SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Limited (Administrators Appointed) v The Members of the LM Managed Performance Fund* [2014] QSC 54
PARTIES:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED) AND LM ADMINISTRATION LIMITED (ADMINISTRATORS APPOINTED)** **(applicants)** **v** **THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND** **(respondents)**
FILE NO:	BS2869 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	31 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2014
JUDGE:	Mullins J
ORDER:	**Amended application filed on 13 March 2014 is dismissed**
CATCHWORDS:	COSTS – AGREEMENTS AS TO COSTS – where costs order made in favour of a party – where the party's costs agreement with the party's solicitors included an estimate of fees and costs and the basis for charging and provided for the sending of accounts at regular intervals – where costs agreement was subject to a special condition that no fees would be payable unless an order was made by the court in favour of the party and the fees charged would be limited to the amount of costs recovered by the party from the other party ordered to pay the costs – whether the party was under a legal liability to the party's solicitors to pay costs that entitled the party to recover costs under the costs order made in the party's favour against the other party *Legal Profession Act* 2007 (Qld), s 323 *Uniform Civil Procedure Rules* 1999 (Qld), r 742 *King v King* [2012] QCA 81, considered *Kuek v Devflan Pty Ltd* (2011) 31 VR 264, considered *Noye v Robbins* [2010] WASCA 83, considered

Wentworth v Rogers (2006) 66 NSWLR 474, considered

COUNSEL: P J McCafferty for the applicants
R T Cowen (*sol*) for the respondents FS and GS Kennedy

SOLICITORS: Russells for the applicants
Tucker & Cowen for the respondents FS and GS Kennedy

[1] In this proceeding the Chief Justice ordered on 23 May 2013 that the applicants pay the costs of two of the respondent unit holders represented by Mr Tucker, namely Frazer Scott Kennedy and Georgina Symons Kennedy (the respondents), of and incidental to the application, assessed as necessary on the indemnity basis: *KordaMentha & Anor v Members of the LM Managed Performance Fund & Ors* [2013] QSC 133. The reasons for the costs being ordered on the indemnity basis are explained at [15] to [20] of the judgment.

[2] On 22 July 2013 the respondents served a costs statement on the solicitors for the applicants who are the administrators of LM Investment Management Limited (Administrators Appointed) and liable under the costs order in that capacity. The applicants then filed and served a notice of objection to the costs statement, followed by an amended notice of objection. The amended objection identified as a matter of law that no costs were payable to the respondents on the basis of the *dicta* in *King v King* [2012] QCA 81.

[3] The respondents' solicitors wrote to the costs assessor in response to the amended notice of objection. They asserted that the costs assessor did not have jurisdiction to determine the issue of law identified in the amended objection, but if the costs assessor did have jurisdiction, made submissions as to why the *obiter dicta* in *King* concerning the indemnity principle and its application to conditional costs agreements and costs orders should not be applied and that the facts and circumstances relating to the respondents' costs agreement distinguished it from those in *King*.

[4] The costs assessor provided the parties with his final certificate filed on 10 January 2014 which certified the amount payable to the respondents (including the assessor's fees) as $31,871.13. Reasons were provided to the parties by the costs assessor on 20 February 2014. The costs assessor dismissed the amended objection on the basis that it would require the costs assessor to set aside the order of the Chief Justice, the costs agreement was not a pro bono agreement as in *King*, fees were payable by the respondents under the client agreement with their solicitors in the event that a costs order was obtained; and *King* was distinguishable because in that case there was an attempt following the hearing in the Court of Appeal, but before judgment was given, to vary the pro bono agreement and add an entitlement to costs for which there was no consideration.

[5] The applicants apply pursuant to r 742(6) of the *Uniform Civil Procedure Rules* 1999 (Qld) for an order setting aside the certificate of the costs assessor on the basis that the costs assessor erred in determining that he had no jurisdiction to uphold the applicants' objection, because (1) either he did have such jurisdiction or, if there were doubt over the question, he should have referred the matter to the court pursuant to r 717(2) of the *UCPR*, and (2) the costs assessor erred in failing to follow *King*.

[6] In lieu of the decision of the costs assessor, the applicants seek an order that the amount of costs payable to the respondents pursuant to the order of the Chief Justice is nil.

Jurisdiction

[7] On one view, the applicants' seeking an order which has the effect that no costs would be payable by the applicants under the order made by the Chief Justice suggests they are seeking to re-visit the costs order made by the Chief Justice. There was a decision made by the costs assessor, however, that is reflected by the amount of the costs assessment which must be amenable to review under r 742 of the *UCPR*. That review raises for decision the question whether the terms of the costs agreement the respondents entered into with their solicitors precludes any costs being recoverable by them against the applicants under the costs order on the basis the applicants had no legal obligation to pay the costs of their solicitors.

Indemnity principle

[8] The indemnity principle was expressed by Hansen JA in *Kuek v Devflan Pty Ltd* (2011) 31 VR 264 at [59] in terms to the effect: the party with the benefit of the costs order (the receiving party) cannot recover costs from the party ordered to pay the costs in circumstances where the receiving party is not liable to his or her own lawyers. As the authorities relied on by the applicants and the respondents show, despite the fact that the principle can be expressed in simple terms, its application in a particular case may not be straightforward, particularly where solicitors are otherwise undertaking work on a pro bono basis, where a litigation funder is involved, or where a party's costs were paid by the party's employer on the undertaking of the party to pay any costs awarded to the employer. See *Noye v Robbins* [2010] WASCA 83 at [332]-[338].

