER

(tenth third party)

and

ANGELO VENARDOS

(eleventh third party)

and

CAROLYN ANNE HODGE

(twelfth third party)

and

MICHELLE JACKSON

(thirteenth third party)

and

BRUCE MACKENZIE

(fourteenth third party)

and

ALEXANDER DAVID MONAGHAN

(fifteenth third party)

FILE NO/S: BS No 2166 of 2015

DIVISION: Trial Division

PROCEEDING: Applications for costs made in writing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 October 2019

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Jackson J

ORDERS: **On the application filed by the defendants on 21 June 2019 the order of the court is that:**

- 1. the defendants pay the plaintiff's costs of the application;**
- 2. the defendants pay the first third party's costs of the application.**

On the application filed by David Whyte on 21 June 2019 the order of the court is that:

- 3. the applicant pay the first third party's costs of the application;**
- 4. the applicant be indemnified for those costs from the scheme property of the First Mortgage Income Fund;**
- 5. the first third party's costs of the application are ordered to be costs in the proceeding as between the defendants and the plaintiff;**
- 6. the applicant's costs of the application are ordered to be costs in the proceeding as between the defendants and the plaintiff.**

Otherwise:

- 7. the defendants pay the fourth third party's costs of the third party claim, except for the fourth third party's costs of the hearing on 26 July 2019 of the application by the defendants for leave to proceed filed on 21 June 2019.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – Whether costs of the Leave to Proceed application should follow the event

– Whether costs of the Representation application should be costs in the proceeding

Chan & Ors v Macarthur Minerals Ltd & Ors [2019] QSC 168, cited

LM Investment Management Pty Limited (in liq) v EY (also known as Ernst & Young) & Ors [2019] QSC 246, cited

Mio Art Pty Ltd v Macequest Pty Ltd (No 2) [2013] QSC 271, cited

Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622, cited

Corporations Act 2001 (Cth), s 500

Uniform Civil Procedure Rules 1999 (Qld), rr 5, 601NF, 681, 685

COUNSEL: D Ananian-Cooper for the plaintiff
A Leopold QC for the defendants
S Russell (solicitor) for the first third party
P Ahern for the fourth third party

SOLICITORS: Gadens for the plaintiff
Clifford Chance for the defendants
Russells for the first third party
Squire Patton Boggs for the fourth third party

JACKSON J:

- [1] Following the decision of *LM Investment Management Pty Limited (in liq) v EY (also known as Ernst & Young) & Ors*,¹ (“Leave to Proceed application”) and the dismissal of an application by David Whyte for LM Investment Management Limited (receivers and managers appointed) (in liquidation) (“LMIM”) in its capacity as the responsible entity for the LM First Mortgage Income Fund (receiver appointed) (“FMIF”) to be added as a sixteenth third party to the proceeding constituted by the third party notice with leave to defend the allegations against the first third party filed on 21 June 2019 (“Representation application”), the parties made written submissions as to costs.

Leave to Proceed application

- [2] The plaintiff and first and fourth third parties apply for orders that the defendants pay their costs of the Leave to Proceed application.
- [3] Because each of those parties was successful in resisting the Leave to Proceed application, an order that costs “follow the event”² would be an order that the defendants pay the costs of

¹ [2019] QSC 246.

² *Uniform Civil Procedure Rules 1999 (Qld)*, s 681(1).

the application of each of those parties. On one view, the application was not made against the plaintiff, because it was not made by counterclaim. However, the plaintiff was named as a respondent to the application and in substance, the defendants did contend that they should be entitled to raise the subject matter of the third party claim as set out in the third party notice and the third party statement of claim against the plaintiff's claim by way of response to the plaintiff's claim. For that reason, I considered the application as if it were properly made by counterclaim against the plaintiff, as well as against the first to third third parties. Accordingly, in substance, the plaintiff was a respondent to the application.

- [4] Another alternative possible view is that the application was not brought against the first third party in its own right or capacity. However, the title of the third party claim constituted by the third party notice and third party statement of claim against the first third party did not specify that it was brought against the first third party in its capacity as responsible entity of the FMIF³ and it was appropriate, therefore, for the first third party in its own right or capacity, by the liquidator, to resist the application.
- [5] As to the fourth third party, the application for leave to proceed did not need to be made against it because it is not in liquidation. The requirement of leave to proceed applies to a company in liquidation, in this instance the first to third third parties, because LMIM resolved to go into a creditors' voluntary liquidation.⁴
- [6] However, the application for leave to proceed, as filed, was directed to all the "Other Third Parties", care of their respective solicitors who were identified as the respondents to the application.
- [7] The defendants raise a number of grounds in opposition to an order for costs that would follow the event of dismissal of the Leave to Proceed application.
- [8] As against the plaintiff, the defendants submit there are a number of grounds why another or special order for costs should be made.
- [9] First, they submit that a failure by the plaintiff to articulate its complaints at a reasonable time prior to the hearing on 26 July 2019 should result in a different order. I do not understand this submission, unless it is intended to penalise the plaintiff for raising its grounds of opposition late, as a sanction for non-compliance with the implied undertaking of a party to a proceeding to proceed promptly.⁵ But even if the grounds of opposition were raised late, they were opposed by the defendants on the day and responded to by written submissions filed on 6 August 2019⁶ as well as later submissions. It is not suggested that the costs were unnecessarily increased by any lateness of the plaintiff in raising its grounds of opposition.

