SUPREME COURT OF QUEENSLAND

CITATION:	*Robson & Ors v Commissioner of Taxation (No 2)* [2015] QSC 131
PARTIES:	**WILLIAM ROLAND ROBSON AND WILLIAM PAUL COTTER** (first plaintiffs) v **REGIONAL COMMUNITY ASSOCIATION INCORPORATED (ABN 91 076 047 780)** (second plaintiff) and **COMMISSIONER OF TAXATION** (defendant)
FILE NO/S:	BS10873/14
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	1 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions only
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The first plaintiffs pay the defendant's costs of the proceeding on the standard basis.** **2. The defendant pay the cross-applicants' costs of the cross-application.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES - where the first plaintiffs are the liquidators of the second plaintiff – where the Commissioner of Taxation is the defendant – where the second plaintiff is an incorporated association – where the claim was to recover an alleged unfair preference under s 588FF of the *Corporations Act* 2001 (Cth) - where the cross-applicants are the former management committee of the second plaintiff – where the cross-application was to determine liability of the defendant to the first plaintiffs as between the cross applicants and the defendant – where the first plaintiffs were unsuccessful against the defendant –

whether costs should follow the event – whether the defendant should pay the cross-applicants costs of their application

Allman v Daly (No 2) [1959] VR 614, applied
Arena Management Pty Ltd (Rec & Mgr apptd) v Campbell Street Theatre Pty Ltd (2011) 80 NSWLR 652; [2011] NSWCA 128, cited
Barclays Bank v Tom [1923] 1 KB 221, considered
Cooper as liquidator of Wanted World Wide (Australia) Ltd (in liq) v Federal Commissioner of Taxation (2004) 186 FLR 111; [2004] FCA 1063, referred to
Creswick v Creswick (No 2) [2011] QSC 118, cited
Crosbie v Commissioner of Taxation (2003) 130 FCR 275; [2003] FCA 922, cited
Crowe v Wheeler & Reynolds [1986] 2 Qd R 84, cited
Dean-Willcocks Pty Ltd v Commissioner of Taxation (No 2) (2004) 49 ACSR 325; [2004] NSWSC 286, cited
Duncan v Federal Commissioner of Taxation (2006) 58 ACSR 555; [2006] FCA 885, cited
Federal Commissioner of Taxation v Moodie (2014) 308 ALR 571; [2014] NSWCA 59, considered
Fletcher (as Liquidators of Octaviar Administration Pty Ltd) v Anderson (2014) 103 ACSR 236; [2014] NSWCA 450, cited
Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52; [2007] HCA 56, cited
Furber v Stacey & Anor [2005] NSWCA 242, cited
Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd [1992] 1 Qd R 162, applied
Hall (as liquidator of Reynolds Vineyards Pty Ltd) v Commissioner of Taxation (2004) 49 ACSR 325; [2004] NSWSC 950, cited
Harris v Commissioner of Taxation [2006] 2 Qd R 445; [2006] QSC 108, cited
Kheirs Financial Services Pty Ltd & Anor v Aussie Home Loans Pty Ltd & Anor (2010) 31 VR 46; [2010] VSCA 355, applied
Lombard Insurance Co (Australia) Ltd v Pastro (1994) 175 LSJS 448, applied
Noxequin Pty Ltd v Deputy Commissioner of Taxation [2007] NSWSC 87, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, applied
Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd (Subject to a Deed of Co Arrangement) & Ors [2014] QCA 24, applied
Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd (1988) 77 ALR 190; [1988] HCA 2, applied
re Salmon; Priest v Uppleby (1889) 42 Ch D 351, applied
Robson & Ors v Commissioner of Taxation [2015] QSC 76, related

Ruddock v Vadarlis (No 2) (2001) 115 FCR 229; [2001] FCA 1865
The Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & Ors [2010] QSC 467, cited
Western Australia v Collard [2015] WASCA 86, applied
William Hollier & Anor v Australian Maritime Safety Authority & Ors (No 2) [1998] FCA 975, applied

Corporations Act 2001 (Cth), ss 588FF, 588FGA

Uniform Civil Procedure Rules 1999 (Qld), rr 680, 681

COUNSEL: S Hogg for the plaintiffs
R Schulte for the defendant
B Heath (solicitor) for the cross-applicants

