SUPREME COURT OF QUEENSLAND

CITATION:	*Kimtran P/L & Anor v Downie & Anor* [2003] QCA 424
PARTIES:	**KIMTRAN PTY LTD and BIRCHCROFT PTY LTD** (appellants/respondents) v **PHILIP GRAEME DOWNIE and SUSAN RUTH CARTER** (respondents/applicants/appellants)
FILE NO/S:	Appeal No 5473 of 2003 DC No 4448 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	Application for extension of time Application for leave s118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	26 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2003
JUDGES:	McMurdo P, Dutney and Philippides JJ Separate reasons for judgement of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Set aside orders made in the District Court and in lieu thereof order the respondent to pay the costs of the appeal and of the appeal to the District Court to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE - COSTS – JURISDICTION OF QUEENSLAND BUILDING TRIBUNAL TO AWARD COSTS AGAINST A THIRD PARTY - liquidators' personal liability for costs - where appellants are the liquidators of a company in liquidation - where company in liquidation ordered to pay the costs of an application for security for costs and an application to strike out the proceedings – where application for an order that the liquidators pay those costs refused by the Queensland Building Tribunal – where Tribunal concluded there was no jurisdiction to award costs against the liquidators PROCEDURE - COSTS - where an order for costs against the company in liquidation would be unlikely to result in an effective indemnity – where propriety of liquidators' conduct not in question – exercise of discretion

PRACTICE AND PROCEDURE – EXERCISE OF JUDICIAL DISCRETION – whether the learned primary judge erred in the exercise of his discretion to make the costs orders against liquidators - where the learned primary judge was wrong in the extent to which he considered his discretion was constrained – where discretion therefore miscarried – discretion exercised afresh by this Court

Commercial and Consumer Tribunal Act 2003 (Qld), s 71
District Court Act 1967 (Qld), s 118
Queensland Building Services Authority Act 1991 (Qld), s 61(1), s 95(1)

Belar Pty Ltd (in liq) v Mahaffey [2000] 1 Qd R 477, discussed
In re W Powell & Sons [1896] 1 Ch 681, referred to
Kemp v Coastal Constructions Pty Ltd [1993] QCA 076; Appeal No 171 of 1992, 17 March 1993, considered and distinguished
Knight v FP Special Assets Ltd (1992) 174 CLR 178, discussed and followed
Mahaffey v Belar Pty Ltd [1999] QCA 2; Appeal No 8239 of 1997, 16 March 1999, discussed
Re Kemp [1994] 1 Qd R 285, cited
Walker Corporation Ltd v Winton [1997] QDC 125; District Court 819 of 1996, 30 May 1997, referred to
Walter v McBride (1995) 36 NSWLR 440, considered and followed

COUNSEL: DJS Jackson QC, with him MJF Burnett for the appellants/respondents
P Hackett for the respondents/applicants/appellants

SOLICITORS: Gadens Lawyers for the appellants/respondents
H Drakos and Company for the respondents/applicants/appellants

[1] **McMURDO P:** I agree with the reasons for judgment of Dutney J and with the orders proposed.

[2] **DUTNEY J:** This is an application for an extension of time within which to seek leave to appeal and for leave to appeal from a decision of the District Court under s 118 of the *District Court of Queensland Act* 1967 (Qld).

[3] The applicants are the liquidators of Forboyz CMS Pty Ltd (in liquidation) which brought an application in the Queensland Building Tribunal on 20th March 2000 for payment for certain building works carried out prior to the liquidation. A defence and counterclaim was filed on 27th June 2000. On 17th August 2000 the respondents successfully applied for security for costs which was not provided. The application for security was made promptly and resisted. The application was then struck out

on an application brought by the present respondents on 4th April 2001 without any determination on the merits.

[4] The Tribunal ordered the company in liquidation to pay the costs of the application for security for costs and the costs of the application to strike out the proceedings. Shortly afterwards an application was made by the respondents for an order that the liquidators pay the costs ordered against the company. That application was refused by the Tribunal and the respondents appealed to the District Court. In refusing the application the Tribunal member concluded that because the application for costs against the liquidators was not brought until after the matter had been concluded there was no jurisdiction to award costs against the liquidators, although such jurisdiction would have existed if the application had been made when the application by the company was disposed of. The respondents appealed to the District Court.

