SUPREME COURT OF QUEENSLAND

CITATION:	*Boost Foods Pty Ltd v Blu Oak Pty Ltd and Ors* [2015] QSC 146
PARTIES:	**BOOST FOODS PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 113 408 987)** (Plaintiff) **v** **BLU OAK PTY LTD (ACN 118 969 850)** (First Defendant) **BRADLEY WARDROP-BROWN** (Second Defendant) **JULIE VAN EPS** (Third Party)
FILE NO/S:	Brisbane No 2038 of 2011
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	4 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2015; 30 March 2015
JUDGE:	Boddice J
ORDER:	**1. The defendants' application filed 21 November 2014 is dismissed.** **2. The third party's application filed 5 December 2014 is dismissed.** **3. Each party in proceeding number 2038 of 2011 is to bear its or their own costs of that proceeding.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – DEPARTING FROM THE GENERAL RULE – DISCONTINUANCE OR ABANDONMENT – where the Third Party decided it was not commercially sensible to pursue the proceeding to trial as there was no prospect of recovering costs against the Defendants – where the Third Party discontinued proceedings on the eve of trial – where the proceeding did not proceed to trial – where the proceeding was subsequently dismissed PROCEDURE – COSTS – GENERAL RULE – DEPARTING FROM THE GENERAL RULE – INCONCLUSIVE PROCEEDINGS – where, because of the dismissal of the proceeding, there had not been any independent assessment of

the parties' submissions – where there had been no determination on the merits – where both parties made submissions about the likelihood of their success in a determination on the merits – where there was significant expert evidence to be adduced – where it was not possible for the judge to assess the likelihood of the parties' success at trial

PROCEDURE – COSTS – GENERAL RULE – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – where the defendants' insurance policy was limited to $1,000,000.00 and included legal fees – where the third party claimed she was unaware of that limitation or its inclusion of legal fees – where the third party did not become aware of these terms until the proceeding had been significantly advanced towards trial – where the third party was the initiating and driving force of the litigation by the plaintiff – where the litigation was protracted – where the third party alleged misconduct by the defendants, their solicitors and insurers – where other parties reached a settlement as to costs

Uniform Civil Procedure Rules 1999 (Qld), r 681
Burns v State of Queensland and Croton [2007] QCA 240
Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10) [2009] FCA 498
FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340
Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622
Rushton (Qld) Pty Ltd v Rushton (NSW) [2004] QSC 47
The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2009] 2 Qd R 356

COUNSEL:	No appearance for the Plaintiff D A Savage QC, with D de Jersey for the Defendants The third party appeared on her own behalf
SOLICITORS:	No appearance for the Plaintiff Moray & Agnew Lawyers for the Defendants The third party appeared on her own behalf

[1] On 17 November 2014 the plaintiff's claim against the first and second defendants, and the defendants' claim against the third party were dismissed. On 21 November 2014, the defendants filed an application seeking costs orders against the plaintiff's administrator and the third party. On 5 December 2014, the third party filed an application for costs orders against the defendants and their insurer and solicitors.

[2] The defendants and the plaintiff's administrator reached agreement as to costs between themselves, resulting in an order that there be no order as to costs. There remains in dispute the defendants' application for orders that the third party pay their costs of the proceeding, and the third party's application for orders that the defendants, the

defendant's insurers, Dual Australia, and the defendants' solicitors, Moray & Agnew Lawyers, pay her costs of the proceeding, including costs paid by her to fund the plaintiff's claim.

Background

[3] The plaintiff, a producer and supplier of food products to retailers, was placed into administration on 19 July 2010. Initially, William Fletcher was appointed administrator. However, Mr Fletcher resigned on 29 July 2010 and Ian Currie was appointed as administrator. At that time the third party was the plaintiff's sole director and major shareholder.

[4] The first defendant is a food product developer. The second defendant is the first defendant's sole director. Prior to the plaintiff being placed in administration, the plaintiff and the defendants entered into commercial arrangements for the development of a food product, under the brand name Nutriboost.

