SUPREME COURT OF QUEENSLAND

CITATION:	*Arawak Holdings Pty Ltd v King Tide Company Pty Ltd* [2018] QCA 148
PARTIES:	**ARAWAK HOLDINGS PTY LTD** ACN 157 865 195 (respondent/applicant) **v** **KING TIDE COMPANY PTY LTD** **ACN 602 611 423** **(appellant/respondent)**
FILE NO/S:	Appeal No 5530 of 2017 SC No 9275 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 199
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2018
JUDGE:	Morrison JA
ORDERS:	**1. The appellant and Mr Beau Timothy John Hartnett pay the respondent's costs of the appeal on the standard basis.** **2. The application is otherwise dismissed.** **3. The appellant and Mr Hartnett pay 50 per cent of the costs of the application, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – DIRECTOR OF COMPANY – where the applicant is a corporation – where the respondent was successful at trial – where the respondent then sought a non-party costs order below against the sole director of the applicant, Mr Hartnett, and was successful – where the applicant appealed that decision – where the appeal was dismissed and costs were ordered against the corporation –whether a non-party costs order can be made against Mr Hartnett in respect of the costs of the appeal PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – SECURITY FOR

COSTS – PROCEDURE – OTHER MATTERS – where the respondent filed an application for security for costs in the appeal proceedings – where it was agreed that King Tide would pay the sum of $34,000 by way of security for Arawak's costs of the appeal – where that security was paid into court – where the appeal was dismissed and costs were ordered against King Tide – where the costs of the appeal have not yet been assessed – whether the security can be released

Uniform Civil Procedure Rules 1999 (Qld), Chapter 17A Part 3, r 687(1), r 737(1)

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Gdanski v Palms Court Management Pty Ltd [2017] VSCA 348, considered
JJES Pty Ltd v Sayan (No 2) [2014] NSWSC 975, cited
King Tide Company Pty Ltd v Arawak Holdings Pty Ltd [2017] QCA 251, related
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, followed
Rushton (Qld) Pty Ltd v Rushton (NSW) [2004] QSC 47, considered

COUNSEL: B Kidston, with A Quinn, for the applicant
S Carius for the respondent

SOLICITORS: Enyo Lawyers for the applicant
Small Myers Hughes Lawyers for the respondent

[1] **MORRISON JA:** The appellant (King Tide) and the respondent (Arawak) have been engaged in litigation for some years. It commenced in October 2014 with proceedings against a third party seeking damages for misleading and deceptive conduct. Once those proceedings were underway King Tide and Arawak fell into dispute about the conduct of the litigation and eventually King Tide sought injunctive relief against Arawak.

[2] That led to a trial between King Tide and Arawak, which was heard on 7 February 2017. On 5 May 2017 the proceedings were dismissed and King Tide was ordered to pay costs.

[3] King Tide instituted appeal proceedings on 2 June 2017. Directions were made to progress that appeal.

[4] On 22 June 2017 the learned trial judge dealt with an application by Arawak for a non-party costs order against Mr Hartnett, the director of King Tide. The decision was reserved.

[5] In the appeal proceedings, on 27 July 2017 Arawak filed an application for security for costs. That application was eventually compromised on the basis that King Tide would pay the sum of $34,000 by way of security for Arawak's costs of the appeal. That security was paid into court in late August 2017.

[6] On 15 September 2017 the learned trial judge ordered King Tide and Mr Hartnett to pay Arawak's costs of the trial.

[7] Three days later on 18 September 2017 King Tide's appeal was heard. On 27 October 2017 the appeal was dismissed and costs were ordered against King Tide.[1]

[8] On 9 November 2017 Arawak asked King Tide and Mr Hartnett to consent to orders which included a non-party costs order being made against Mr Hartnett in respect of the appeal costs, and that the security be released. That was not agreed.

[9] Undaunted by its lack of success, King Tide filed an application for special leave in the High Court on 27 November 2017. By the time that the present application was heard, the application for special leave had not been determined by the High Court.

The current application

[10] The present application was filed on 4 December 2017. By that application Arawak seeks a non-party costs order against Mr Hartnett in relation to the costs of the appeal. It also seeks to have the security released to meet the costs of the appeal, even though those costs have not been assessed.

