

SUPREME COURT OF QUEENSLAND

CITATION: *Doctors of Optimization Pty Ltd v MPA Engineering Pty Ltd (Subsidiary of Aquatec Maxcon Group Ltd) [No 2] [2024] QCA 61*

PARTIES: **DOCTORS OF OPTIMIZATION PTY LTD**
(appellant)
v
MPA ENGINEERING PTY LTD (SUBSIDIARY OF AQUATEC MAXCON GROUP LTD)
(respondent)

FILE NO/S: Appeal No 3547 of 2023
SC No 16262 of 2022

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 21 February 2023 (Bradley J)

DELIVERED ON: 19 April 2024

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Morrison JA and North and Henry JJ

ORDERS: **1. The appellant, Doctors of Optimization Pty Ltd (ACN 618 587 901) pay the Respondent’s costs of and incidental to the appeal to be assessed on an indemnity basis.**
2. Dr Waqqis Ahmad pay the Respondent’s costs of and incidental to the appeal to be assessed on an indemnity basis.

CATCHWORDS: COSTS – COSTS ON AN INDEMNITY BASIS – COSTS AGAINST NON-PARTY – DIRECTOR OF COMPANY – where the Appellant filed a notice of appeal from a judgment in the trial division – where the Respondent wrote to the Appellant with an explanation as to why the appeal was ‘doomed to fail’ and sought the Appellant’s agreement to the dismissal of the appeal by consent – where the Respondent advised that if dismissal was not agreed, the costs of the appeal would be sought on an indemnity basis against the Appellant and also its sole director personally – where the sole director of the Appellant was a non-party – where the appeal was dismissed – where the Respondent sought costs on an indemnity basis from the Appellant and also its sole director personally – where neither the Appellant nor its sole director filed any submissions on costs – whether the

Appellant and the sole director as a non-party be ordered to pay the costs personally on an indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 681(1), r 703(1)

Doctors of Optimization Pty Ltd v MPA Engineering Pty Ltd [2023] QCA 219, cited

Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397; [1988] FCA 364, cited

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 801, cited

Karam v Palmone Shoes Pty Ltd [2012] VSCA 97, cited

Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, cited

Naomi Marble and Granite Pty Ltd v FAI General Insurance Co Limited (No 2) [1999] 1 Qd R 518; [1998] QSC 18, cited

COUNSEL: Dr Waqqis Ahmad appeared as Director for the Appellant
T Pincus appeared for the Respondent

SOLICITORS: Dr Waqqis Ahmad appeared as Director for the Appellant
Gadens Lawyers for the Respondent

[1] **MORRISON JA:** I agree with North J.

[2] **NORTH J:** On 21 March 2023, the Appellant filled a notice of appeal. On 10 November 2023 the appeal was dismissed; reasons were published.¹ The Respondent sought costs, on an indemnity basis, from both the Appellant company and also its sole director Dr Waqqis Ahmad, who represented the Appellant at the hearing of the appeal. Directions were made for written submissions on the question of costs and for the questions to be determined on the papers.

[3] The Respondent filed and served its submission upon both the Appellant and Dr Ahmad.

[4] Neither the Appellant nor Dr Ahmad have filed any submissions.

[5] In the circumstances of this appeal, having regard to the issues and arguments agitated by the Appellant and its director and the success of the Respondent, in the exercise of the Court's direction an order for costs following the event in favour of the Respondent should be made.²

[6] The questions for determination are:

- (a) Whether the costs should be assessed on an indemnity basis;³ and
- (b) Whether Dr Ahmad should be ordered to pay the costs as well as the Appellant.

[7] On 30 March 2023, the Respondent wrote to the Appellant providing a copy of the primary judge's reasons, along with an explanation as to why the appeal was

¹ *Doctors of Optimization Pty Ltd v MPA Engineering Pty Ltd* [2023] QCA 219.

² *Uniform Civil Procedure Rules 1999* (Qld) r 681(1).

³ *Uniform Civil Procedure Rules 1999* (Qld) r 703(1).

‘doomed to fail’ and sought the Appellant’s agreement to the dismissal of the appeal by consent by 6 April 2023. The letter stated that, if the dismissal was not agreed, the Respondent reserved the right to rely on the letter in relation to the costs of the appeal which would be sought on an indemnity basis against the Appellant and Dr Ahmad personally.

- [8] In the letter the Respondent contended, correctly in my view, that the appeal was doomed to fail because the Appellant could not identify any error in the primary judge’s determination namely that the Respondent had an offsetting claim exceeding the value of the alleged debt the subject of the Appellant’s statutory demand.
- [9] There was no meaningful response to the letter.

