

SUPREME COURT OF QUEENSLAND

CITATION: *Onza Industries Pty Ltd v Tingalpa Tyre & Mechanical Pty Ltd (No 2)* [2021] QSC 32

PARTIES: **ONZA INDUSTRIES PTY LTD**
(Plaintiff)
v
TINGALPA TYRE & MECHANICAL PTY LTD
(Defendant)

FILE NO/S: BS No 10492 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 3 February 2021, *ex tempore*

DELIVERED AT: Brisbane

HEARING DATE: 3 February 2021 and on the papers

JUDGE: Bowskill J

ORDER: **The defendant pay 75% of the plaintiff's costs of the proceeding, excluding the costs of the application filed on 8 June 2020, to be assessed on the standard basis.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – VESTING ORDERS – VESTING ORDERS, CONVEYANCES AND TRANSFERS – VESTING ORDERS – whether the plaintiff should recover its costs of the proceeding – whether an apportionment of costs appropriate – whether a costs order should be made against the director of the defendant, who was not a party to the proceeding
Plante v James [2011] QCA 109

COUNSEL: D Lang, *sol*, for the plaintiff
I Plath, director, appeared with leave for the defendant

SOLICITORS: Lewis & McNamara for the plaintiff/applicant

[1] On 6 January 2021 I delivered my reasons for judgment in relation to this matter, *Onza Industries Pty Ltd v Tingalpa Tyre & Mechanical Pty Ltd* [2021] QSC 1. The parties were directed to file written submissions in relation to the costs of the proceeding, which was done. The matter was listed today, as it was indicated some further submissions about costs may be made. However, no further substantive submissions have been made other than in relation to the issue of apportionment, which I will address in a moment.

- [2] The plaintiff was successful insofar as the proceeding sought relief in the form of a vesting order and consequential orders to give effect to that. The plaintiff was unsuccessful, however, in relation to the other part of its claim, which sought equitable damages and an order for an account against the defendant.
- [3] The plaintiff submitted that as it was largely successful in its claim the appropriate order is that the defendant pay its costs of the proceeding on the standard basis. The plaintiff further sought an order that Mr Ira Plath, the director of the defendant, also be bound by that costs order.
- [4] Alternatively, the plaintiff submitted that the defendant and Mr Ira Plath should be ordered to pay its costs from 11 August 2020. That is on the basis that, from that time, the plaintiff made it clear that it was agreeable to resolving the proceeding on the basis reflected in the final orders and declarations which were made following the trial.
- [5] The defendant submits that given the mixed success of the plaintiff and the defendant there should be no order for costs or, alternatively, that any order should only require the defendant to pay the plaintiff's costs from 11 August 2020. The defendant opposes any order that Mr Ira Plath personally be ordered to pay the plaintiff's costs.
- [6] The first question is whether there should be an order in favour of the plaintiff for at least some of its costs. In my view, there should be. Orders for costs are intended to compensate, not penalise. The proceedings were required to be brought in order to obtain orders which were, ultimately, found to be justified to vest the property in the plaintiff as the new trustee. The fact that the plaintiff was unsuccessful in part of its claim, which was found to be misconceived and to be directed at the wrong party (the defendant rather than Mr Ira Plath) does not mean the plaintiff ought to be prevented from recovering its costs at all.
- [7] What it does mean, though, is that this is a case in which an apportionment of costs is appropriate. Acknowledging the inevitable lack of precision involved in any such apportionment, I consider it is fair to apportion 75% to the part of the proceeding concerning the ownership of the property, and whether or not a vesting order should be made; and 25% to the remaining issues.
- [8] In my view, it is appropriate in the circumstances and given the outcome of the proceeding that the plaintiff recover 75% of its costs, assessed on the standard basis.
- [9] I do not think that it is necessary or appropriate to limit the plaintiff to the costs incurred only after 11 August 2020. I accept that, from that point in time, it was apparent the plaintiff would agree to resolve the proceeding on a basis very similar to the eventual outcome. On the material before the court, no formal offer to settle was made under the *Uniform Civil Procedure Rules*. Consistently with that, the plaintiff does not make any submission about recovering indemnity costs after this time. But I can see no reason why the plaintiff should be limited in recovering the appropriate apportionment of costs only from this time onwards. The costs of the application filed on 8 June 2020, heard and determined by me on 11 August 2020 ([2020] QSC 244), should be expressly excluded as that was dismissed with no order as to costs.

- [10] The second question is whether this is an appropriate case in which to make an order that a non-party, Mr Ira Plath, also pay the plaintiff's costs. For the following reasons I am not satisfied of that.
- [11] As confirmed by the then President of the Court of Appeal in *Plante v James* [2011] QCA 109 at paragraph 4, non-party costs orders are exceptional. They are only made where the interests of justice clearly warrant such an order.
- [12] Mr Ira Plath, as director of the defendant, was given leave to represent the defendant company, including at the trial. That was in circumstances where, I accept, the defendant lacked funds to retain a lawyer, although I understand it had done so at an earlier stage of the dispute. There was a considerable level of personal involvement in the dispute both by Mr Ira Plath, as director of the defendant, and by Mr Ondra Plath, as director of the plaintiff. That seems to have been inevitable given the family relationship. But Mr Ira Plath was not at any stage joined as a party to the proceeding in his personal capacity. That was the plaintiff's choice.
- [13] The defendant was not the moving party to the proceeding, rather the responding party. There was no counterclaim. Mr Ira Plath's conduct of the litigation, on behalf of the defendant, was somewhat misconceived. But the plaintiff's position in some respects I found also to be misconceived. Some adverse findings were made against both sides. And there is no suggestion, in the submissions, of the plaintiff at any time putting Mr Ira Plath on notice of any intention to seek a costs order directly against him.
- [14] In all the circumstances I am not satisfied it is in the interests of justice to make an order for costs against Mr Ira Plath personally.
- [15] I therefore order that the defendant pay 75% of the plaintiff's costs of the proceeding, excluding the costs of the application filed on 8 June 2020, to be assessed on the standard basis.