[5] Subsequent to the appointment of the administrator to the plaintiff, the third party, in her capacity as the company's director and then majority shareholder, put forward a proposal for a Deed of Company Arrangement ("the Deed"). The administrator advised creditors of the details of that proposal in his report to the creditors dated 17 August 2010.

[6] Relevantly, for present purposes, the proposal advanced by the third party was that the plaintiff remain active as a company but not trade whilst it pursue an action for damages against the defendants. The action was to be funded by the third party or by a litigation funder. In the event the third party funded that litigation, she proposed she be paid 20% of the judgment, after legal costs and fees, with creditors to receive the balance up to 100 cents in the dollar, and any surplus be paid to the company.

[7] After briefly speaking with the plaintiff's then lawyers, the administrator advised creditors it was in their best interest for the company to execute the Deed. In making this recommendation, the administrator noted there were limitations on the available information, that investigations were preliminary and that there were no funds available to allow the administrator to carry out any further or substantial investigations.

[8] A creditors' meeting was held on 25 August 2010. The minutes of that meeting record the administrator advised creditors he had received an email from the second defendant which contained matters that the administrator took issue with, in a number of respects. At the time of the meeting, the unsecured creditors of the plaintiff company totalled $713,536.00. The company's total liabilities were $1,121,226.00.

[9] The meeting of creditors voted in favour of the Deed, which was duly executed by the administrator and the third party on 13 September 2010. That Deed ended the administration of the company under Part 5.3A of the *Corporations Act*. However, the Deed reappointed Mr Currie as administrator of the plaintiff.

[10] Relevantly, for present purposes, the email from the second defendant referred to above contained the following statement:

> "We also advise creditors that the information provided by the Administrator is not correct as Blu Oak Pty Ltd has only $1,000,000.00 of professional indemnity insurance and in the highly unlikely event that any litigation is successful the total payable would not satisfy the outstanding creditors and let alone any costs or counter claims."

[11] The information contained in that email, which did not attach a copy of any insurance policy or give evidence of the financial standing otherwise of the first defendant, was contrary to information provided by the third party at the time the Deed was voted on and entered into in 2010. The third party had advised she believed the first defendant's level of indemnity was $10,000,000.00, saying she had been so informed directly by the second defendant.

The proceeding

[12] The administrator commenced the present proceedings against the defendants in 2011. However, at all times, the litigation was practically run by the third party, who kept the administrator informed from time to time about the progress of the litigation.

[13] In the proceeding, the plaintiff claimed that as a consequence of the defendants' breach of contract, negligence and/or breaches of the *Trade Practices Act* it had suffered significant damages, including costs incurred in preparation of the product as well as a loss of future profits. The damages were not quantified in the initial statement of claim. They were subsequently quantified in a sum well in excess of $1,000,000.00.

[14] In their defence, the defendants put in issue whether they were involved in the manufacture of the product; whether the plaintiff, through the third party, sourced alternative supplies and ingredients without or contrary to the advice of the defendants; whether the third party ignored the defendants' advice; and whether the third party caused the plaintiff to agree to supply orders she knew or ought to have known the plaintiff was not in a position to meet.

[15] The proceeding was characterised by multiple amendments to pleadings, and various interlocutory applications. As the trial approached, it became apparent the defendants challenged the bases upon which the plaintiff's expert evidence had been prepared, and validity of the opinions expressed therein. Late in the proceeding, issues arose in relation to the obtaining of expert reports by the defendants, and the need for additional expert reports by the plaintiff.

[16] In the lead up to the anticipated trial, the plaintiff unsuccessfully applied for summary judgment, and subsequently for leave to further amend its pleadings. These unsuccessful applications resulted in costs orders in the defendants' favour. The third party also applied unsuccessfully to have the third party proceedings struck out, with a resultant order for costs in the defendants' favour.

[17] In early August 2014, trial dates were allocated for a two week trial commencing in November 2014. At reviews held subsequent to the allocation of those trial dates, the third party confirmed it was the plaintiff's intention to prosecute the claim to trial. However, throughout this time the third party was seeking access to the terms of the defendants' insurance policy. That access was denied, and subsequent inquiries caused the third party to doubt the veracity of the defendants' assertions as to the existence of any insurance policy.