Indemnity Costs

- [10] Indemnity costs may be awarded in circumstances, where a party, properly advised, would have known that it had no prospects of success so is presumed to have commenced or continued the proceeding in wilful disregard of the facts or law.⁴ A refusal of an offer to compromise can be regarded as imprudent where acceptance of that offer would have resulted in an outcome more favourable than the Appellant could now achieve. This is a well-established basis for an order of indemnity costs.⁵
- [11] In the letter, the Respondent provided the applicant with an explanation of why the appeal was ‘doomed to fail’ and sought the Appellant’s agreement to the dismissal of the appeal by consent by 6 April 2023 with no order as to costs. The Respondent reserved the right to rely on the letter in relation to the costs of the appeal. The letter, if considered by the Appellant or Dr Ahmad in light of sound advice would have brought home to both Dr Ahmad and the company that there were no prospects of success and in turn acceptance of the Respondent’s offer to dismiss the appeal by consent would have resulted in an outcome more favourable than the Appellant could now achieve. The Appellant and its director were imprudent in not accepting the Respondent’s offer.
- [12] The Respondent correctly submits that the Appellant’s ‘self-representation’ does not assist it against an order for indemnity costs, particularly where it was given notice of an intention to seek such costs.⁶ The Respondent’s letter put the Appellant on notice that:

“Should you fail to agree to orders to dismiss the Appeal as requested above, our client ... reserve its right to rely on this letter in relation to the question of costs of the Appeal, which will be sought on an indemnity basis against Doctors of Optimisation and you personally, from the date of this letter.”⁷

Order for payment of costs by a non-party

⁴ *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at [401].

⁵ *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at [5].

⁶ *Karam v Palmone Shoes Pty Ltd* [2012] VSCA 97 at [33] to [38].

⁷ Affidavit Beau Foley filed 10 November 2023, (BF).

- [13] The Respondent seeks an order that Dr Ahmad pay the costs. The discretionary power to make such an order is well established.⁸ The power is not limited to but can be exercised in some or all of the following circumstances:⁹
- (a) The party to the litigation is an insolvent person or a “man of straw;”
 - (b) The non-party has played an active part in the conduct of the litigation;
 - (c) The non-party has interest in the subject matter of the litigation;
 - (d) The conduct of the litigation was unreasonable or improper; and
 - (e) The non-party has been warned that such an order may be sought.
- [14] It is important to recognise that whilst the Court has discretionary power to make an order against a non-party, such an order is exceptional and should only be made in circumstances where it is in the interests of justice to justify such a course.¹⁰ In this appeal all of the circumstances which, in the interests of justice, justify making the order sought by the Respondent are present.

Discussion

- [15] The Respondent submits that it should be inferred that the Appellant is a “man of straw”. The evidence relied upon by the Respondent supports this submission. In an affidavit by Dr Ahmad filed in support of the interlocutory application to the Federal Court, Dr Ahmad deposes to there being no books and records in respect to the Appellant; and that “All my money is in the Defendant's custody how can I bring a paid legal representation”. On the 18 September 2023, the Respondent conducted an ASIC company search for the Appellant dated and confirmed that the current issued capital of the Appellant to be \$100.00. On the 18 September 2023, the Respondent conducted a Land Title search which confirmed the Appellant does not own any property in Queensland. A NSW Land Title search confirmed the Appellant does not own any property in that state.
- [16] The Respondent submits that as the Appellant’s sole director and shareholder, Dr Ahmad can readily be characterised as the real party. The evidence supports this submission. Dr Ahmad has described the Appellant as his “home-based one-man-only company.” It is apparent that the Appellant is a vehicle through which Dr Ahmad personally provides services of the kind for which his statutory demand claimed an entitlement to payment.
- [17] Dr Ahmad has played the only active part in the conduct of the appeal for the Appellant. The conduct of both the Appellant and Dr Ahmad can be categorised as an act of *imprudent refusal of an offer to compromise*.
- [18] There are compelling grounds to order costs on the indemnity basis with orders for Dr Ahmad, as a non-party to pay personally.
- [19] The orders should be:

⁸ *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at [192]-[193].

⁹ *Naomi Marble and Granite Pty Ltd v FAI General Insurance Company Limited (No 2)* [1999] 1 Qd R 518 at [542] – [545].

¹⁰ *Naomi Marble and Granite Pty Ltd v FAI General Insurance Company Limited (No 2)* [1999] 1 Qd R 518 at [542] – [545].

1. The Appellant, Doctors of Optimization Pty Ltd (ACN 618 587 901) pay the Respondent's costs of and incidental to the appeal to be assessed on an indemnity basis.
2. Dr Waqqis Ahmad pay the Respondent's costs of and incidental to the appeal to be assessed on an indemnity basis.

[20] **HENRY J:** I agree with North J.