³ *LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) & Ors* [2019] QSC 246, [22]-[25].

⁴ *Corporations Act 2001* (Cth), s 500(2).

⁵ *Uniform Civil Procedure Rules 1999* (Qld), r 5.

⁶ CFI 97.

- [10] Second, the defendants submit that the plaintiff should have accepted that the defendants did not require leave to proceed and that is a reason why no order for costs should be made in favour of the plaintiff. As I said in the reasons for judgment dismissing the Leave to Proceed application, I did not understand then and I do not understand now how it is that the defendants submit that leave to proceed was not required when they were the applicants applying for an order for that leave.⁷
- [11] Third, the defendants submit that correspondence by the defendants suggested that the hearing of the Leave to Proceed application “could be pushed back” to enable the defendants’ solicitors and counsel to consider and determine whether and to what extent the third party notice and third party statement of claim ought to be amended is a basis for refusing to order costs in favour of the plaintiff. In my view, the plaintiff was not required to agree to adjourn the hearing of the application so that the defendants could reconsider their position, at the risk of being denied the costs of the application, in the circumstances of the case.
- [12] Fourth, the defendants submit that a number of claims brought by the third party notice and third party statement of claim may still, in effect, survive through the vehicle of a counterclaim as adumbrated by the reasons for decision.⁸ In my view, that some part of the subject matter of the third party notice and third party statement of claim may be able to be brought against the plaintiff, if leave is granted (or, for that matter, that some part of it may be able to be raised by way of set-off in the defence), is not a reason why an order for costs of the Leave to Proceed application should not be made in favour of the plaintiff. The abandonment by the defendants of significant parts of the third party statement of claim, after the oral hearing of the application, together with the reasons themselves, amply demonstrate, in my view, that the defendants propounded a significant number of causes of action on which leave to proceed was not granted because they did not have a solid foundation that gave rise to a serious dispute.
- [13] The order sought by the plaintiff is that the defendants pay the costs of David Whyte in his capacity as the person appointed under s 601NF of the *Corporations Act 2001* (Cth) and as the receiver of the LM First Mortgage Income Fund ARSN 089 343 288 and of the plaintiff of and incidental to the defendants’ application for leave to proceed filed 21 June 2019.
- [14] In my view, an order in that form should not be made. There is no reason advanced for a separate order in relation to the costs of Mr Whyte. The appropriate order is that the defendants pay the costs of the plaintiff of the Leave to Proceed application. Second, it is not appropriate that the order for costs of the application should be an order for the costs “of and incidental to” the application. The statutory language for making an order in those terms has passed, as decisions of this court show.⁹ The appropriate order is that the defendants pay the

⁷ *LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) & Ors* [2019] QSC 246, [99].

⁸ *LM Investment Management Limited (in liq) v EY (also known as Ernst & Young) & Ors* [2019] QSC 246, [104].

⁹ *Chan & Ors v Macarthur Minerals Ltd & Ors* [2019] QSC 168, [13]; *Mio Art Pty Ltd v Macequest Pty Ltd (No 2)* [2013] QSC 271, [6]-[22].

plaintiff's costs of the application for leave to proceed filed by the defendants on 21 June 2019.

- [15] The first third party by the liquidator applies for an order that the defendants pay the costs of the first third party of the Leave to Proceed application.
- [16] The defendants submit that their intention was to propound their claims against the first third party as against the plaintiff, or at least that was made clear in the defendants' outline of argument on the Representation application served on 19 July 2019. The defendants submit that the first third party's submissions filed on 26 July 2019 and appearance at the hearing on that date were wholly unnecessary and there should be no order as to the first third party's costs on 26 July 2019, which I take to mean that any costs the defendants are ordered to pay to the first third party should be limited to a time before that date.
- [17] As I concluded in the reasons for decision, the Leave to Proceed application filed on 21 June 2019 and the third party notice and third party statement of claim on which that application was based did name the first third party in its own right or capacity, whatever may have been the defendants' intention by 19 July 2019. The defendants do not go so far as to say that as at 19 July 2019 they undertook to the first third party that they would apply to amend the third party notice and third party statement of claim to make it clear that the only claims propounded were against the plaintiff or that they undertook to pay the first third party's costs up to that point in time.
- [18] In my view, there is no sufficient reason not to make an order that costs follow the event as between the defendants and the first third party, or to limit those costs to a time period. The appropriate order is that the defendants pay the first third party's costs of the application.
- [19] The fourth third party applies for an order that the defendants pay the fourth third party's costs of and incidental to the entire proceeding including the costs of "the hearing" on 26 July 2019, meaning the hearing of the Leave to Proceed application.
- [20] The fourth third party relies on the fact that after the oral hearing on 26 July 2019, the defendants abandoned their claim against, *inter alia*, the fourth third party, as recorded in the reasons for decision, as supporting its application for an order that the defendants pay the fourth third party's costs of the Leave to Proceed application.
- [21] The defendants oppose an order that they pay the costs of the fourth third party of the Leave to Proceed application on the ground that the fourth third party was not a proper respondent. However, apart from those costs, the defendants accept that they must pay the fourth third party's costs of the proceeding.
- [22] In my view, the defendants' submission should be accepted. The defendant did wrongly include the fourth third party as a respondent to the application by naming the "Other Third Parties" as respondents. However, the fourth third party cannot have been in any doubt that the defendants did not require leave to proceed against the fourth third party as a company in liquidation, pursuant to s 500(2) of the *Corporations Act 2001 (Cth)*, because the fourth third party was not a company in liquidation.

