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Carter v Caason Investments Pty Ltd & Ors [2016] VSCA 236 (7 October 2016)

Last Updated: 7 October 2016

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0135

RYAN CARTER and ESPLANADE
HOLDINGS PTY LTD

Applica

v

CAASON INVESTMENTS PTY LTD & Ors

Responden

JUDGES:

WEINBERG, FERGUSON and KAYE JJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

5 September 2016

DATE OF JUDGMENT:

7 October 2016

MEDIUM NEUTRAL CITATION: [\[2016\] VSCA 236](#)

JUDGMENT APPEALED

Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd (No 3) [\[2015\] VSC 644 \(Elliott J\)](#)

FROM:

PROCEDURE – Costs – Discretion to make non-party costs order – Applicants were sole director and sole shareholder of litigation funder – Litigation funder had only \$100 in paid-up capital – Litigation funder provided funds for plaintiff to continue proceeding below – Plaintiff failed in its claim – Orders for security for costs made during proceedings but were insufficient to cover costs – Defendants sought non-party costs order against applicants and various other persons associated with plaintiff – Trial judge ordered that applicants be jointly and severally liable for payment of defendants' costs – Discretion to order costs to

be exercised judicially – Costs awarded dependent on the justice of the case – Costs order against non-parties exceptional in sense that usual costs orders made against party to proceeding – Factors to be taken into account include financial position of party against whom order would be made, whether security for costs orders made, whether non-party has ‘real interest’ in litigation, amount of funding contributed and whether non-party agreed to provide indemnity – Whether the trial judge erred by ‘piercing the corporate veil’ – Plaintiff and litigation funder impecunious – Making a non-party costs order against company director is not piercing the corporate veil – Plaintiff maintained ultimate control of litigation but applicants had direct interest beyond mere recovery of funds – Litigation funder could be properly characterised as a party to proceedings – Judge’s exercise of discretion did not miscarry – Leave to appeal refused – [Supreme Court Act 1986 s 24\(1\)](#) – *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 – *Campbell’s Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 336 – *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43; (2009) 239 CLR 75 – *Deutsche Bank AG v Sebastian Holdings Inc & Anor* [2016] EWCA Civ 23; [2016] 4 WLR 17

APPEARANCES:

Counsel

Solicitors

For the applicant

Dr L Vout with

Gadens Lawyers

For the first to third respondents Mr L Christensen

Flory Partners

Mr ST Pitt with

Ms S Scully

WEINBERG JA

FERGUSON JA

KAYE JA:

Introduction

1 In 2011, Bakers Investment Group (Australia) Pty Ltd^[1] (‘Bakers’), the plaintiff and defendant by counterclaim below, brought a proceeding against Caason Investments Pty Ltd^[2] (‘Caason’) and others,^[3] the defendants and plaintiffs by counterclaim below.

2 The case concerned an agreement between Bakers and Caason regarding the funding of an exploration and development opportunity in relation to a coal mine in northeast Tasmania. Each side made claims against the other with respect to a number of alleged breaches of that agreement.

3 On about 7 February 2014, Bakers obtained litigation funding from Global Litigation Funding Pty Ltd^[4] (‘Global’) to enable it to continue the litigation.

4 Ultimately, Bakers failed in its claim. A number of security for costs orders had been made during the course of the proceedings. These included an order made during the course of the trial itself. The amount of security ordered was less than the amount claimed by Caason and the other defendants for their costs of the proceeding. They sought non-

party costs orders against various persons associated with Bakers^[5] (defined below by the judge as the 'Associated Non-Parties') and also against Global, its sole shareholder, Esplanade Holdings Pty Ltd ('Esplanade') and Mr Ryan Carter (Carter Jnr) and his father, Mr Rodney Carter (Carter Snr) (defined below by the trial judge as the 'Funding Non-Parties').

5 Relevantly, Carter Jnr was, at all relevant times, a director and secretary of Global. He was also, at all relevant times, a director and secretary of Esplanade. Judgment was delivered on 4 December 2014. After that date, but before the non-party costs application was heard, Carter Jnr became a shareholder in Esplanade.

6 The trial judge, having found in favour of Caason, made orders^[6] that Global, as well as Esplanade and Carter Jnr, pay Caason and the other defendants' costs of and incidental to the proceeding, on the standard basis, dating from 7 February 2014. His Honour ordered that they be jointly and severally liable for the payment of those costs. He rejected a submission on behalf of Caason that a number of Associated Non-Parties, all of whom, as we have said, were linked with Bakers, also be required to pay non-party costs.