[18] On the eve of the trial, the third party formed the view that having regard to the unavailability of funds to meet any judgment, it was pointless to pursue the proceeding to trial. The third party decided there was no point in expending further costs when substantial costs had already been incurred to date and there was no practical prospect of recovery of those costs, let alone any judgment sum. The proceeding was subsequently dismissed.

[19] On 7 November 2014, shortly prior to the commencement of the trial, the administrator terminated the Deed. He did so pursuant to clause 4.4.2 of the Deed, which provided that if the administrator formed the view the continued prosecution of the action was not practical or desirable, or not in the interests of creditors as a whole, the administrator could, by notice in writing to the company and to the third party, terminate the Deed.

[20] The administrator took this action as a consequence of two matters. First, by letter dated 29 July 2014, the defendants' solicitors provided the administrator with a copy of a letter dated 9 July 2014, in which it was asserted that evidence would be led at trial to the effect that the plaintiff had instructed its manufacturers to omit or substitute different ingredients for the product formulations which had been developed by the defendants and, further, the defendants only carried a policy of insurance limited to $1,000,000.00, inclusive of defence costs. A copy of the policy schedule was annexed to that letter. The letter asserted there was no excess insurer. Second, the third party advised the administrator, in early November 2014, that she was no long willing or able to fund the litigation to trial, and that she was intending to personally represent the plaintiff company at trial.

[21] The administrator, by letter dated 30 July 2014, responded to the defendants' solicitors' letter. He sought further information from the defendants' solicitors. No substantive response was received to that request, although subsequently the defendants' solicitors wrote advising they would apply under the *Corporations Act* for an order terminating the Deed. The administrator also corresponded with the third party and the plaintiff's then solicitors. No substantive response was received from either the former solicitors or the third party.

[22] On 27 August 2014, another firm of solicitors advised the administrator they had been engaged to act the plaintiff's behalf. They subsequently provided Counsel's advice to the effect the proceedings had fair to reasonable prospects. The administrator, upon receipt of this information, took no further steps in relation to the Deed until notified by the third party, in early November 2014, of the limitations on the defendants' insurance and of the fact she was no longer able to fund the action and would represent the plaintiff herself in Court.

Defendants' costs application

[23] The defendants submit the Court ought to make a costs order in their favour against the third party, as she was the moving party in the litigation brought by the plaintiff which failed to recover any relief from the defendants. The third party was also the moving party under the Deed, the source of funds for the litigation, and stood to derive a significant success fee from the litigation.

[24] The defendants further submit the conduct of the litigation by the third party on behalf of the plaintiff was unreasonable and improper. Not only were there issues surrounding the preparation of the plaintiff's case for trial, the plaintiff rejected offers to settle which would have resulted in the proceeding being resolved on terms more advantageous than the discontinuance on the eve of trial.

[25] Finally, the defendants submit that having regard to all of the circumstances, it was reasonable they joined the third party. Accordingly no order for costs should be made in favour of the third party in respect of costs incurred by her in defending the claim.

Third party's submissions

[26] The third party submits the Court's discretion in respect of costs includes the power to award not only her costs in respect of the third party proceedings, but also the costs paid by her on the plaintiff's behalf pursuant to her obligations under the Deed. The third party submits those orders should be made not only against the defendants, but also against the defendants' insurer and their solicitors.

[27] The third party submits costs orders should be made against the defendants, as they had pressed unmeritorious defences, stonewalled progress of the proceeding, and breached orders. Such conduct was obstructionist and not in the interests of justice. They also failed to disclose the true nature and extent of their insurance, including before, during and after mediation.

[28] The third party submits orders should be made against the insurers on the basis they knew, from the outset, that the plaintiff's claim exceeded the limit of indemnity and that the defendants had no other means to meet any order, including an order for costs. The insurer also knew the defences put forward would fail and would cause the plaintiff to incur costs, and the insurer had sole conduct and direction of the defence, the pursuit of which had the effect of keeping the plaintiff out of its money, during which time the insurer had the use of that money.