[5] In the District Court it was conceded that the jurisdiction existed in the Tribunal to make an order against a non-party (such as the liquidators) and the matter was argued on its merits. Despite the concession the learned District Court judge did consider the question of jurisdiction himself. His Honour then reviewed the authorities on liquidators' personal liability for costs and concluded that the decision of this Court in *Mahaffey v Belar Pty Ltd*[1] effectively circumscribed his discretion in the way dealt with in paras [50] and [51] of his judgment where he said:

> [50] If it were necessary to show that there is some good reason relating to the conduct of the liquidator to justify an order for costs against the liquidator, so that it is necessary to show more than the mere fact that an order for costs against the company would not, or would be unlikely to, provide the successful party with the appropriate indemnity in respect of costs, in my opinion in the circumstances of this case the appellants have not shown that, and I would not exercise my discretion in their favour. However, as I understand the effect of the decisions in *Belar* (supra), it is sufficient for the successful party to show that an order for costs against the company would be unlikely to result in an effective indemnity, for an order for costs to be made against liquidators (regardless of the propriety of their conduct), and the only issue is whether there is some discretionary consideration which would justify exercising the discretion against the successful party, such as the avoidability of all or some of the costs. That is the basis upon which I approach the exercise of the discretion; because that was not the basis adopted by the tribunal member, it follows that the exercise of discretion was vitiated by error of law. The liquidators should also pay the costs of the appeal.
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> [51] I might add however that I reach this conclusion with some regret, since it appears that the approach adopted by the Queensland Court of Appeal is significantly different from that adopted by other courts in Australia, and in England, and that the Court of Appeal in Queensland has not really explained why the considerations which

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1 [1999] QCA 2; Appeal No 8239 of 1997, 16 March 1999.

> are regarded as so significant by those other courts deserve in Queensland so little weight. I do recognise the force of the reasoning in the Court of Appeal decisions, but would have found them more convincing if they had at least dealt with the reasoning in the authorities elsewhere. However, the discretion is not unfettered and must be exercised judicially and in accordance with general legal principles as laid down by the Queensland Court of Appeal.

[6] The other Queensland Court of Appeal decision to which the primary judge referred was *Kemp v Coastal Constructions Pty Ltd*.[2] Although an example of the exercise of the discretion against provisional liquidators, there is no discussion of principle and it was decided solely on a balancing of the risk of not recovering costs faced by the successful party against the provisional liquidators' right to an indemnity against company assets for anything they might be required to pay. That discretion was, however, exercised in circumstances where the court had been critical of the manner in which the provisional liquidators had conducted the litigation and the appeal and in particular of the provisional liquidators dissipation of the assets litigating technical points.[3]

[7] In the District Court the liquidators were ordered to pay the costs of the whole proceeding in the Tribunal other than half the costs of the application for security for costs and the costs of the application to strike out the proceedings. The excluded costs were costs the primary judge concluded were unnecessarily incurred by the respondents.

[8] The liquidators wish to appeal both the learned primary judge's exercise of discretion and the finding that the Tribunal has jurisdiction to award costs against a non-party, a jurisdiction which, so it seems, has been assumed by the Tribunal and used from time to time.

[9] Save for the failure to bring the application for leave to appeal within time I would have no hesitation in concluding that the matters which troubled the primary judge were of sufficient importance to justify the grant of leave in this case. Because the application was filed out of time I should consider whether the failure to file the application within time should be excused.

[10] The application for leave to appeal was filed three days late on 20th June 2003. The material discloses that the solicitors for the liquidators sent the application for leave and the supporting affidavit to the registry by courier on 17th June, the last day for filing. The courier apparently failed to appreciate that he was expected to file the documents as opposed to simply leaving them with the security officer at the court. The registry thus did not receive the documents until the 18th June at which time the registry, not surprisingly in the circumstances assumed that the documents were being filed by post. The registry refused to file the documents because they were out of time, no filing fee was included and an indexed and paginated book of documents was not included. The latter was not in fact a requirement of filing.

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2 [1993] QCA 76; Appeal No 171 of 1992, 17 March 1993.

3 see *Re Kemp* [1994] 1 Qd R 285.