7 Carter Jnr and Esplanade seek leave to appeal against the non-party costs orders made against them. For the reasons which follow, we would refuse leave as, in our opinion, the proposed grounds of appeal have no 'real prospect of success'.^[7]

Legal principles

8 Before this Court would interfere with the discretionary order as to costs that was made, it would be necessary for an error of the *House v The King*^[8] kind to be demonstrated. That is, it would need to be shown that the judge made his decision based upon a wrong legal principle, or made a mistake as to the facts, or took into account an irrelevant matter, or failed to take into account a relevant matter, when weighing the various considerations to arrive at his decision. Alternatively, it would have to be shown that the decision was so unreasonable or plainly unjust that this Court could infer that there was a failure properly to exercise the discretion.^[9]

9 When the discretion that has been exercised is one as to costs, there is a high hurdle to be overcome by an applicant before this Court will interfere.^[10] The trial judge is in the best position to determine who should bear the costs of a proceeding and it is not for this Court to substitute its decision for that made below unless the applicant establishes a relevant error that vitiates the exercise of that discretion.

10 It is evident from the terms of [s 24\(1\)](#) of the [Supreme Court Act 1986](#) that the discretion vested in a judge regarding costs is a broad one. That provision reads:

Unless otherwise expressly provided by this or any other Act or by the [*Supreme Court Rules*], the costs of and incidental to all matters in the Court ... is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.^[11]

11 As can be seen from the terms of [s 24\(1\)](#), provided that the discretion is exercised judicially, costs may be awarded against a non-party. Ordinarily though, costs are only awarded against an actual party to a proceeding. In this sense, the authorities speak of an order against non-parties as exceptional.^[12]

12 In *Knight v FP Special Assets Limited*,^[13] Mason CJ and Deane J (Gaudron J agreeing) stated:

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 a [person] 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.^[14]

13 Each case must depend upon its own particular facts. There are, however, a number of factors that are commonly taken into account in determining whether or not to exercise the judicial discretion in favour of making an order against a non-party. Such matters include: the financial position of any party against whom a costs order would be made; whether there have been orders made for security for costs; whether the non-party has a 'real interest' in the litigation, and if so, its extent; the amount of funding contributed by the non-party; and whether the non-party has agreed to provide an indemnity if an adverse costs order is made against a funded party.^[15]

Judge's reasons

14 The judge's reasons deal with both the application for orders against the Associated Non-Parties and the Funding Non-Parties. His Honour first set out the relevant principles to be applied.^[16] He then considered the financial position of Bakers, and concluded that it was a 'person of straw'.^[17] The judge then turned to the exercise of his discretion in respect of making orders against the Associated Non-Parties.^[18] He concluded that the circumstances did not warrant the making of a costs order against any of them.^[19]

15 The judge then considered the position of the Funding Non-Parties. He discussed the principal authorities upon which they relied in resisting any non-party costs order, and set out why he regarded them as being of little assistance in the current circumstances. We will return to discuss those authorities later in these reasons.

16 The judge set out those matters that he thought relevant to the exercise of his discretion. He noted that the funding agreement between Global and Bakers required Global to pay an amount of up to \$100,000 immediately towards security for costs.^[20] He noted that Global was entitled to a percentage of any amount that Bakers received from the litigation, including interest and costs. He observed that if Bakers were successful in its claim, Global would receive a very substantial return on its investment.^[21]

17 The judge referred to other provisions in the funding agreement as follows:

(1) Bakers agreed to grant a charge over all of its interest in the proceeding, and its claim against the defendants, in order to secure Bakers' obligations under the funding agreement.

(2) In the event that Bakers were to be successful in the proceeding, it was required to repay Global all funding that had been advanced for legal costs and disbursements, before paying a percentage of the gross amount awarded to, or agreed to be paid to, Bakers, including interest and costs.

(3) Bakers was required to provide Global with detailed monthly reports on the status and progress of the proceeding, or at more frequent intervals, as requested by Global.

(4) Bakers retained the right to direct the conduct of the proceeding.

(5) Bakers agreed to consult with Global 'on all matters'.

(6) Bakers agreed it would not settle the proceeding, or reject an offer to do so, without engaging in reasonable prior consultation with Global.