[29] The third party submits an order for costs should be made against the solicitors because they were party to making unsupported allegations to the Court, thereby pursuing a case which was baseless and which had no or substantially no chance of success.

Evidence

[30] There were multiple affidavits from the third party dealing extensively with a contention that the plaintiff had substantial prospects of success at trial and that there was no substance in the defendants' pleaded defences as the defendants had produced no evidence prior to the trial to support those contentions.

[31] Central to these assertions was the third party's contention that the contemporaneous documentation supported the plaintiff's case, as did the expert evidence relied upon by the plaintiff. The third party contended that the expert report provided late by the defendants was inadmissible, as the report was not from a food technologist and the author had no qualifications with respect to food science. The report also had significant factual and technical errors. The third party further contended there were significant defects in the accountant's report in response to the expert evidence relied upon by the plaintiff.

[32] The third party further contended neither the second defendant, nor any staff of the first defendant, had supplied any direct evidence. All that had been sworn to, to date, was the defendants' solicitors' account of evidence that would have been led from witnesses at trial. In all the circumstances, no weight should be afforded to such evidence.

[33] The defendants relied on multiple affidavits from Angela Yates, the solicitor having carriage of the matter on the defendants' behalf. She deposed to aspects of the defendants' defence including the contentions that it was not ultimately responsible for the manufacturing of the products on behalf of the plaintiff and that the manufacture occurred using ingredients which were inconsistent with the specifications provided by the defendants. Her affidavit contained detailed assertions as to the evidence that would have been led at trial. Evidence would also have been led at trial to establish significant deficiencies in the assumptions made by the plaintiff's expert as to the accuracy of the expert's conclusions. Ms Yates gave evidence at the hearing in relation to these assertions.

[34] Mr Da Lozzo also gave evidence at the hearing that at the first creditors' meeting the plaintiff's insurance policy was discussed, with specific reference to the policy being for "$1,000,000.00". He did not resile from that proposition, despite the third party's assertion the insurance policy was not mentioned at this meeting and a contention his evidence was inconsistent with the evidence of other witnesses. There was also no mention in the minutes about any insurance matters being raised or discussed.

[35] Deborah Seabrook, the compliance officer of Lumley Insurance, the insurer of the defendants' insurance policies, gave evidence that an initial search found no record of any insurance policies in favour of the defendants. Subsequent searches revealed a 2009 policy and a 2008 policy. The inability to initially find reference to the policies was due to a lack of information in respect of the relevant reference number. She did not accept that was inconsistent with her initial search of the "bordereaux".

[36] Rene Dubois, a senior executive at Arch Insurance Europe, the reinsurer of Lumley's risks at the time the defendants' policies were issued in 2008/2009, gave evidence he had no awareness of the Court proceedings or involvement in the underwriting of the defence costs. He could only locate a bordereaux record that had been provided to Dual

International not Lumley Insurance. He agreed Arch Europe could avoid paying out a policy which had been issued without authority.

Applicable principles

[37] Unless the Court otherwise orders, costs of a proceeding follow the event. However, the Court has a broad discretion in awarding costs, including in respect of orders for costs against non-parties.[1] The discretion is unfettered, although it must be exercised judicially.

[38] The relevant principles for the awarding of costs, in circumstances where there has been no hearing on the merits, were concisely enunciated by McHugh J in *Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin*[2]:

> "In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.
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> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence a litigation. Thus, for example, in *R v Gold Coast City Council; Ex parte Raysun Pty Ltd*, the Full Court of the Supreme Court of Queensland gave a prosecutor seeking mandamus the costs of the proceedings up to the date when the respondent council notified the prosecutor that it would give the prosecutor the relief that it sought. The Full Court said that the prosecutor had reasonable ground for complaint in respect of the attitude taken by the respondent in failing to consider the application by the prosecutor for approval of road and drainage plans.
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> Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *The South East Queensland Electricity Board v Australian Telecommunications Commission* where his Honour ordered the respondent to pay 80 per cent of the applicant's taxed costs even

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1 *Uniform Civil Procedure Rules* 1999 (Qld) r 681.