[23] Accordingly, in my view, the order for costs that should be made is that the defendants pay the fourth third party's costs of the proceeding, except for the fourth third party's costs of the hearing on 26 July 2019 of the application by the defendants for leave to proceed filed on 21 June 2019.

Representation application

[24] At the conclusion of the hearing of the oral submissions on the Leave to Proceed application on 26 July 2019, the court ordered that the Representation application be adjourned to a date to be fixed.

[25] On 4 October 2019, when the court's decision on the Leave to Proceed application was delivered, the court ordered that the Representation application be dismissed.

[26] The first third party, by the liquidator, applies for an order that both the plaintiff and the defendants pay the costs of the first third party of the Representation application.

[27] Mr Whyte and the plaintiff seek an order that the defendants pay their costs of the Representation application or that there be no order as to costs.

[28] I note at the outset that the plaintiff was not named as an applicant in or respondent to the Representation application, and no basis was articulated as to why the plaintiff would have costs of that application.

[29] The defendants submit that Mr Whyte's application was misconceived, as seeking an order that he be joined in his own name, given that he was already empowered to bring, defend or maintain any proceeding on behalf of the FMIF in the name of LM Investment Management Limited as necessary for the winding up of the FMIF.

[30] The defendants also rely on their submissions served on 19 July 2019 on the Representation application, to submit that Mr Whyte's application ought to have been withdrawn at that point, because they accepted that he was the appropriate person to conduct the first third party's defence. They submit there should be no order as to Mr Whyte's costs of the Representation application, including the brief mention on 26 July 2019 and the order made on 4 October 2019 dismissing the application.

[31] Mr Whyte submits that no order should be made that the plaintiff pay the first third party's costs of the Representation application, because it was Mr Whyte and not the plaintiff who filed and prosecuted the Representation application (somewhat inconsistently with the application made by the plaintiff for its costs of the Representation application to be paid by the defendants). Mr Whyte also submits that no order should be made that he pay the first third party's costs, being those incurred by the liquidator, because the Representation application was dismissed in circumstances where it was no longer necessary to decide it.

[32] Mr Whyte submits that where it proves unnecessary to determine the matters in issue in a proceeding because further prosecution becomes futile, the court will not generally determine the issues or make an order for costs in favour of one party against the other unless a party

has not acted reasonably, relying on *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin*.¹⁰

- [33] The *Uniform Civil Procedure Rules* 1999 (Qld) specifically deal with circumstances where it becomes unnecessary to continue with a proceeding, and provide that in those circumstances, any party to the proceeding may apply to the court for an order for costs¹¹ and that “the court may make the order the court considers just”.¹² The discretionary power under that rule is not confined, although it is informed by the considerations discussed in the passage referred to from the reasons in *Lai Qin*.
- [34] In my view, Mr Whyte should pay the liquidator’s costs of the application filed by Mr Whyte on 21 June 2019 and Mr Whyte should be indemnified in respect of those costs from the scheme property of the FMIF. It should be further ordered that those costs be made costs in the proceeding as between the plaintiff and the defendants.
- [35] However, in my view, it is not necessary to make any further order in respect of the first third party’s costs of the Representation application.
- [36] Further, Mr Whyte’s costs of the Representation application should also be made costs in the proceeding between the plaintiff and the defendant. After receipt of the defendants’ submissions, served on 19 July 2019 and filed on 22 July 2019 and a short further period, there was no substantial reason for Mr Whyte to incur further costs on the Representation application. It was clear that the defendants did not oppose the plaintiff appearing in opposition to the defendants’ application for leave to proceed or in opposition to the defendants’ claim made against the first third party by the third party notice and third party statement of claim.

¹⁰ (1997) 186 CLR 622, 625.

¹¹ *Uniform Civil Procedure Rules* 1999 (Qld), r 685(1).

¹² *Uniform Civil Procedure Rules* 1999 (Qld), r 685(2).