SOLICITORS: M+K Lawyers for the plaintiffs
G Tanna for the defendant
Carter Newell for the cross-applicants

[1] **Jackson J**: On 27 April 2015, I gave judgment in *Robson & Ors v Commissioner of Taxation* [2015] QSC 76 ("principal judgment"). The question was whether Pt 5.7B of the *Corporations Act* 2001 (Cth), including s 588FF, applies in the winding up of the second plaintiff as an incorporated association. I decided that it does not, dismissed the plaintiffs' claim, and made a declaration to that effect as between the cross-applicants and the defendant.

[2] The parties make written submissions as to costs. The questions raised are whether the costs of the proceeding between the plaintiffs and the defendant should follow the event and what order should be made as to the cross-applicants' costs?

[3] Costs of a party are recoverable pursuant to r 680 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). Under UCPR r 681, the general rule, as acknowledged by the plaintiffs in their submissions, is that costs follow the event unless there are reasons for the exercise of discretion otherwise.[1]

Defendant's costs of the claim

[4] The plaintiffs make two submissions as to costs. First, that there should be no order as to costs of the claim because the question resolved by the principal judgment was unclear and there was a sufficient public interest in having the matter determined to justify departure from the general rule. I am not persuaded by this submission.

[5] Public interest is not, per se, a ground for departure from the general rule as to costs.[2] In *Ruddock v Vadarlis (No 2)*[3] Black CJ and French J said that:

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1 *Creswick v Creswick (No 2)* [2011] QSC 118, [7]; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 62-63. See also *Oshlack v Richmond River Council* (1998) 193 CLR 72, [63]-[70].

2 The imprecision of the term "public interest" was considered in *Oshlack v Richmond River Council* (1998) 193 CLR 72, [71]-[73].

3 (2001) 115 FCR 229, 236.

> "[Public interest litigation] may best be seen as an envelope or class description for a range of circumstances which, upon examination, may be found to be relevant to the question whether there should be a departure from the ordinary rule that costs follow the event".[4]

[6] And:

> "That a proceeding was brought otherwise than for the personal or financial gain of the applicant, and in that sense in the public interest, does not detract from the general proposition that ordinarily costs follow the event and that the primary factor in deciding on the award of costs is the outcome of the litigation."[5]

[7] The fact that a question of law is novel does not of itself justify departure from the general rule that costs follow the event. It is not unusual that a "decision will involve a statute of wide significance … or will otherwise have wider legal significance or public importance".[6]

[8] As stated in *William Hollier & Anor v Australian Maritime Safety Authority & Ors (No 2)*:[7]

> "In a common law jurisdiction decisions of the courts, in private as well as public law, often clarify the law or lay down new law for the benefit of citizens, taxpayers, traders, patentees, insurers and insured, landlords and tenants, etc etc. To that extent, much litigation has a public interest going beyond the interests of the parties. But this feature is inherent in common law litigation and provides no ground for departure from the usual rule as to costs."[8]

[9] In my view, this was "a dispute confined to the commercial interests of those involved, in which the [plaintiffs were] involved because of [their] relationship to the [defendant]."[9]

[10] Accordingly, the first plaintiffs should be ordered to pay the defendant's costs of the proceeding on the standard basis.[10]

Cross-applicants' costs

[11] The defendant submits that the plaintiffs should be ordered to pay the cross-applicants' costs directly. Alternatively, he submits that the first plaintiffs should be

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4 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 236, [14]. See also Quick & Garnsworthy, *Quick on Costs*, Sydney, Law Book Co, 2009, [4.3190]. Public interest litigation is typically concerned with "…a challenge to a planning decision of a council or statutory body or a challenge to an administrative decision, in either case by someone of limited means, commonly an individual or an association membership of which has a personal rather than a business interest in the challenge being made.".

5 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 237, [18].

6 *Western Australia v Collard* [2015] WASCA 86, [32].

7 [1998] FCA 975.

8 *William Hollier & Anor v Australian Maritime Safety Authority & Ors (No 2)* [1998] FCA 975.

9 *Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd (Subject to a Deed of Co Arrangement) & Ors* [2014] QCA 24, [10].