The non-party costs order below

[11] The learned trial judge delivered reasons in respect of the non-party costs order against Mr Hartnett on 15 September 2017.[2] In doing so his Honour referred to some of the authorities which establish the principles concerning the making of a costs order against a non-party.

[12] The first of those was the decision of the High Court in *Knight v FP Special Assets Ltd*[3] where Mason CJ and Deane J said:

> "… the prima facie general principle is that an order for costs is only made against a party to the litigation. As our discussion of the earlier authorities indicates, there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. Thus, for example, there are several long established categories of case in which equity recognized that it may be appropriate for such an order to be made.
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> For our part, we consider it appropriate to recognize 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

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1 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251.
2 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd (No 2)* [2017] QSC 199. (**Reasons below**).
3 (1992) 174 CLR 178 at 192-193 (internal citations omitted); [1992] HCA 28.

> for costs should be made against the non-party if the interests of justice require that it be made."

[13] The learned trial judge also referred to some of the various criteria which may assist in the exercise of the discretion to make a non-party costs order. They include:

(a) where the source of funds for the litigation was the non-party or its principal;[4]

(b) the non-party or its principal had an interest (which need not be financial) which was equal to or greater than that of the party or, if financial, was a substantial interest;[5]

(c) the unsuccessful party was insolvent or otherwise could be described as a "man of straw";[6]

(d) the mere fact that a non-party may have benefited from the litigation, by itself, is not a proper basis for an adverse exercise of discretion;[7]

(e) where proceedings are initiated and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in the result, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued;[8]

(f) the existence of a special personal interest in or potential benefit from the litigation is a critical factor warranting an order against a non-party, but the mere fact that the non-party may have funded the legal costs would not normally be sufficient.[9]

[14] There is no challenge on this application to those principles, or the relevant criteria. Instead the submissions centred on whether they were applicable in the present circumstances.

[15] The learned trial judge made a number of findings concerning King Tide and Mr Hartnett. As to King Tide, the only evidence of its financial circumstances was that it had a paid-up share capital of $120. It had not adduced any evidence to show that it was not a "company of straw".[10]

[16] As to Mr Hartnett, the learned trial judge found that he had played an active part in the conduct of the litigation, being the sole director of King Tide, and a director of the firm of solicitors that acted for King Tide for much of the litigation. Further, he was the author of much of the correspondence written on behalf of King Tide, and had an interest in the subject of the litigation because he was a beneficiary of the Hartnett (No 5) Discretionary Trust, of which King Tide was the trustee. His

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4 *JJES Pty Ltd v Sayan (No 2)* [2014] NSWSC 975 at [19]. See also *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340.

5 *JJES Pty Ltd v Sayan (No 2)* [2014] NSWSC 975 at [19].

6 *JJES Pty Ltd v Sayan (No 2)* [2014] NSWSC 975 at [19].

7 *Bischof v Adams* [1992] VicRp 61; [1992] 2 VR 198, cited in *Vestris v Cashman* (1998) 72 SASR 449 at 457 [30].

8 *Carborundum Abrasives Pty Ltd v Bank of New Zealand (No. 2)* (1992) 5 PRNZ 418; [1992] 3 NZLR 757, cited in *Vestris v Cashman* (1998) 72 SASR 449 at 457 [30].

9 *Re Foster; ex parte Foster v Duus* (1994) 121 ALR 494; (1994) 49 FCR 309, cited in *Vestris v Cashman* (1998) 72 SASR 449 at 457 [30].

10 Reasons below at [21].

Honour also recorded that Mr Hartnett admitted under cross-examination that he was the sole person "behind" King Tide.[11]

[17] Having made those findings the learned trial judge found that Mr Hartnett fell into the category described in *Knight v FP Special Assets Ltd*.[12]

[18] When his Honour came to exercise the discretion consideration was given to whether the interests of justice called for a non-party costs order:

> "Mr Hartnett was the real party in these proceedings. He was instrumental in the conduct of the litigation and in the representations and arguments advanced. He stood to gain if the application was successful. He falls within the category described in *Knight* and, for the reasons given above, the interests of justice require that he be the subject of a costs order."[13]

[19] No appeal was brought against the findings or orders made by the learned trial judge.