2 (1997) 186 CLR 622 at 624-625; see also *Ibrahim v PERI Australia Pty Ltd* [2013] NSWCA 328 at [17].

> though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.
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> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases."

[39] The discretion to make orders for costs against non-parties is to be exercised with caution.[3] Generally, an order for costs is only made against a party to a litigation and an order for costs against a non-party is only to be made where there is a proper basis upon which to award those costs.[4] On this latter aspect, Jerrard JA (with whom Cullinane and Jones JJ agreed) said in *Burns v State of Queensland and Croton*[5] said

> "[13] In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, Mason CJ and Deane J, with whom Gaudron J agreed, wrote as follows at 192-193:
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> 'For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.'
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> [14] That judgment dealt with the power given by Order 91 rule 1 of the *Supreme Court Rules 1900* (Qld), to make costs orders against non-parties. The provisions of the *Uniform Civil Procedure Rules 1999* (Qld) r 689(1) and r 766(1)(d), relevantly replacing Order 91 r 1, do not lead to any different result from the power described in *Knight v FP Special Assets*.
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> ….
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> [16] Dawson J in *Knight v FP Special Assets Ltd* described the power to award costs against a non-party a little differently, in these terms (at CLR 202):
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> 'The cases therefore establish a long asserted jurisdiction to award costs in appropriate cases against a person who is not a party to the proceedings where that person is the effective litigant standing

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3 *Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2)* [1999] 1 Qd R 518 at 544.
4 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192-193; 199.
5 [2007] QCA 240 at [13], [14], [16] and [17].

behind an actual party or where there has been a contempt or abuse of the process of the court.'

His Honour went on to explain that the principle was that the real litigant rather than the nominal party might be made liable for costs, recognising that that would happen in exceptional cases. In *Kebaro Pty Ltd v Saunders* (2003) FCAFC5, the Full Federal Court, in a passage cited with apparent approval by Muir J in *Rushton (Qld) Pty Ltd v Rushton (NSW)* [2004] QSC 47, wrote as follows:

'[103] In our opinion, the authorities established, on the foregoing analysis, the following propositions:

- A non-party costs order is exceptional relief, although some categories of factual situations are now recognised as within the discretion, for example, the situation described by Mason CJ and Deane in *Knight* at 192-193. The width of the jurisdiction is illustrated by a recent English decision that there can be circumstances in which it would be appropriate to order costs **in favour** of a non-party against a party (see *Individual Homes v MacBreams Investments*, 23 October 2002, High Court of Justice Chancery Division at 8.
- While such an order is extraordinary, the categories of case are not closed, although an order warrant its exercise, a sufficiently close connection, or as Gobbo J expressed it, a 'real and direct and ...material' connection with the principal litigation, must be demonstrated; in the words of Callinan J the non-party can fairly be liable if a judge by its conduct, to be a real party to the litigation, even if not **the** real party.'

[17] I agree with that analysis, which stresses the nature of such an order. The decisions analysed in the judgment include *Symphony Group PLC v Hodgson* [1994] QB 179, in which Balcombe LJ in the UK Court of Appeal identified as relevant matters whether the non-party had some management of the action, had maintained or financed it, or had caused it. Likewise in *Murphy v Young & Co's Brewery* [1997] 1 WLR 1591, the UK Court of Appeal included as relevant factors whether the non-party had an interest in the outcome, whether the non-party initiated the litigation, had control over it, or had intermeddled in it. In *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner for Taxation* (2001) 179 ALR 406 Callinan J, when awarding costs against a non-party (in hopeless litigation it had backed) held the non-party was a real party to the litigation in very important and critical respects."

[40] The applicable principles were further considered by Martin J in *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*[6]:

"(a) A non-party costs order will ordinarily be made 'when, in the circumstances of a particular case, it is just and equitable that a non-party pay the costs of a party to the litigation'. Put another way, a

6 [2009] 2 Qd R 356 at [38].

court will ordinarily not make a non-party costs order unless the interests of justice justify a departure from the general rule that only parties to proceedings are subject to costs orders.