[11] No explanation appears in the material as to why the initial attempt to file the application was left to the last moment. This is regrettable and the whole episode reflects little credit on the solicitor handling the application. Nonetheless I consider the delay sufficiently short and the circumstances sufficiently unusual that time should be extended. There is no suggestion that the respondents have been in any way prejudiced by the late filing. I come to this view particularly having regard to what seems to me to be the importance of the points the applicants wish to raise. In particular whether the exercise of the judge's discretion to award costs against a liquidator who is not a party to an action by the company in liquidation is as circumscribed as the primary judge seemed to think and whether there is in consequence a different approach in Queensland to other jurisdictions in which the same or similar insolvency regimes are in place.

[12] The question of the Tribunal's power to award costs against a third party should also be finally resolved although there have been substantial changes to the statutory provisions since this proceeding was commenced.

[13] Both parties agreed that the issues raised on this application were such that if this Court were minded to grant leave to appeal no further argument was required and we should determine the appeal proper.

[14] For the reasons I have indicated I would excuse the late filing on the part of the applicants and grant leave to appeal. I should now turn to the merits of the appeal.

[15] Logically the first issue to determine is whether or not the Tribunal had a jurisdiction to award costs against a non-party such as a liquidator.

[16] The Tribunal is a statutory body with the powers conferred on it by parliament.[4] In *McBride* at 450, Kirby P considered the ramifications of giving the term "costs" in the context of a statutory tribunal a meaning broader than the usual meaning of party and party costs such that it should be left to the legislature. In considering the extent of the power the legislature has conferred on the tribunal, however, Kirby P said at 447:

> "Where a subordinate court of limited jurisdiction is created, it must find its powers in the express language of the statute which gives it existence, in the implications which derive from that language and are necessarily involved in it or such powers as may be inferred from the very fact that the legislature has created a court, with jurisdiction to perform and therefore with the necessary means of carrying out that jurisdiction and giving it effect."

[17] In this case the legislature conferred a power over costs on the Tribunal by s 95 of the *Queensland Building Services Authority Act* (Qld) 1991 in these terms:

> (1) The Tribunal may, on application by a party to a domestic building dispute, make such orders and directions as may be just to resolve the dispute and any other matters at issue between the parties.
> (2) ….

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4 *Walton v McBride* (1995) 36 NSWLR 440.

> (3) The Tribunal may order that a supplier, subcontractor or another person be joined as a party to a proceeding under this section, and may make such orders and directions against a party so joined as may be just.[my underlining]
> (4) In the exercise of its jurisdiction under this section, the tribunal may exercise any 1 or more of the following powers-
> …
> (g) award costs.

[18] Since this application was before the Tribunal it has been abolished and replaced by the Commercial and Consumer Tribunal. The power to award costs conferred on that Tribunal appears in s 71(1) of the *Commercial and Consumer Tribunal Act* (Qld) 2003. The power in s 71(1) of the present legislation is in identical form to s 61(1) of the *Queensland Building Tribunal Act* 2000 which repealed those parts of the *Queensland Building Services Authority Act* (Qld) 1991 which related to the Tribunal effective from 1st July 2000. The transitional provisions in the *Queensland Building Tribunal Act* required the proceeding commenced a few months earlier to continue to be dealt with under the old legislation. The *Queensland Building Tribunal Act* was repealed by the *Commercial and Consumer Tribunal Act* which Act, as a transitional measure, reintroduced to the *Queensland Building Services Authority Act* provisions to enable the Tribunal to continue until the new Tribunal commenced. This transitional period was only from 23rd May 2003 to 1st July 2003 and need not be considered. The transitional provisions of the *Commercial and Consumer Tribunal Act* require all extant proceedings from 1st July 2003 to be conducted under the new legislation. The power in s 71(1) of the current legislation is expressed in much more general language:

> (1) In a proceeding, the tribunal may award the costs it considers appropriate on –
> (a) the application of a party to the proceeding; or
> (b) its own initiative.

[19] In *Knight v FP Special Assets Ltd*[5] at 205 Gaudron J discussed the approach which should be adopted to the interpretation of the power to award costs:

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

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5 (1992) 174 CLR 178.