Submissions on the application

[20] Mr Kidston, counsel for Arawak, submitted that the reasons advanced by the learned trial judge were still applicable and called for a non-party costs order against Mr Hartnett. He submitted that Mr Hartnett had contended that King Tide was "impecunious" when he resisted an order for security for costs, whereas he later stated that King Tide was not impecunious and could meet an adverse costs order. In those circumstances King Tide had not put any evidence before the court showing that it could meet the costs order or otherwise had any assets or means. In the absence of such evidence the court should conclude that King Tide was impecunious and Mr Hartnett knew it to be so.

[21] He submitted that Mr Hartnett continued in control of King Tide for the duration of the appeal and that as the appeal concerned matters the subject of the trial proceedings, the trial judge's findings still held true. Mr Hartnett was the sole shareholder, sole director, secretary of King Tide and beneficiary of the underlying trust. He submitted it was apparent that the source of funds for the proceeding and appeal appeared to be Mr Hartnett. As Mr Hartnett had elected to say nothing about his involvement or interest in the appeal, an inference could be drawn against him in that respect.

[22] He submitted that Mr Hartnett had been on notice that costs would be sought against him, just as it had been in the proceedings at first instance.

[23] As to the security it was submitted that whilst the costs had not been assessed, they were likely to be well in excess of the amount of security. In any event Arawak was a creditor of both King Tide and Mr Hartnett in respect of the costs of the trial, which themselves dwarfed the amount of security. Therefore it was just that the security provided in respect of the costs of the appeal be paid out.

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11 Reasons below at [22].
12 Reasons below at [23].
13 Reasons below at [36].

[24] For King Tide and Mr Hartnett, Mr Carius of counsel submitted that nothing had been identified as exceptional about Mr Hartnett's involvement in the appeal. The appeal had been argued solely on point of law and by senior counsel. Unlike the proceedings at first instance Mr Hartnett was neither a witness nor acting as solicitor for King Tide during the appeal. His involvement was merely as director, giving instructions to pursue an appeal which, if successful, would have relieved King Tide of a significant contingent costs order liability.

[25] Further, it was submitted that there was no basis upon which one could conclude that King Tide was a nominal plaintiff or stalking horse for Mr Hartnett. It was also submitted that there was no evidence to demonstrate that King Tide was insolvent during the conduct of the appeal, as it was represented by solicitors and counsel. Whilst it was not contended that King Tide had any assets against which a judgment could be executed, it did not follow that an inference could be drawn that it was insolvent or a man of straw.

[26] Mr Carius submitted that the pursuit of an order for security for costs undermined the application for a non-party costs order. Finally, it was submitted that it was not unreasonable for Mr Hartnett, as a director of King Tide, to cause it to institute an appeal if that appeal would relieve the company of a substantial contingent liability. There was nothing exceptional about Mr Hartnett's involvement in the appeal on that basis.

[27] As to the release of the security, Mr Carius contended that it was premature because no steps had been taken to progress the assessment of the costs. He pointed to rule 676(3)(d) of the *Uniform Civil Procedure Rules* 1999 (Qld)[14] which provides that security must be discharged in relation to the balance of the security after costs have been satisfied. The contention was that an order applying the security to costs should only be made where the court has ascertained the quantum of the costs.

Discussion

[28] In my respectful view, it is clear that Mr Hartnett comes within the principles enabling a non-party costs order to be made. On 15 November 2017 the learned trial judge made an order for the costs of the trial against Mr Hartnett, expressly on the basis of factual findings that brought Mr Hartnett within the category described in *Knight v FP Special Assets*. That is, he played an active part in the conduct of the litigation, he was the sole director of King Tide, he was a director of the firm of solicitors that acted for King Tide for much of the litigation, he was the author of much of the correspondence by King Tide, he had an interest in the subject of the litigation as a beneficiary under the relevant trust, and had admitted he was the sole person "behind" King Tide.[15]

[29] I do not consider that the mere fact that counsel were engaged for the appeal and a different firm of solicitors appeared on the record, alters those findings in any significant way. Mr Hartnett remains the person behind King Tide and, since King Tide has admittedly no assets or income, the inference is open that Mr Hartnett is the person who is funding the appeal proceedings. That inference could be displaced if Mr Hartnett or King Tide had chosen to advance any evidence to the contrary. They did not;

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14 (**UCPR**).

