

SUPREME COURT OF QUEENSLAND

CITATION: *Ashala Model Agency Pty Ltd (in liq) & Anor v Featherstone & Anor (No 2)* [2016] QSC 300

PARTIES: **ASHALA MODEL AGENCY PTY LTD (IN LIQUIDATION) ACN 114 423 406**
(first plaintiff)

and

DAVID JAMES HAMBLETON AS LIQUIDATOR OF ASHALA MODEL AGENCY PTY LTD ACN 114 423 406
(second plaintiff)

v

DARRELL MORGAN FEATHERSTONE AS TRUSTEE UNDER INSTRUMENT 710920248
(first defendant)

and

DARRELL MORGAN FEATHERSTONE AS TRUSTEE OF THE KJM FAMILY TRUST
(second defendant)

and

GREGORY DAVID FEATHERSTONE AS TRUSTEE UNDER INSTRUMENT 710920248
(third defendant)

and

GREGORY DAVID FEATHERSTONE AS TRUSTEE OF THE KJM FAMILY TRUST
(fourth defendant)

FILE NO: BS7133/12

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 16 December 2016

DELIVERED AT: Brisbane

HEARING DATE: Written submissions on 20 June 2016

JUDGE: Jackson J

ORDERS: **The order of the court is that:**

1. **The first and third defendants pay the second plaintiff's costs occasioned by joinder of the third defendant as a party to the proceeding and thrown away by the adjournment of the trial on 10 December 2015, to be assessed on the indemnity basis.**
2. **Otherwise, the first defendant pay the second plaintiff's costs of the proceeding.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – where the second plaintiff obtained judgment recovering real property from the first defendant, with a right to the first defendant to prove in the winding up of the first plaintiff for rent payable under a lease – where the plaintiff was required join the third defendant as a party and the trial was adjourned on the first day of the hearing, due to the unexplained conduct of the defendants – whether the defendants should pay the plaintiffs' costs – whether costs should be assessed on the indemnity or standard basis

Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684

Mosman Services Pty Ltd v McDonald (No 2) [2013] QSC 217, cited

COUNSEL: L Copley for the plaintiffs
No appearance for the defendants

SOLICITORS: Irish Bentley Lawyers for the plaintiffs
Lillas & Loel for the defendants

- [1] **Jackson J:** On 6 June 2016, I gave judgment (on the second plaintiff's claim) that the first defendant as trustee of the KJM Family Trust transfer Lot 106 on BUP 103388 in the County of Stanley Parish of North Brisbane Title Reference 50095706 to the first plaintiff, with a right to the first defendant to prove in the winding up of the first plaintiff for rent payable under the lease made between the first plaintiff and the first defendant dated 1 July 2007 to the extent of \$480,150. I also dismissed the plaintiffs' claims against the third defendant. The question of costs remains.
- [2] As to the first defendant, the plaintiffs apply for the following orders:
1. The first defendant pay the plaintiffs' costs of the proceeding on the standard basis; and
 2. The first defendant pay the plaintiffs' costs of and incidental to an application and hearing on 10 December 2015 and those thrown away by reason of the order for adjournment of the trial made on that day on the indemnity basis.
- [3] As to the third defendant, the plaintiffs apply for an order that he too pay the costs of and incidental to the application and hearing on 10 December 2015 and thrown away by reason of the adjournment of the trial, both on the indemnity basis.

- [4] The first defendant applies for an order that the plaintiffs' costs should be restricted to partial recovery of their costs in relation to the claim made that resulted in the judgment, on the standard basis.
- [5] The third defendant applies for an order that the plaintiffs pay his costs of the proceeding.