(7) If the parties could not agree upon a settlement proposal, there was a mechanism by which the question could be referred to senior counsel for advice (being senior counsel for Bakers) or, if unable to be resolved, to independent senior counsel. In the event that the parties could still not agree, Bakers retained unfettered power to settle or not settle the proceeding.

(8) Global was entitled to request such information as it reasonably required in relation to the conduct and progress of the proceeding.

(9) Bakers agreed that it would not retain solicitors to act for it in the proceeding, other than those identified in the agreement, without Global's prior written approval.^[22]

18 The judge observed that Bakers retained ultimate control throughout of the conduct of the litigation. However, Global retained a right to closely monitor the conduct of the proceeding and any settlement discussions.^[23] In relation to this latter matter, the judge noted that Global had the right to have direct input in relation to the outcome of the discussions, although as indicated, Bakers had the final say.^[24]

19 The judge stated that, in contrast with the Associated Non-Parties, against whom an order had been sought, the Funding Non-Parties, and in particular, Global, had a 'very substantial interest in the proceeds of any judgment in favour of Bakers, which went beyond the mere recovery of funds provided.'^[25] His Honour said:

Global Litigation's interest in such proceeds was represented by both payment of a significant portion of any judgment (including interest and costs) and by way of a security interest over the whole amount.^[26]

20 The judge considered that it was relevant that security for costs orders had been made. He observed, however, that this was but one factor to take into account.^[27] In his opinion, other matters that were relevant to the exercise of the discretion were:

(1) the litigation would not have proceeded to the end of trial and judgment but for Global's involvement;^[28]

(2) Global was in the business of funding commercial litigation for profit;^[29]

(3) before the trial began, the defendants' solicitors had written to Global and Carter Jnr putting them on notice that Caason and the other defendants reserved their rights to make an application for non-party costs orders against them, giving them more than two weeks to consider whether they should continue to support the litigation;[30]

(4) no response was received to that letter;[31]

(5) Global took part in the mediation that was held in the proceeding, with that mediation being attended by Carter Snr on behalf of Global.[32]

21 The judge noted that it was common ground that Global was in the sole business of seeking to make profits from commercial litigation with its business model being based upon it making an investment of a relatively small amount for what would be potentially a very significant profit if the litigation were successful.[33] His Honour observed that Global's entitlement would have included the benefit of a significant part of the costs order in favour of Bakers, had the plaintiff succeeded in the litigation.[34] He noted that because Global had funded the litigation, Caason and the other defendants had engaged in a nine day trial. Moreover, the community had borne the expense of that trial, involving both Court staff and other resources.[35]

22 The judge contrasted Global's position with that of the Associated Non-Parties. Those persons had become involved in the litigation in order to ensure that they carried out the various duties that they owed to Bakers.[36] Global's position, on the other hand, was one of involvement in the litigation purely for its own commercial gain. Global was simply funding a private dispute between parties with whom it had no earlier association.[37]

23 Taking all these matters into account, the judge determined that it was appropriate to make an order against Global that it be jointly and severally liable for the costs ordered against Bakers.

24 In reaching this conclusion, the judge noted that Global was not merely a passive funder, but by reason of what it stood to gain, could properly be characterised as a party to the proceeding.[38] His Honour stated that the order would be limited to those costs incurred from the time that Global became involved in the litigation, which was on or about 7 February 2014, sometime well after the proceeding was commenced in 2011.[39]

25 Next, the judge considered the position of Carter Jnr and Esplanade. Having noted that Global had only \$100 in paid-up capital, and that there was no evidence to suggest that it held any significant assets, (and noting that it was not a requirement for a non-party costs order to be made that a person against whom such an order is contemplated have a direct financial interest in the outcome of the proceeding),[40] the judge said:

In my view, it would not be in the interests of justice if corporate funders were able to be established with limited paid up capital and virtually no assets, so that those truly standing behind the litigation would not be exposed to any adverse costs order. A costs order against such persons associated with the funder does not, in substance, ignore the independent legal entity of a company, but rather ensures that the costs order is directed to those persons who

in substance were funding the litigation and, to the extent they were, exercising influence or control in relation to the litigation.