15 Reasons below at [22].

Mr Carius frankly conceding that King Tide and Mr Hartnett were not in a position to contend that King Tide had any assets.[16]

[30] More to the point, once the non-party costs order was made on 15 September 2017 Mr Hartnett had a direct interest in the outcome of the appeal proceedings. By then the appeal had been instituted, directions made by the registrar and an order made for security for the costs of the appeal.[17] The order for security for costs was made on the basis that King Tide was impecunious. Whatever was said inconsistently with that later, that was plainly the case as the application was resolved by the proffering of $34,000 security in a form appropriate to the registrar. Had there been any serious evidence that King Tide was able to meet any costs order, no doubt the application would have been resisted.

[31] Therefore, by the time the appeal was heard on 18 September 2017, Mr Hartnett had a direct and substantial interest in its success. He had been ordered to pay the costs of the trial. By the time this application was heard those costs had been assessed at $128,967.04. Whilst that assessment was not available at the time of the appeal, it would nonetheless have been clear that Mr Hartnett's liability was substantial. If the appeal had succeeded he would have been relieved of that liability.

[32] For that reason it could not be said that Mr Hartnett was merely acting as the director or shareholder of King Tide. In both *Rushton (Qld) Pty Ltd v Rushton (NSW)*[18] and in *Gdanski v Palms Court Management Pty Ltd*[19] it was held that the mere fact that a person is a director or shareholder of an unsuccessful litigant corporation, without more, was not to justify a costs order against them. As was said in *Rushton*, the simple act of control of a corporate litigant by a director is an unremarkable occurrence. Further, as was said in *Gdanski*, where the conduct of the director does not extend beyond what would have been expected of him in his capacity as director and shareholder, or solicitor, that does not justify a non-party costs order. A significant factor in *Gdanski* was that Mr Gdanski did not have any personal interest in the outcome of the litigation of any kind.[20]

[33] Those authorities are distinguishable from the present case. Mr Hartnett had, from the moment he was made liable to a costs order as a non-party, a direct and vital interest in the successful outcome of the appeal.

[34] Given that Mr Hartnett and King Tide have chosen not to advance any evidence that King Tide is in a position whereby it can meet the costs of the appeal, or even that portion (if any) above the amount of security, I draw the inference that King Tide is impecunious and always was during the course of the appeal. Further, I see no reason to conclude that Mr Hartnett has merely been the director or shareholder of an unsuccessful litigant corporation. His interest plainly goes beyond that.

[35] In the circumstances it is appropriate that he be made liable for the costs of the appeal.

Release of the security

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16 Transcript of hearing, T1-25 ll 29-38.
17 Order of Philippides JA dated 21 August 2017.
18 [2004] QSC 47 at [12]-[13].
19 [2017] VSCA 348 at [43] and [113].
20 *Gdanski v Palms Court Management Pty Ltd* [2017] VSCA 348 at [113].

[36] On behalf of Arawak, material was put before the court suggesting its incurred legal costs on the appeal amounted to $93,190.15 plus GST.[21]

[37] As mentioned earlier the amount of security the subject of the order on 21 August 2017 was $34,000, to be provided in a form acceptable to the registrar. The application before me was conducted on the basis that the security was cash.

[38] The amount paid in was the subject of a compromise in the face of the application for security, which originally sought a figure slightly in excess of $55,000.[22] The compromise was inevitable because, as Mr Carius accepted, no other inference could be drawn but that King Tide accepted that there were grounds for warranting an order for security for costs.[23]

[39] In the material prepared to resist the application for security, King Tide contended that the appropriate figure was $35,000, based upon an assessment by Mr Peterson, a costs assessor.[24]

[40] During the course of the hearing Mr Kidston, on behalf of Arawak, obtained instructions that his client agreed to undertake, if required, that if there were any excess between the costs assessed on the costs of appeal and the amount of security, that the excess would be returned.[25]

[41] That undertaking would go some way to alleviating any concern that the assessed costs might come in at lower than $34,000 when that full sum had been paid out to Arawak.