[20] There is no conflict between this passage and the comments of Mason CJ and Deane J at 198-199 where they identify the artificiality of denying the jurisdiction to award costs against a non-party when a jurisdiction expressly exists as it did under s 95 of the *Queensland Building Services Authority Act* 1991 to join a party to the proceedings for the sole purpose of seeking an order for costs.

[21] Since the Tribunal falls into that category of a body which is required to act judicially it follows that a broad interpretation should be given to the power to award costs.

[22] In my view the language of s 95(1) as it appeared when this application was commenced and under which it was required to continue was sufficiently broad to encompass an order of the type made here against the liquidators. I do not consider the reference to the "matters at issue between the parties" should be construed as confining the power to awarding costs against persons named in the proceedings. Costs are an integral part of the resolution of disputes in this jurisdiction. It would in my view be an artificial restraint on the power to do what was just for the purpose of resolving disputes to deny a body required to act judicially the power to award those costs merely because the step of formally joining to the proceedings the party against whom costs are sought has not been taken. Such a restriction is inconsistent with the authorities to which I have referred.[6]

[23] Whatever the position was under s 95 of the *Queensland Building Services Authority Act* 1991, it seems that the current provision in s 71(1) of the *Commercial and Consumer Tribunal Act* 2003 is not materially different in its generality from O 91, r 1 of the Rules of the Supreme Court discussed in *Knight v FP Special Assets Ltd*[7] and the existence of the power of the present Tribunal to award costs against non-parties would now be beyond argument.

[24] Having determined that the Tribunal had a discretion to award costs against the appellants it is necessary to look at whether that discretion as exercised by the primary judge has miscarried. His Honour below felt himself bound by the decision of this court in *Mahaffey v Belar Pty Ltd*[8] to award costs if there was a doubt about the respondents' ability to recover any costs awarded from the company in liquidation unless there were particular reasons to depart from this usual practice. The relevant passages are set out above. In the result his Honour awarded all the costs against the liquidators except for the costs of the application to strike out the proceedings and half the costs of the application for security for costs which his Honour found for reasons set out in his judgment were unnecessarily incurred by the respondents.

[25] Neither party before us argued that his Honour's interpretation of this court's decision in *Mahaffey v Belar Pty Ltd*[9] was correct. It seems to me also that his Honour was wrong in interpreting that decision as saying anything other than that the discretion to award costs was at large. In particular what the court said on that occasion was that the failure to prove misconduct on the part of the liquidator in the

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6 A helpful list of other authorities on this topic and a useful discussion in the context of the Building Tribunal can be found in *Walker Corporation Ltd v Winton* [1997] QDC 125; District Court 3 of 1997, 30 May 1997 at pages 19 to 26.

7 supra.

8 supra.

9 supra.

prosecution of the proceedings was not a bar to invoking the discretion but rather only a factor to be considered in determining in which way the discretion was to be exercised. *Mahaffey v Belar Pty Ltd*[10] was a case which turned very much upon its facts. Apart from commenting that "the adversarial costs of unsuccessful litigation brought by an insolvent company are commonly ordered against the liquidators personally"[11], which comment merely states a truism, the significant passages in the judgment appear at [8], [9] and [10]. After narrowly rejecting a submission that the liquidators should pay indemnity costs (in itself an indication that the conduct of the liquidators was not exemplary), the court said:

> "[8] …Lengthy submissions were received on behalf of the respondent (really on behalf of the liquidators) opposing such an order. In the main these were founded upon the erroneous premise that the liquidators could be required to pay costs only if a finding was made against them of misconduct or incompetence in the commencement or conduct of the action. On the premise that issues of personal impropriety and lack of bona fides are raised against the liquidators, it was submitted that they have not had the opportunity to be heard on such issues, and that they would now wish to place evidence before the court on a range of matters including evidence of the conduct of the defence. The submission proceeds that it would be a breach of natural justice for the Court of Appeal to make a determination on such matters and that such questions should be remitted for further hearing before the trial judge. These submissions are misconceived in a number of respects. In the first place there was opportunity to present all relevant material and all relevant submissions on costs during the hearing of the appeal itself, and a further special opportunity was given upon publication of the reasons for judgment. But more importantly the discretion to make a costs order of the kind proposed is not limited to cases where liquidators are shown to be guilty of impropriety or lack of bona fides.
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> [9] Furthermore, such an order in the present case sits comfortably with the principles under which orders for costs may be made against non-parties…[12]
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> [10] It was submitted for the respondents that the statements by members of the High Court in *Knight* cannot ordinarily apply to those in control of a company in liquidation, because such companies are nearly always insolvent. There is however nothing in the judgments in that case which would confine it to say receivers as distinct from liquidators, or any reason in principle why liquidators should be exempt from such a risk. If the position were otherwise liquidators could hold to ransom any alleged debtor, and it would not be easy to prove misconduct. It may be added that the present case is a strong example of one where the liquidators had a

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10 supra.