Carter Junior and Esplanade Holdings, being the sole director and secretary, and the sole shareholder, respectively, of Global Litigation at the relevant times are the persons that have, in substance, stood behind the litigation. As noted..., both Carter Junior and Esplanade Holdings were given express notice of the defendant's intention to seek a non-party costs order to be made against them in the event that the defendants were successful. In my view, the costs order ought to include both of them.

For completeness, neither of them... put any evidence before the court as to their involvement. Although not necessary for the conclusion reached, it should be noted that the absence of any such evidence gives rise to an adverse inference as to the level of their involvement.^[41]

26 The judge determined that no order should not be made against Carter Snr because, although he attended the mediation on behalf of Global, that did not indicate that he was 'standing behind', or was to benefit personally from the litigation.^[42]

27 The judge concluded by noting that he would make orders that each of Carter Jnr, Esplanade and Global be jointly and severally liable with Bakers for the costs of the proceeding. As indicated, he limited those orders to costs incurred on and from 7 February 2014. He otherwise dismissed Caason's summons seeking non-party costs against Carter Snr and the Associated Non-Parties.^[43]

Proposed grounds of appeal

28 The proposed grounds of appeal ultimately reduce to two questions:

(a) as a preliminary step, did the judge err in considering that Global should be liable for the costs of Caason and the other defendants?

(b) did the judge err in the exercise of his discretion in ordering that, as Global was without any significant assets, Carter Jnr (its sole director) and Esplanade (its sole shareholder) should each be responsible for the costs of Caason and the other defendants?

Should an order have been made against Global as the litigation funder? (Proposed grounds 3 and 4)^[44]

29 The applicants before this Court submitted that the judge had made the order against Global simply because it was a litigation funder, without more. They contended that this was an error as it was an insufficient basis for the making of the order. They submitted that, since the decision in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd*,^[45] litigation funders were no longer to be viewed with disfavour in the way that the courts had previously done.

30 The applicants submitted that litigation funders are now part of the landscape of modern litigation. They contended that the funding agreement between Global and Bakers contained standard terms of a kind that one would now routinely expect in agreements of

that type. They argued that what was said in Knight must now be understood in context, having regard to the change in policy and approach to litigation funding that had occurred.

31 These submissions must be rejected. In Campbell's, a litigation funder ('Firmstones') encouraged tobacco retailers to make a claim for refund of licence fees. Firmstones instructed solicitors, and caused them to commence representative proceedings, each brought in the name of a tobacco retailer, but without naming any specific person as a 'represented retailer'. An 'opt-in' procedure, by which persons might later consent to becoming plaintiffs, was proposed. The draft opt-in notice set out the role that Firmstones would play in the litigation. It provided, for example, that it would give instructions and enter into settlement agreements, and recorded that Firmstones would receive one third of any amount awarded.

32 The trial judge ruled that the entire proceeding was an abuse of process and contrary to public policy. The New South Wales Court of Appeal allowed the appeal and reversed that decision. The High Court dismissed the appeal from that court.

33 It can fairly be said that Campbell's stands for the proposition that the mere fact of the existence of a litigation funder does not render the proceeding an abuse of process. Nor does it warrant condemnation of the proceeding as being against public policy.

34 The High Court's conclusion in that regard says nothing about who should pay the costs of a proceeding, and whether they should ever be borne by a litigation funder. Here, the question for the judge was whether it was just to order that the funder should bear the costs, having regard to Baker's impecuniosity and the extent of Global's involvement and interest in the proceeding. The judge was required to consider quite different matters from those which would have been relevant if he was determining whether the proceeding constituted an abuse of process.

35 Similarly, the High Court's decision in Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd^[46] (upon which the applicants relied) does not assist. There, the relevant rule of court provided that costs could only be ordered against a non-party who had committed an abuse of process. It was held that no such abuse had occurred. Inevitably, as a consequence, the litigation funder could not be ordered to pay non-party costs.

36 The applicants' reliance on Murphy v Young & Co's Brewery^[47] and Tharros Shipping Co Ltd v Bias Shipping Ltd (The Griparion) (No. 3)^[48] is also misplaced. Those cases concern legal expense insurers, not litigation funders. By way of contrast to the position of Global, the legal expense insurers did not stand to gain a percentage of the fruits of the litigation.

37 Knight has not been overturned. Indeed, in Jeffery & Katauskas, the plurality distinguished Knight as a case in which the general discretion of the court to award costs against non-parties was discussed, compared with the more restrictive discretion created by the rules of court that only permitted non-party costs to be ordered if there was an abuse of process.^[49] Knight remains binding on this Court.