(b) As there is no doubt as to the jurisdiction to make such an order, the circumstances in which n order of this nature will be made are those which are confined by questions of discretion. Many different ways of expressing the degree of caution necessary have been set out in the authorities. They include that any such application should be treated 'with considerable caution'. Such orders should be granted only when 'exceptional circumstances make such an order reasonable and just'. Such orders should be granted only 'sparingly'.

(c) As with any discretion, it must be 'exercised judicially and in accordance with general legal principles pertaining to the law of costs'. The exercise of the discretion is accurately described by the author of 'Law of Costs': 'It inevitably comes down to a fact-specific inquiry informed by various relevant considerations.'"

[41] In *Knight*, Mason CJ and Deane J recognised a general category of case in which an order for costs should be made against a non-party. There are, however, other categories of cases in which costs orders have been made against non-parties. They were summarised in *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*[7]:

"(a) the unsuccessful party to the proceedings was the moving party and not the defendant;

(b) the source of funds for the litigation was the non-party or its principal;

(c) the conduct of the litigation was unreasonable or improper;

(d) the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest; and

(e) the unsuccessful party was insolvent or could otherwise be described as a person of straw."

[42] The mere fact that the non-party is a guiding force behind the litigation is of itself insufficient. As Muir J observed in *Rushton (Qld) Pty Ltd v Rushton (NSW)*[8]:

"In my view the mere fact that a person is the sole director and shareholder of an unsuccessful litigant corporation will not, without more, suffice to justify a costs order against that person. And that is so even if the person was the corporation's sole, principal or ultimate decision maker in relation to the litigation.

To conclude otherwise would be to ignore the principle that costs orders against non-parties are "exceptional" and ought be made only if appropriate in the interest of justice. The control of a corporate litigant by a director who

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7 [2005] NSWCA 340 at [210].
8 [2004] QSC 47 at [12] – [13].

> is also its sole or majority shareholder is an unremarkable occurrence. It is sanctioned by a long established legislative framework which recognises that a company has an independent legal personality distinct from that of its members and that neither members nor directors, as a general proposition, are personally liable for its acts and defaults."

[43] To exercise the discretion in favour of an award of costs against a non-party, a clear connection between the non-party and the proceedings must be established. The observations of Collier J, in *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10)*[9] provide a useful summary of relevant considerations in the exercise of this discretion:

> "[20] The exercise of such discretion is approached with caution – indeed it has been described as 'rare and – and depends on the circumstances of each case as it is a 'fact-specific jurisdiction'. Principles guiding the approach of the Court to the exercise of the [discretion] include the following:
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> - There must be a real link between the non-party and the proceedings, which is material to the issue of costs.
> - The mere fact that a person may benefit from litigation will not, without more, suffice to justify an award of costs.
> - An order for costs may be appropriate – provided the interests of justice so require – where the party to litigation is an insolvent person or a man of straw, the non-party has played an active part in the conduct of the litigation and the non-party has an interest in the subject of the litigation.
> - Regard will be had to whether the non-party had been warned, or the non-party could have been joined as a party or applied to join earlier in the proceedings and thereby obtained the protection of the rules of the court.
> - It can be appropriate to exercise the power against a person who may be characterised as no more than a real party to the litigation in critical and important respects, albeit not the only such party.
> - An order for costs may be appropriate where a non-party causes a party to bring or defend proceedings for his or her own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest.
> - Where a non-party has maintained or financed an action, or caused an action, or has some management of the action, a costs order may be appropriate. This may be the case where, for example, the nominal plaintiff is mentally incompetent and the non-party has a substantial interest in the outcome.
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> [21] Conversely, the courts have declined to order costs against a non-party:

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9 [2009] FCA 498 at [20]-[21].

