

Getting money out of straw

Date : January 18, 2017

By Hayley Hitch a Solicitor of Matthews Folbigg, in our Insolvency, Restructuring and Debt Recovery Group.

What do you do when the unsuccessful party, who has just dragged you through the court for no reasonable cause, appears to be a company made of straw? Is it possible to seek costs orders against the director, even though the director is not a party to the proceedings? The Full Court of the Federal Court has recently held that in certain circumstances it will consider such an application.

In *Trustee for the MTGI Trust v Johnston (No 2)* [2016] FCAFC 190, the Court considered what costs orders should be made where it had previously found the application before it had no merit. The Respondent, Mr Johnston, had been awarded compensation by the Fair Work Commission. Two applications by MTGI, as trustee for the MTGI Trust ("**MTGI**"), for leave to appeal the original decision had been refused by the Full Bench of the Fair Work Commission, and MTGI had also lost the application to the Federal Court for a review of the Full Bench's decisions.

In the circumstances, Mr Johnston submitted that:

1. The proceedings had been commenced vexatiously or without reasonable cause;
2. MTGI had an ulterior motive to commence the proceedings (i.e. to avoid enforcement action for decisions made by the Fair Work Commission whilst proceedings were on foot);
3. Within 24 hours of the hearing, MTGI withdrew 5 of its 11 points of claim; and
4. An offer to settle the proceedings (known as a *Calderbank* offer) by dismissing the proceedings with each party to pay its own costs was provided to MTGI but not accepted.

On the grounds stated above, Mr Johnston therefore sought an order that be awarded in his favour, to be payable by MTGI, but importantly, also to be payable by a non-party to the proceedings (Mr Paul Desmond Wallace, sole director and shareholder of MTGI), in accordance with s 570 of the *Fair Work Act 2009* (Cth) ("**the Act**") and s 43 of the *Federal Court of Australia Act 1976* (Cth).

Section 570 of the Act provides a discretion to the Court to make an order for a party to a proceedings to pay the costs incurred by another party in such proceedings where the Court is satisfied that:

1. The party instituted proceedings vexatiously or without reasonable cause; or
2. The party's unreasonable act or omission caused the other party to incur costs; or
3. The party unreasonably refused to participate in a matter before Fair Work Australia and the matter arose from the same facts as the proceedings.

The Court found that MTGI did not commence proceedings vexatiously, as the initial application was not found to be an ‘abuse of process, scandalous, oppressive or embarrassing’. However, the Court did find that the proceedings were commenced without reasonable cause as the application was misconceived and without prospects of success from the time it was instituted (at [15]). The Court also noted that this was the 5th set of proceedings between the parties in respect of essentially the same matter.

Furthermore, the Plaintiff’s failure to accept the reasonable offer set out in Mr Johnstone’s *Calderbank* letter caused significant costs to be incurred by Mr Johnstone to continue with the proceedings.

Costs Against A Non-Party

In respect of whether the costs order should be made against a non-party to the proceedings, the Court noted the cases authorised such an order where:

- The party to the litigation is an insolvent person or man of straw – here MTGI was a \$1 company and there was no evidence from MTGI that its assets exceed \$1, indeed there was evidence that lack of cash meant the company could not afford legal representation;
- Where the non-party played an active part in the conduct of the litigation – the Court was satisfied that Mr Wallace had done so as sole director and shareholder of MTGI;
- Where the non-party has an interest in the subject of the litigation – the Court inferred this from the “aggressive and insulting personal correspondence” from Mr Wallace to the Fair Work Commission which indicated Mr Wallace was interested in pursuing the proceedings “irrespective of the merits of the case” (at [33]);

The Court was satisfied of the overarching requirement that such an order be in the ‘interests of justice’ and made the following Orders:

1. MTGI and Mr Paul Desmond Wallace be jointly and severally liable for the costs of Mr Johnston of and incidental to the proceedings.

The costs referred to in paragraph 1 of these Orders are:

- (a) Fixed in the sum of \$48,387.18; and
- (b) To be paid to Mr Johnston within 28 days of the date of this Order.

The lessons to be learned from this case are:

- It is not always possible to hide behind a corporate vehicle and the Court will look to protect parties dragged into proceedings without reasonable cause, including by means of indemnity costs orders against directors and shareholders personally; and

- The importance of a proper *Calderbank* offer. Had the Defendant failed to make a *Calderbank* offer in these proceedings, the Court may not have granted a costs order on an indemnity basis.

It is important to ensure that a *Calderbank* offer is properly framed and proposes a genuine compromise to resolve the dispute.

It is also prudent that before commencing any proceedings, legal advice is obtained in respect of the prospects of success of the proposed action. Any litigation can be hazardous, with potential personal costs orders part of the risks which need to be factored into bringing any claim.

Read the article/judgment [here](#)

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact Hayley Hitch at hayleyh@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au.