38 The question remains whether, in the circumstances of this case, the judge erred in making Global liable for the defendants' costs. In our view, he did not. Here, Global had more than a mere right to recover the funds it had advanced. It had a direct interest in, and entitlement to, a substantial part of the fruits of the litigation, if Bakers succeeded. Global took a charge over Bakers' assets to secure its interest. As the judge observed, Global

was involved in the litigation purely for commercial gain. There was no public interest component to the proceeding. Importantly, Global was not merely a passive funder – it had rights to information and involvement in decision making in the litigation. Funding the litigation had consequences for the Caason and the other defendants (continuation of the litigation against them), the Court and the justice system. The litigation would not have proceeded to completion were it not for Global. Global and Carter Jnr were specifically put on notice at an early stage that costs may be sought against them. Those circumstances constituted an ample basis for the exercise by the judge of the discretion in favour of a costs order against Global.

39 Proposed grounds 3 and 4 have no real prospect of success. We would not grant leave to appeal in respect of either of those grounds.

Should an order have been made against Carter Jnr and Esplanade, given Global's financial position? (Proposed grounds 1 and 2)^[50]

40 The applicants' primary submission was that there was no distinction of any real consequence between them and the Associated Non-Parties. Yet the judge had treated them differently by making them liable for costs whilst declining to make a similar non-party costs order against the Associated Non-Parties. That argument is unpersuasive. What the judge had to consider, and what this Court on appeal has to consider, is whether an order should have been made against Esplanade and Carter Jnr, taking into account matters relevant to their respective positions.^[51]

41 In any event, whilst there are some parallels between the Associated Non-Parties, and the Funding Non-Parties, there is at least one significant point of distinction between them. The Associated Non-Parties each had a direct connection with the plaintiff, Bakers. As such, they were not, in truth, strangers to the litigation as the applicants were. The only connection that Carter Jnr and Esplanade had to the plaintiff, and the litigation, was through Global as a litigation funder for commercial gain. They were not interested in vindicating any rights of their own.

42 Global has \$100 of paid up capital. There was no evidence that it had any other assets. Nor was there any evidence of Global's ability to meet a costs order made against it. In those circumstances, Global may properly be described as 'a person of straw.' That being the case, the judge appropriately considered whether orders should be made against Carter Jnr and Esplanade to reduce the risk that the Caason and the other defendants (as successful parties in the litigation) might be deprived of their costs.

43 Carter Jnr was, as we have said, the sole director of Global and the sole director of its shareholder, Esplanade. He was the controlling mind and will of both companies. The sole business of Global was to fund litigation. Based on those facts alone, the judge was entitled to describe Carter Jnr and Esplanade as standing behind the litigation. The applicants' submission that there was no evidence to support that finding must be rejected.

44 As the judge said, had it been necessary, the fact that Global, Esplanade and Carter Jnr did not adduce any evidence in opposition to the costs application made against them, meant that an adverse inference, as to their level of involvement in the litigation, might more easily be drawn.^[52]

45 The applicants' contentions to the contrary are not persuasive. They were on notice at all relevant times that an application for costs against them would be made. They knew the basis for that application. Yet they chose not to put on evidence when they were best placed to do so, having personal knowledge of any relevant facts bearing upon the extent of their own involvement.[\[53\]](#)

46 The judge did not state expressly that he inferred that Carter Jnr had a financial interest in the outcome of the litigation (either directly or indirectly through family members, related companies, trusts or the like). Nevertheless, on the material before this Court, that would have been a legitimate inference to draw. It is one which can more comfortably be drawn because of the lack of any evidence from, or on behalf of, Carter Jnr.[\[54\]](#)

47 The applicants' complaint that the judge placed too little weight on the fact that security for costs had been paid, including by Global, and that Global had not provided an indemnity to Bakers in respect of any costs' orders made against it, does not disclose any appealable error. The judge noted that these were factors to be taken into account.[\[55\]](#)

48 The judge's decision to order costs against the applicants cannot be regarded as unreasonable. Nor can it be said to be plainly unjust. Consequently, no inference can be drawn that his Honour failed to exercise his discretion properly by not taking into account both the lack of an indemnity, and the fact of security paid.[\[56\]](#) He attributed to both matters the weight that he deemed appropriate, and it was within the scope of his discretion to do so.