Circumstances relating to the third defendant

- [6] The proceeding was started by the plaintiffs against the first defendant in 2012. The statement of claim alleged that the first defendant was the trustee of the KJM Family Trust. The defence admitted that allegation.
- [7] On 9 October 2015, the proceeding was set down for trial starting on 10 December 2015.
- [8] On 8 October 2015, an amended defence was filed, purportedly withdrawing (but without leave) the admission that the first defendant was the trustee of the KJM Family Trust on the ground that the first defendant was removed as trustee on 25 December 2014.
- [9] On 3 December 2015, the first defendant disclosed documents that showed the replacement of the first defendant as trustee of the KJM Family Trust by the third defendant.
- [10] On 10 December 2015, the first defendant submitted that the proceeding ought to be dismissed. The plaintiffs applied for an order that the third defendant be joined as a defendant as trustee. An order was made joining the third defendant as a defendant and for the future conduct of the proceeding.
- [11] On 18 December 2015, an amended claim and statement of claim were filed with the third defendant named as a defendant.
- [12] On 27 January 2016, the third defendant filed a defence raising the same grounds of defence as the first defendant's existing defence.
- [13] On 14 March 2016, the first and third defendants filed a further amended defence. They raised an allegation that on 1 March 2016 the third defendant resigned as trustee of the KJM Family Trust and was replaced by the first defendant.
- [14] The consequence of the first defendant again being the trustee of the KJM Family Trust was that thereafter no order could be made against the third defendant as trustee of the property of the trust. That is why the order was made that the proceeding by the plaintiffs against the third defendant should be dismissed.
- [15] Importantly, no explanation was ever offered for why the third defendant was substituted as the trustee for the first defendant on 25 December 2014 or as to why the first plaintiff was reinstated as trustee on 1 March 2016. However the involvement of the third defendant led to the adjournment of the trial which had been set down for hearing on 10 December 2015 and to the further interlocutory steps that were ultimately necessary whilst the third defendant was the trustee of the KJM Family Trust. Ultimately, all of the costs and expenses of those interlocutory steps

were made useless by the reinstatement of the first defendant as the trustee of the KJM Family Trust.

Plaintiff's submissions

- [16] Accordingly, the plaintiff submits that there is a special or unusual feature of the litigation warranting an order for indemnity costs against the first and third defendants in relation to the costs of the application filed on 9 December 2015 and heard on 10 December 2015 that resulted in the order that the third defendant be joined as a party to the proceeding and the costs thrown away by reason of the adjournment of the trial and consequential directions.
- [17] In the absence of any explanation for the conduct of the first and third defendants, in my view, it is appropriate that an order to that effect be made.
- [18] Otherwise, the plaintiffs submit that the costs of the proceeding should follow the event in accordance with r 681 of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”).
- [19] The first defendant submits that because part of the plaintiffs’ claims were stayed by the operation of s 58(3)(b) of the *Bankruptcy Act 1966* (Cth), the plaintiffs should be deprived of an order for costs against the first defendant.
- [20] In my view, where there is some success on both sides of the litigation after trial, there may be good reasons to make an order for costs under rr 681 and 684 of the UCPR in relation to a particular question in or a particular part of a proceeding and to declare a percentage of costs the proceeding to be attributable to the question or part of the proceeding to which the order relates. In *Mosman Services Pty Ltd v McDonald (No 2)*¹ Byrne SJA said:

“In *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd*, a Full Court of the Federal Court of Australia said:

‘... the demands of the community for greater economy and efficiency in the conduct of litigation may properly be reflected in a qualification of the presumption that a successful party is entitled to all its costs’

referring, with apparent approval, to *Commissioner of Australian Federal Police v Razzi*, where Wilcox J said:

‘... the court should use all proper means to encourage parties to consider carefully what matters they will put in issue in their litigation. If parties come to realise that they will not necessarily recover the whole of their costs, even though they have unsuccessfully raised a discrete issue, they are likely better to consider whether the raising of that issue is a justifiable course to take.’² (footnotes omitted)

¹ [2013] QSC 217.

² [2013] QSC 217, [5].

- [21] However, in the present case, it is difficult to see why an order should be made apportioning the costs of the proceeding in a way that the second plaintiff will not obtain them against the first defendant. Although the first plaintiff's personal claims against the first defendant were stayed by reason of his bankruptcy and the effect of s 58(3) of the *Bankruptcy Act* 1966 (Cth), I cannot see how the costs of the proceeding by the second plaintiff against the first defendant were significantly affected, at least in the way the trial was conducted. Although the first and third defendants submitted that they came prepared for trial on all issues, there is no evidence as to what that means or as to why or how the costs that they would otherwise have incurred were increased.
- [22] To the extent that the third defendant may have incurred costs because he became a trustee of the KJM Family Trust during the course of litigation, in my view, there is no reason to consider that the plaintiff should be deprived of the orders for costs that it seeks as against the first defendant or the third defendant.
- [23] Accordingly, in my view, the appropriate orders for costs are that the first and third defendants pay the second plaintiff's costs occasioned by joinder of the third defendant as a party and thrown away by the adjournment of the trial to be assessed on the indemnity basis. Otherwise, the first defendant should be ordered to pay the second plaintiff's costs of the proceeding.