10 *Arena Management Pty Ltd (Rec & Mgr apptd) v Campbell Street Theatre Pty Ltd* (2011) 80 NSWLR 652, [18].

ordered to pay the defendant's costs of the proceeding including any costs the defendant is ordered to pay to the cross-applicants in relation to the cross-application. The cross-applicants sought an order defendant pay their costs of the cross-application.

[12] At the start of the hearing of the separate question on the claim, the defendant's counsel informed the court that the defendant had notified the cross-applicants that he would claim an indemnity against them under s 588FGA(2) of the *Corporations Act* 2001 (Cth) ("CA") if he was ordered to repay any payments made under s 588FGA(1) of the CA.[11]

[13] In my view, the jumping-off point is the operation of s 588FGA of the CA, which relevantly provides:

> "**588FGA Directors to indemnify Commissioner of Taxation if certain payments set aside**
>
> (1) This section applies if the Court makes an order under section 588FF against the Commissioner of Taxation because of payment of an amount in respect of a liability under any of the following provisions of the *Income Tax Assessment Act* 1936:
> …
>
> (2) Each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.
> …"

[14] Section 588FGA of the CA is engaged by the making of an order under s 588FF of the CA. The liability of a defendant in s 588FGA proceedings then turns on whether he or she was a director when the payment was made and the amount of the Commissioner's loss or damage.

[15] As stated in the principal judgment, the plaintiffs were not concerned to have the separate question resolved between them and the cross-applicants or to join the cross-applicants as defendants to their claim. The defendant was not prepared to start a third party proceeding against them either, despite inviting them to apply to be joined at the hearing.[12]

[16] The cross-applicants subsequently applied to be joined to the proceedings to be heard on the question of the defendant's liability to the plaintiffs. Accordingly, I gave the cross-applicants leave to file an application, so that the determination of the separate question between the cross-applicants and defendant would be heard at the same time as the determination of that question between the plaintiffs and the defendant, and all parties would be bound by a single determination.[13]

[17] The defendant makes three submissions. First, that the defendant should not be liable for drawing the proceedings and potential liability under s 588FGA of the CA to the attention of the cross-applicants in a letter from the defendant.

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11 *Robson & Ors v Commissioner of Taxation* [2015] QSC 76, [9].
12 *Robson & Ors v Commissioner of Taxation* [2015] QSC 76, [10].
13 *Robson & Ors v Commissioner of Taxation* [2015] QSC 76, [11].

[18] Relevantly, the letter stated:

> "2. The liquidators have served the Commissioner with a Claim and Statement of Claim seeking the repayment of payments made by RCAI prior to its liquidation … on the basis that the payments are 'voidable transactions' within the operation of Section 588FE of the Corporations Act 2001 ('the Act') and that they were made at a time when the company was insolvent.
>
> …
>
> 3. We refer you to the operation of section 588FGA of the Act. This section applies if the Court makes an order under section 588FF for the Commissioner to repay the payments listed in 588FGA(1). It requires any person **who was a member of the management committee of RCAI at the time the payments were originally made** to indemnify the Commissioner in relation to those payments, including any costs and interest.
>
> 4. On information currently to hand you may become personally liable to indemnify the Commissioner … Your liability will arise immediately on the making of an order against the Commissioner pursuant to section 588FGA(2) of the Act.
>
> 5. You are entitled to be heard in response to the liquidators' application if you choose to do so. Should you wish to be heard before you incur a liability under section 588FGA(2) of the Act, you should make arrangements to appear at the hearing of the Liquidator's application…
>
> **6. If you do not understand any aspect of this letter, or the implications for you, you should obtain legal advice as soon as possible.**"

[19] The defendant relies upon a number of cases in support of the proposition that s 588FGA of the CA creates an interest for the cross-applicants to be joined to s 588FF proceedings.[14]

[20] Second, the defendant submits that he was under no obligation to join a party and that an order that the defendant pay the cross-applicants' costs would be inconsistent with the decision of *Federal Commissioner of Taxation v Moodie*.[15] It may be accepted that defendant was not obliged to join the cross-applicants as a party. However, in my view, an order that the defendant pay the costs of the cross-application would not be inconsistent with *Moodie*.