49 The applicants' submission that the judge was too ready to lift the corporate veil misunderstands the jurisdiction to make a costs order against a non-party. Costs are awarded dependent upon the justice of the case. A successful party would ordinarily expect to be awarded costs. Where the unsuccessful party who would ordinarily bear the costs is impecunious, the ordinary costs order would leave the successful party exposed and out of pocket. That would not be a just outcome.

50 Consequently, in those circumstances, the courts look to non-parties primarily from the perspective of their involvement in the conduct of the litigation, and their interest in its subject matter. Other factors are of course relevant. It is relevant, for example, to consider whether security for costs had been sought by the successful defendant. It is also relevant to take into account whether notice was given that costs may be claimed against a non-party litigation funder. But, returning to the central proposition, the Court is not 'piercing the corporate veil.' Rather, it is making an order appropriate to fit the justice of the case as to who should bear the burden of costs. In doing so, the Court naturally takes into account any corporate structure that is in place but does not let that swamp all other relevant considerations.

51 The Court of Appeal of England and Wales recently considered the issue of costs orders against a director of a company in *Deutsche Bank AG v Sebastian Holdings Inc & Anor.*[\[57\]](#) In responding to the submission that such an order would amount to piercing the corporate veil, and treating both the company and director as one person, the Court said:

In one sense that might appear at first sight to be true, but it is necessary to bear in mind that on an application of this kind the court is not concerned with legal rights and obligations but with a broad discretion which it will seek to exercise in a manner that will

do justice. In *Threlfall v ECD Insight Ltd v ECD Insight Ltd (Costs)*...
Lewison LJ said...:

“If a non-party costs order is made against a company director, it is quite wrong to characterise it as piercing or lifting the corporate veil; or to say that the company and the director are one and the same. As Mr Shaw has demonstrated, the separate personality of a corporation, even a single-member corporation, is deeply embedded in our law. But its purpose is to deal with legal rights and obligations. By contrast, the exercise of discretion to make a non-party costs order leaves rights and obligations where they are. The very fact that the making of such an order is discretionary demonstrates that the question is not one of rights and obligations of a non-party, for no obligations exist unless and until the court exercises its discretion. Moreover the fact that the discretion, if exercised, is exercised against a non-party underlines the proposition that the non-party has no substantive liability in respect of the cause of action in question.”

It is for that reason that, in appropriate circumstances, the court may find that the third party is the real party to the litigation because he is controlling, and perhaps funding, the litigation and conducting it for his own benefit rather than that of the nominal party to the proceedings. Although the court will not ignore the corporate structure, it is entitled when exercising its discretion in relation to costs to have regard to considerations of that kind.^[58]

52 Indeed, there are many examples in this country where those standing behind corporate entities have been ordered to pay costs. Knight is but one such example.

53 Proposed grounds one and two must fail.

Conclusion

54 The judge’s exercise of discretion to make costs orders against the applicants did not miscarry. An order was appropriately made against Global, as litigation funder, given the impecuniosity of the plaintiff, the funder’s interest in the proceeding and the extent of its involvement in the litigation.

55 The judge was correct to be satisfied that Global was of no financial substance. In those circumstances, his Honour correctly considered the position of the funder’s shareholder and director and concluded that they both stood behind the litigation. He was entitled to arrive at that conclusion. Having taken account of all relevant matters, he made costs orders against the applicants. There was no error of any discernible kind in his having done so.

56 The application for leave to appeal should be dismissed.

^[1] Bakers is named as the fourth respondent but took no part in the proceeding in this Court.

^[2] The first respondent.

^[3] The second and third respondents.

^[4] Global is named as the fifth respondent but took no part in the proceeding in this Court.

^[5] Orders had already been made dealing with Bakers' liability to pay the defendants' costs of the proceeding.

^[6] *Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd (No 3)* [2015] VSC 644 ('Reasons').

^[7] *Supreme Court Act 1986* s 14C, *Kennedy v Shire of Campaspe* [2015] VSCA 47 [12].

^[8] [1936] HCA 40; (1936) 55 CLR 499 ('House').

^[9] Ibid, 504–5 (Dixon, Evatt and McTiernan JJ).

^[10] *Ballantyne Sweets Pty Ltd v Ballantyne Chambers Pty Ltd (in liquidation)* [2014] VSCA 223 [40] and the cases cited in that paragraph.