[42] However, in my respectful view, King Tide's contention that it is premature to permit access to the security is correct.

[43] A party's entitlement to recover costs is given either under the UCPR or by an order of the Court: r 680. A court may order that costs not be assessed until the proceeding ends: r 682(2). That is not the case here. It is also the case that costs may be assessed without an order for assessment having been made if the court orders one party to pay another party's costs: r 686(a).

[44] Under r 687(1) if a party is entitled to costs by reason of an order of the court, "the costs are to be assessed costs". The process for assessment of costs is governed by Chapter 17A, Part 3 of the UCPR. That process includes the following:

(a) the party who is entitled to be paid costs must serve a costs statement in the approved form on the party liable to pay the costs: r 705(1);

(b) the party on whom the costs statement is served may, within 21 days after being served, make objections to any items in the statement: r 706(1);

(c) if there is no objection to the costs statement then the other party can apply for the appointment of a costs assessor to assess the costs: r 708;

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21 Affidavit of Mr McMahon, filed 4 December 2017, para 26.

22 Affidavit of Mr McMahon, sworn 27 July 2017, para 32.

23 Hearing Transcript, T1-31 lines 1-8.

24 Outline by King Tide on the security for costs application, paras 4 and 7-13; part of Exhibit LPM-2 to the Affidavit of Mr McMahon, filed 4 December 2017.

25 Transcript of hearing, T1-13 to T1-14.

(d) if the party entitled to be paid costs does not serve a costs statement within a reasonable time, then the other party can require that to be done, and the court can intervene to direct it to be done: r 709A; and

(e) where a party has served a costs statement, or where a party is one on whom a costs statement has been served, then either party can apply for the assessment: r 710(1) and (1A).

[45] When an application for costs assessment is made, it must nominate a costs assessor who consents to the appointment in order to "carry out the costs assessment": r 710(2)(c)(d). There is also provision whereby an assessing registrar can carry out the assessment: r 714. Once a costs assessment has been completed, the costs assessor "must certify the amount or amounts payable by whom and to whom": r 737(1).

[46] What those provisions reveal is that when the court orders one party to pay another party's costs, the entitlement to recover the costs is confined to assessed costs. Ordinarily that requires the assessment process to be followed and for an assessment of the costs to be completed.[26]

[47] No step has been taken to assess the costs ordered by this court on 27 October 2017.[27] Therefore, the entitlement to recover those costs has not yet arisen. In my view, access to the security for those costs should not be given until the costs are assessed, either under the process referred to above, or if the parties agree that it is not necessary to do so because they agree the amount.

Costs of the application

[48] It is evident from the foregoing reasons that the application has succeeded in terms of obtaining a non-party costs order against Mr Hartnett, but has failed in terms of having access to the security ordered in to court.

[49] Arawak seeks that their costs of the application to be paid on the indemnity basis. There is no good reason for that. First, a non-party costs order is a discretionary matter for the court. Parties seeking such an order have to bring the case within the principles referred to above, and even then there is still a discretion as to whether the interests of justice require the order to be made. In my view, it cannot be said there was anything in the resisting of that order which would enliven the well-known principles referred to in *Colgate-Palmolive Co v Cussons Pty Ltd*.[28] There is no necessity to review those principles on this application.

[50] Further, the application insofar as it sought access to the security has failed. Comparatively speaking, less time and material were devoted to that issue as compared to the non-party costs order. There should, in my view, be some apportionment of the costs to reflect to the relevant success and failure on the issues. What I intend to do is to apportion the amount that Arawak will recover by way of costs of the application, to reflect King Tide's success on the second issue.

Conclusion

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26 I say ordinarily because the parties can short circuit some steps, or even the assessment, by agreement.

27 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251.

28 (1993) 46 FCR 225 at 232-234; [1993] FCA 536; see also *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo* [2013] QCA 305 at [21]-[22].

[51] For the reasons given above I make the following orders:

1. The appellant and Mr Beau Timothy John Hartnett pay the respondent's costs of the appeal on the standard basis.

2. The application is otherwise dismissed.

3. The appellant and Mr Hartnett pay 50 per cent of the costs of the application, to be assessed on the standard basis.