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14 *Crosbie v Commissioner of Taxation* (2003) 130 FCR 275, [6]; *Dean-Willcocks Pty Ltd v Commissioner of Taxation (No 2)* (2004) 49 ACSR 325, [46]; *Harris v Commissioner of Taxation* [2006] 2 Qd R 445, [21]; *Hall (as liquidator of Reynolds Vineyards Pty Ltd) v Commissioner of Taxation* (2004) 49 ACSR 325, [46]; *Cooper v Commissioner of Taxation* (2004) 186 FLR 111. See also *Fletcher (as Liquidators of Octaviar Administration Pty Ltd) v Anderson* [2014] NSWCA 450.

15 (2014) 308 ALR 571, [129].

[21] In *Moodie*, McColl JA said that "the liquidator has no interest in the controversy between the Commissioner and director. The liquidator's only remedy is against the Commissioner."[16] Her Honour said further:

> "The liquidator's only interest is obtaining a s 588FF order against the Commissioner. However, the Commissioner has dual interests: to resist the claim as against the liquidator and, in the event that is unsuccessful to recover from the director using the s 588FGA(4) route. Even where, as in this case, the Commissioner does not advance a positive defence, he stands to benefit from the director's involvement if the latter succeeds on the insolvency issue. In such circumstances, subject to the terms of the pleadings or any agreement as between the Commissioner and liquidator, it could be expected that the Commissioner would seek to piggyback on the finding that the company was not relevantly insolvent to resist the liquidator's claim."[17]

[22] Where a liquidator sues the Commissioner, and where the directors have an interest in the outcome of the suit, the situation is analogous to third party proceedings. This is acknowledged by the authorities cited by the Commissioner.[18] The rationale for third party procedure was explained by Scrutton LJ in *Barclays Bank v Tom*:[19]

> "[I]t is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that matter between the defendant and the third party the plaintiff has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the plaintiff and himself, for otherwise he might be at great disadvantage if, having fought the case against the plaintiff and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the

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16 *Federal Commissioner of Taxation v Moodie* (2014) 308 ALR 571, [91]. Relying on *Hall (as liquidator of Reynolds Vineyards Pty Ltd) v Federal Commissioner of Taxation* (2004) 51 ACSR 169; *Duncan v Federal Commissioner of Taxation* (2006) 58 ACSR 555; *Barclays Bank v Tom* [1923] 1 KB 221.

17 *Federal Commissioner of Taxation v Moodie* (2014) 308 ALR 571, [93].

18 *Federal Commissioner of Taxation v Moodie* (2014) 308 ALR 571; *Crosbie v Federal Commissioner of Taxation* (2003) 130 FCR 275; *Dean-Willcocks v Federal Commissioner of Taxation (No 2)* (2004) 57 ATR 413; *Harris v Federal Commissioner of Taxation* [2006] 2 Qd R 445; *Hall (as liquidator of Reynolds Vineyards Pty Ltd) v Federal Commissioner of Taxation* (2004) 51 ACSR 169; See also *Noxequin Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWSC 87.

19 [1923] 1 KB 221. Cited with approval in this court in: *The Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2010] QSC 467; *Crowe v Wheeler & Reynolds* [1986] 2 Qd R 84, 87; *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 Qd R 162, 173-174.

> third defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions."[20]

[23] In *re Salmon; Priest v Uppleby*,[21] Lord Esher MR held that in ordinary circumstances, where the defendant seeks to join a third party whose presence is "wholly immaterial to the plaintiff and is solely for the benefit of the defendant, the unsuccessful plaintiff should not be liable in costs for such joinder."[22] The relevant principles have been discussed in further detail and applied in subsequent Court of Appeal cases in New South Wales, Queensland, Victoria and the Full Court of the South Australian Supreme Court.[23]

[24] The observations of McColl JA in *Moodie* identify the interests of the parties in s 588FF and s 588FGA proceedings. I acknowledge that the authorities cited by the defendant demonstrate that directors have an interest in being heard in s 588FF proceedings between a liquidator and the Commissioner. *Cooper as liquidator of Wanted World Wide (Australia) Ltd (in liq) v Federal Commissioner of Taxation* suggests that an obligation may lie on the liquidators to give notice.[24] However I do not need to comment on that case.