[9] In *King* an application for leave to appeal had been argued before the Court of Appeal in circumstances where it was apparent to the court that the applicant's lawyers were acting for him pro bono. When the court published its judgment, it reflected the court's view that it was appropriate to make no order for costs. The parties were given leave, however, to file written submissions when the applicant's lawyers asked for costs when judgment was pronounced. There had been a costs agreement made before the hearing of the application for leave to appeal in which it was recorded that the solicitors had agreed there would be no charges in relation to the matter. About 15 minutes before delivery of judgment in the Court of Appeal, a variation was made to the costs agreement in terms that if the court ordered that the other party pay the applicant's costs, then the solicitors could charge the applicant for the legal fees and expenses incurred on the applicant's behalf to an amount no greater than the amount of legal fees and expenses recovered from the other party pursuant to such court order.

[10] Chesterman JA in [8] to [12] analysed the judgments in *Wentworth v Rogers* (2006) 66 NSWLR 474 and expressed preference at [13] for Basten JA's analysis. The result of that analysis was expressed by Basten JA at [133] to the effect that for the purposes of the indemnity principle in a "no win no fee" case, there must be a contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome. Santow JA in *Wentworth* at [45] to [54] emphasised the flexibility of the indemnity principle and

that it was capable of accommodating conditional fee agreements of the kind regulated by the relevant legislation. The third member of the court in *Wentworth* did not express an opinion on the issue. As all members of the court in *Wentworth* agreed that the matter had to be remitted for a judge to determine the content and proper interpretation of the subject costs agreement, the views expressed on the application of the indemnity principle were *obiter dicta*.

[11] Ultimately in *King* at [14] to [16] Chesterman JA decided the application for costs, not by reference to the approach of Basten JA in *Wentworth*, but on the basis that the variation to the costs agreement appeared to be unsupported by consideration, did not as required by s 308 of the *Legal Profession Act* 2007 (Qld) (*LPA*) specify the basis of charging, and appeared a contrivance which would result in an element of unfairness to the other party to the litigation, if effect were given retrospectively to the change. Chesterman JA concluded at [16] that was sufficient to require the discretion as to costs to be exercised against making the order sought. The other members of the Court agreed with the conclusion of Chesterman JA that the order originally pronounced by the court that there be no order as to costs should be the order made. White JA agreed with the reasons of Chesterman JA, but Margaret Wilson AJA limited her agreement to [14] to [16] of Chesterman JA's reasons.

Costs agreement

[12] The respondents entered into a written client agreement dated 1 May 2013 with their solicitors. It is expressly stated to be a costs agreement pursuant to part 3.4 of the *LPA*.

[13] The first page of the costs agreement sets out specific conditions including details of the solicitors, the clients, the agreed work, the basis for charging, the current hourly rates of partners and various categories of employees of the firm, the persons who will do the work, and an estimate of fees and costs. It is followed by the general conditions including those which cover the calculation of fees on time-based charging, the basis for charging for outlays, the sending of accounts at regular intervals, and the payment of interest on overdue accounts.

[14] In the specific conditions, a special condition is included in the following terms:

> "No fees will be payable by you unless an order is made by the Supreme Court of Queensland in your favour for the payment of costs and those costs are recovered by us from other parties and any fees charged shall be limited to the amount of costs so recovered."

Does the costs agreement infringe the indemnity principle?

[15] The applicants submit that the special condition makes the obligation of the respondents to pay the costs of their solicitors conditional on the satisfaction of two conditions: a favourable costs order and the recovery of those costs from the other parties and that it follows that the entitlement of the respondent's solicitors to charge fees to the respondents is dependent upon the satisfaction of these two conditions. The applicants therefore submit that the approach of Basten JA in *Wentworth* that was favoured by Chesterman and White JJA in *King* means that the costs agreement does not permit the application of the indemnity principle.

[16] The respondents submit that they were required to pay their solicitors' fees under the terms of the costs agreement, but the special condition operated as a condition

subsequent in that the fees were waived or capped to the extent they were not covered by recovery under a costs order obtained in the respondents' favour.

[17] The actual decision in *King* on the costs issue turned on the particular facts of the case and did not depend on the application of the indemnity principle.

[18] Unlike in *King*, the costs agreement in this matter has remained in the same form since it was entered into by the respondents and their solicitors. It addressed the requirements of the *LPA* to enable the respondents' solicitors to charge the respondents fees for the professional services for which the solicitors were engaged. The operation of the general conditions was modified by the special condition, but the special condition would be meaningless unless effect was first given to the general conditions that provides for the liability of the respondents for their solicitors' fees.

[19] It is not irrelevant that the *LPA* regulates conditional costs agreements where payment of some or all of the legal costs is conditional on the successful outcome of the matter to which the costs relate: s 323 *LPA*.

[20] As a matter of construction of the costs agreement, it does not infringe the indemnity principle. The costs agreement sets up the basis for the respondents' solicitors to charge the respondents and their liability for the payment of professional costs and outlays, subject to the operation of the special condition. It is therefore unnecessary to analyse the competing views of Basten and Santow JJA in *Wentworth* and the many authorities in which both views are further analysed, applied or distinguished.

Orders

[21] The order which should be made is that the amended application filed on 13 March 2014 is dismissed. It seems appropriate that costs should follow the event and as the costs order that gave rise to this application was an order for costs to be assessed on the indemnity basis, it also seems to be appropriate that a costs order in favour of the respondents should be assessed on the indemnity basis. I will give the parties an opportunity, however, to make submissions on costs in the light of these reasons.