^[11] There is nothing in any other Act or the *Supreme Court Rules* that affects this application.

^[12] *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 [103]; *Ipex ITG Pty Ltd (in liq)(recs appointed) v Victoria (No 2)* [2014] VSCA 315 [36]; *Heath v Greenacre Business Park Pty Ltd* [2016] NSWCA 34 [80] (Gleeson JA, Macfarlan and Leeming JJA agreeing).

^[13] (1992) 174 CLR 178 ('Knight').

^[14] Ibid 192–193, 202 (Dawson J).

^[15] See Reasons [16] and the authorities to which reference is made in that paragraph.

^[16] Reasons [11]–[16].

^[17] Reasons [30].

^[18] Reasons [37]–[48].

^[19] Reasons [49].

^[20] Reasons [68].

^[21] Reasons [69].

^[22] Reasons [70].

^[23] Reasons [71].

[\[24\]](#) *Ibid.*

[\[25\]](#) *Ibid.*

[\[26\]](#) *Ibid.*

[\[27\]](#) Reasons [73].

[\[28\]](#) Reasons [75].

[\[29\]](#) Reasons [80].

[\[30\]](#) Reasons [81].

[\[31\]](#) Reasons [83].

[\[32\]](#) Reasons [84].

[\[33\]](#) Reasons [86].

[\[34\]](#) *Ibid.*

[\[35\]](#) Reasons [87].

[\[36\]](#) Reasons [88], [38]–[39].

[\[37\]](#) Reasons [88].

[\[38\]](#) Reasons [89].

[\[39\]](#) *Ibid.*

[\[40\]](#) Reasons [90]–[91].

[\[41\]](#) Reasons [92]–[94].

[\[42\]](#) Reasons [95].

[\[43\]](#) Reasons [96].

44. [\[44\]](#) Proposed ground 3 is that the judge erred in the exercise of his discretion by placing excessive weight on the nature of the litigation funder as a litigation funder, without more, as a preliminary step to rendering the applicants jointly and severally liable for the defendants' costs of the trial as ordered. Proposed ground 4 is that the judge erred in applying *Knight*.

[\[45\]](#) [\[2006\] HCA 41](#); [\(2006\) 229 CLR 386](#) ('*Campbell's*').

[\[46\]](#) [\[2009\] HCA 43](#); [\(2009\) 239 CLR 75](#) ('*Jeffery & Katauskas*').

^[47] [\[1996\] EWCA Civ 1000](#); [\[1997\] 1 WLR 1591](#).

^[48] [\[1997\] 1 Lloyd's Rep 246](#).

^[49] *Jeffery & Katauskas* 94-95 [31]–[33] (French CJ, Gummow, Hayne and Crennan JJ).

50. ^[50] Proposed ground 1 is that the judge erred in the exercise of his discretion by concluding, in the absence of evidence and by impermissibly drawing a *Jones v Dunkel* inference that each of the applicants was involved to such a level or extent, that they each 'stood behind the litigation.' Proposed ground 2 is that the judge erred in the exercise of his discretion by placing insufficient weight on the exceptionality of 'piercing the corporate veil' of the litigation funder to render each of the applicants jointly and severally liable for the defendants' costs of the trial as ordered.

^[51] On the hearing of the leave application, counsel for the applicants sought to argue that it was not just to order that the applicants pay the defendants' costs when no like order had been made against other non-parties. Counsel accepted that this argument did not fit within the grounds of appeal and he did not press it.

^[52] Reasons [94]. See *Jones v Dunkel* (1959) 101 CLR 298) ('*Jones v Dunkel*').

^[53] *Blatch v Archer* [\[1774\] EngR 2](#); [\(1774\) 1 Cowp 63](#) at 65; [\[1774\] EngR 2](#); [98 ER 969](#) at 970 (Lord Mansfield); *Australian Securities and Investments Commission v Hellicar* [\(2012\) 247 CLR 345](#), 412 [165]–[166] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

^[54] *Jones v Dunkel*.

^[55] Reasons [64], [73].

^[56] *House* 504–5 (Dixon, Evatt and McTiernan JJ).

^[57] [\[2016\] EWCA Civ 23](#); [\[2016\] 4 WLR 17](#).

^[58] *Ibid* 13 [50]–[51] (citations omitted).