11 para [2].

12 The court then set out the passage from *Knight v FP Special Assets Ltd* (supra) at 192-193.

> personal interest in the outcome of the litigation and could be seen to be bringing it as much in their own interests as for those of creditors. In short, but for the suggested undertaking, the liquidators have no basis for resisting the proposed order."

[26] Nothing said by the court in *Mahaffey v Belar Pty Ltd*[13] appears to me to be controversial. The facts of the case are set out in *Belar Pty Ltd (in liq) v Mahaffey*.[14] It was plainly a case where but for an unsustainable argument that the jurisdiction to award costs against a liquidator only arose when he was first found guilty of incompetence or misconduct, costs should have been awarded. I do not see the court as going beyond the position that a finding of misconduct or incompetence was not an essential precondition.

[27] It follows that his Honour, the primary judge here was wrong in the extent to which he considered his discretion was constrained and in the result the discretion miscarried and we should therefore exercise it afresh.

[28] There are a number of reasons why I consider that the primary judge's desired outcome was correct. First, there was no impropriety or misconduct found against the liquidators. To the contrary his Honour found expressly that "overall … it has not been shown that there was any inappropriate conduct on the part of the liquidators, any conduct which was inconsistent with the obligation on a liquidator conscientiously to pursue the duty of gathering in the assets of the company".

[29] More importantly, the fact that the case was dismissed for failure to provide security for costs and without any determination on the merits is significant, particularly where security has been sought and obtained at an early stage before significant costs have been incurred.

[30] In *Knight v FP Special Assets Ltd*[15] Mason CJ and Deane J (with whom Gaudron J agreed) said:

> "The availability of an order for security for costs at an early stage of the litigation would, in many situations, be a strong argument for refusing to exercise a discretion to order costs against a non-party, but discretion must be distinguished from jurisdiction."

[31] McHugh J, although dissenting in the result, expressed the view that the obtaining of adequate security for costs was a bar to recovery after the event against a third party on policy grounds.[16] While this view is not sustainable in light of the decision of the majority it is a further indication of the strong discretionary factor the obtaining of such an order is against making a liquidator personally liable for costs awarded against an insolvent company.[17]

[32] In this case, I consider that when one weighs the unlikelihood of the respondents recovering their costs order against the fact that the action was stayed at an early

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13 supra.
14 [2000] 1 Qd R 477.
15 supra at 191.
16 *Knight* (supra) at 217-218.
17 See also *In re W Powell & Sons* [1896] 1 Ch 681 where at 683 Romer J recognised the importance of obtaining an order for security for costs in these circumstances.

stage and before significant costs were incurred by the obtaining of the order for security for costs, and the absence of any criticism by the primary judge of the conduct of the liquidators, the balance is against the exercising of the discretion in favour of the respondents, and their application should have been refused. The effect of the order for security for costs was that either the respondents were protected for their costs in the event that the proceedings went ahead and the respondents were successful or, as transpired, the proceedings ceased and the respondents were not exposed to the risk of being unsuccessful in the litigation. In these circumstances the respondents have elected to pursue a remedy which offered an effective risk free passage through the litigation at the minimal cost of bringing the application. As an exercise of discretion on the particular facts of this case there appears no compelling reason why the respondents should, as well, receive an indemnity from a third party against the small cost of effectively stifling the litigation. No submission was advanced before us as to the merits of the original proceeding and we have no basis for determining, even if it were relevant, which is doubtful, whether it was well or ill conceived.

[33] I would allow the appeal, set aside the orders made in the District Court and order the respondents to pay the costs of the appeal and of the appeal to the District Court to be assessed on the standard basis.

[34] **PHILIPPIDES J:** I agree with the reasons of Dutney J and with the orders proposed.