[25] The question I am concerned with is who, if anyone, should be liable for the cross-applicants' costs? There can be no true issue between the plaintiffs and the cross-applicants. Liquidators cannot recover from directors for an unfair preference under s 588FF. *Moodie* is clear on this point. Therefore, in accordance with the authorities,[25] there is no basis for a costs order that the plaintiff pay the cross-applicant's costs.

[26] Second, as a matter of principle, because the right to a 588FGA indemnity is not in issue between the plaintiffs and the defendant, there is no "event" in relation to the issue of the s 588FGA liability that arises between the plaintiffs and defendant.[26]

[27] The defendant's final submission is that the cross-applicants' application was premature. In *Kheirs Financial Services Pty Ltd & Anor v Aussie Home Loans Pty Ltd & Anor*[27] the relevant principles were summarised as follows:

> "(1) The usual rule as to costs applies to proceedings as between defendant and third party, the 'event' being the success or failure of the defendant's claim against the third party.

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20 *Barclays Bank v Tom* [1923] 1 KB 221, 223-224.

21 (1889) 42 Ch.D 351.

22 *re Salmon; Priest v Uppleby* (1889) 42 Ch D 351, 361.

23 *Allman v Daly (No 2)* [1959] VR 614; *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 Qd R 162; *Lombard Insurance Co (Australia) Ltd v Pastro* (1994) 175 LSJS 448; *Furber v Stacey & Anor* [2005] NSWCA 242; *Kheirs Financial Services Pty Ltd & Anor v Aussie Home Loans Pty Ltd & Anor v Bank of Australia & Ors* (2010) 31 VR 46.

24 *Cooper as liquidator of Wanted World Wide (Australia) Ltd (in liq) v Commissioner of Taxation* (2004) 186 FLR 111, [50].

25 See for example: *Allman v Daly (No 2)* [1959] VR 614, 618-619; *Lombard Insurance Co (Australia) Ltd v Pastro* (1994) 175 LSJS 448; *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 Qd R 162, 175.

26 *Lombard Insurance Co (Australia) Ltd v Pastro* (1994) 175 LSJS 448.

27 (2010) 31 VR 46.

> (2) Where the third party claim is dismissed because the plaintiff's claim against the defendant fails, the defendant will ordinarily be liable for the third party's costs of the third party proceeding.
>
> (3) The award of costs remains a matter of discretion, however, and there may be circumstances of the case which justify a departure from the usual rule.
>
> (4) In deciding (in a case of the kind referred to in (2)) whether any departure from the usual rule is warranted, the court will ordinarily need to consider at least the following matters:
>
> - the reasonableness of the defendant's decision to join the third party;
> - whether the joinder of the third party was reasonably foreseeable by the plaintiff, such that the plaintiff might be viewed as having some responsibility for the costs of the third party proceeding. (An order for the plaintiff to pay the defendant's costs may thus include the liability to pay the third party's costs of the third proceeding.);
> - the responsibility of plaintiff, defendant and third party, respectively, for the time taken up in the hearing of the third party proceeding."[28]

[28] Given that the defendant virtually invited the cross-applicants to participate at the hearing, it is odd that the defendant should say that their application to be heard on the question as between them was premature. The other possible method of proceeding would have been to make the cross-applicants defendants to the plaintiff's claim. In my view that was not appropriate where the plaintiffs could not have obtained any relief against them under s 588FF and did not want to join them.

[29] In my view, principle two of *Kheirs* can be applied to the current proceedings by analogy. A relevant consideration is that the defendant gave notice to the cross-applicants, effectively inviting them to appear. There was nothing improper in doing so. But they were not in law obliged to do so. The cross-applicants acted on the notice in seeking to appear. Had the defendant not sent the notice, it is quite likely that the cross-applicants would not have incurred the costs of appearing and of their cross-application.

[30] Consequently, I find that the defendant should pay the cross-applicant's costs of the cross-application.

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28 *Kheirs Financial Services Pty Ltd & Anor v Aussie Home Loans Pty Ltd & Anor v Bank of Australia & Ors* (2010) 31 VR 46, 54-55.