- Simply because the non-parties were directors of the plaintiff company and had caused the plaintiff to commence and maintain proceedings in circumstances where they ought to have known that, if the proceedings were unsuccessful, it was unlikely that the plaintiff could meet a costs order.
- Where the non-party had not been separately represented at the hearing of the primary proceedings.
- Simply because the non-party is a legal expense insurer." *(citations omitted)*

Discussion

[44] Whilst the third party submits there is significant evidence to establish the plaintiff would have succeeded at trial, the plaintiff did not proceed to trial. The fact there has been no determination on the merits is a relevant factor in considering the exercise of a discretion in respect of the making of costs orders. The Court does not have the benefit of any independent assessment of the strength or reliability of the evidence to be led at trial.

[45] The difficulty posed by a hypothetical assessment of the likely success of a party at trial, in circumstances where there has been no hearing on the merits, is particularly acute in the present case. The third party made numerous assertions in support of the plaintiff's claim, most of which was in issue. The proposed evidence included expert evidence, which was the subject of challenge, as to both methodology and conclusions.

[46] An assessment of the likely acceptance of the plaintiff's evidence cannot usefully be undertaken in such circumstances. It is no answer, as the third party submits, that the defendants had not produced any evidence in support of their defences. The plaintiff has the onus of proof. It was open to the defendants, should the matter have proceeded to trial, to call evidence. It may well be, through cross-examination and evidence called by the defendants, including expert evidence in response to what was to have been further reports from the plaintiff's expert, the defendants would have successfully defended the plaintiff's claim.

[47] The difficulty posed by these circumstances render it impossible to form any reasonable conclusion as to the likely merits of the plaintiff's claim. At best, a consideration of all of the material suggests if its evidence had been accepted at trial, the plaintiff could have succeeded in its claim. However, nothing in the material supports a conclusion the defendants must have failed in their defence of that claim. The matters raised in Ms Yates' affidavits, if the subject of evidence at trial, could have resulted in a finding the defendants had successfully resisted the plaintiff's claim at trial.

[48] Accordingly, the costs applications are properly to be determined on the basis the plaintiff's claim was not hopeless, and had prospects of success depending on the evidence ultimately accepted at trial, but that the defendants also had prospects of success in defending the claim, depending on the evidence ultimately accepted.

[49] The primary relevant factors, in determining the respective costs applications, are a consideration of the circumstances in which a decision was made by the plaintiff not to further pursue its claim, the reasonableness of that decision, having regard to its timing, and whether that decision was affected by the late provision of information from the defendants which ought reasonably to have been provided earlier in the litigation.

[50] Central to a consideration of these factors is the question of the limits and terms of the defendants' insurance policies. Whilst the third party contends Mr Da Lozzo's evidence that there was a discussion of the limit of the defendants' insurance policy as early as the first creditors' meeting is inconsistent with other evidence, there is no doubt an email from the second defendant was discussed at that meeting.

[51] That email contained reference to the defendants only having a $1,000,000.00 insurance policy. The discussion of that email ought to have put both the plaintiff and the third party on notice as to a limitation on the available insurance. However, that fact alone would not render commencement of the proceeding, and its continuation by the plaintiff, unreasonable as it does not appear it was apparent to anyone at that time that the policy amount was inclusive of defence costs.

[52] The first time the plaintiff and the third party became aware of this limitation appears to have been in or about mid-2014. By that stage, the proceeding had significantly advanced towards trial. Once that fact came to the attention of the plaintiff's administrator, he took steps to obtain further clarification. That process took some time. Whilst this was occurring, the third party was also undertaking her own independent investigations in relation to the existence of any insurance policy. I accept those investigations initially gave her reasonable cause to be concerned as to the existence of any policy, and as to its proper terms.

[53] Ultimately, the administrator exercised his power, under the Deed, to not proceed further with the litigation. This step was as a direct consequence of the third party's indication she was no longer in a position to provide ongoing funding for the litigation, and that she proposed to represent the company in the litigation. In these circumstances, the decision of the administrator was a reasonable decision. Whilst the administrator could have made that decision at a time earlier than the eve of the trial, there is nothing in the administrator's conduct which would satisfy me it would be appropriate to characterise the continuation of the proceeding to that time as unreasonable in all the circumstances.

[54] It is also significant the defendants initially sought costs against the administrator, but that application was not pursued, an agreement having been reached between the parties. A consequence of that agreement was that no order for costs was to be made between the plaintiff and the defendants. The fact the defendants have not pursued an order for costs against the plaintiff is a relevant matter in the exercise of my discretion. Had the defendants done so, the administrator may have had remedies under the Deed in respect of the payment of those costs by the third party, in accordance with her obligations under that Deed.

[55] A consideration of all the circumstances satisfies me it would not be appropriate, in the exercise of my discretion, to order the third party pay the defendants' costs of defending

the plaintiff's claim. A continuation of the claim by the plaintiff, until just prior to the trial, was reasonable having regard to the available information. A timely, and appropriate, decision was made by the third party to no longer fund the ongoing litigation by the plaintiff when it became clear there would be no funds practically available to meet any judgment in the plaintiff's favour. I am satisfied the third party undertook prompt, and timely, investigations in relation to the terms of any insurance policy, and that it was a relevant factor in her decision. Similar considerations also make it inappropriate to order the third party pay the plaintiff's costs of the third party proceedings.

[56] Balancing all of those factors, and having regard to the relevant principles, I am satisfied it is appropriate, in the exercise of my discretion to make no order as to costs in respect of the defendants' application for costs against the third party, both in respect of the plaintiff's claim and the subsequent third party proceedings instituted by the defendants.

[57] A similar order ought to be made in respect of the third party's claim for orders that the defendants pay her costs of the third party proceedings, and the costs paid by her on behalf of the plaintiff. The third party was the initiating and driving force of the litigation by the plaintiff. The consequence was that the defendants were put to significant expense in defence of that claim. Having regard to all of the circumstances, they reasonably instituted third party proceedings. Those proceedings were reasonable having regard to the significant involvement the third party had had in the conduct and actions, which were the subject of the plaintiff's claim against the defendants.

[58] The defendants having been put to significant expense, it would not be an appropriate exercise of the discretion to reward the third party by making a positive costs order in her favour. It was her decision which led to the ultimate abandonment of the litigation by the plaintiff. There was nothing in the defendant's conduct of the proceeding, including in respect of requests for information about its insurance, which was so unreasonable as to justify a positive costs order against them in respect of litigation instituted against them but not ultimately pursued to trial.

[59] There remains for consideration the third party's claim for orders for costs against the defendants' insurer and their solicitors.

[60] Whilst the third party contends the defendants' insurer behaved improperly, there is nothing in the material reasonably to support that contention. The insurer was faced with a claim by the plaintiff. It was entitled to give instructions to defend that claim. It cannot be said on all of the material that that defence involved making unsupported allegations, or pleading defences which were not reasonably open. It also cannot be said the defences unreasonably prolonged the litigation. The issues raised by way of defence, if accepted at trial, had significant merit. They may have resulted in the plaintiff ultimately failing in its claim.

[61] Similarly, there is nothing in the conduct of the defendants' solicitors which would support the making of an order for costs against those solicitors. Nothing in the matters raised by the third party supports the conclusion those solicitors behaved improperly or pursued the litigation for an ulterior purpose. Ms Yates' evidence was concise and clear. It properly raised significant matters, relevant to the defence of the plaintiff's claims. The

suggestion of improper conduct on her part is without substance. There was also no substance in any allegation that Counsel instructed by the defendants' solicitors engaged in improper conduct. I am satisfied, in the exercise of my discretion, there should be no order for costs against the defendants' instructing solicitors or insurers.

Conclusions

[62] Both the defendants' application for costs against the third party, and the third party's application for costs against the defendants, the defendants' insurers, and their solicitors, are dismissed.

Orders:

1. The defendants' application filed 21 November 2014 is dismissed.
2. The third party's application filed 5 December 2014 is dismissed.
3. Each party in proceeding number 2038 of 2011 is to bear its or their own costs of that proceeding.