FEDERAL COURT OF AUSTRALIA

Semantic Software Asia Pacific Limited v Vince (Trustee), in the matter of Bradley (Bankrupt) [2020] FCA 1007

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| File number: | NSD 1041 of 2019 |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 16 July 2020 |
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| Catchwords: | **COSTS** – departure from the general principle that costs follow the event – discussion of the discretion under *Federal Court of Australia Act 1976* (Cth) s 43 – where applicant successful – where applicant ordered to bear their own costs of the application and cross-claim  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43*Federal Court (Bankruptcy) Rules 2016* r 2.06  |
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| Cases cited: | *Harrison v Mills* (1976) 1 NSWLR 42 *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 2)* [2020] FCAFC 95*James v Royal Bank of Scotland* [2015] NSWSC 970*Montes-Granados v Minister for Immigration and Multicultural Affairs* [2000] FCA 60*Sahin v National Australia Bank Ltd* [2013] VSCA 93*Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129*Wales v Wales* [2015] VSCA 345Dal Pont GE, *Law of Costs* (4th ed, LexisNexis Butterworths, 2018)  |
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| Date of hearing: | 1-2 July 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Category: | Catchwords  |
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| Number of paragraphs: | 21 |
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| Solicitor for the Applicant/Cross/Cross-Respondent: | S Gupta of Gupta & Co Pty Ltd |
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| Counsel for the Respondent/Cross-Claimant: | B Petrie |
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| Solicitor for the Respondent/Cross-Claimant: | Rigby Cooke Lawyers |

ORDERS

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|  | NSD 1041 of 2019 |
| IN THE MATTER OF MARK WILLIAM BRADLEY |
| BETWEEN: | SEMANTIC SOFTWARE ASIA PACIFIC LIMITED (ACN 134 067 691)Applicant |
| AND: | PETER VINCE AS TRUSTEE IN BANKRUPTCY OF MARK WILLIAM BRADLEYRespondent |
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| AND BETWEEN: | PETER VINCE AS TRUSTEE IN BANKRUPTCY OF MARK WILLIAM BRADLEYCross-Claimant |
| AND: | SEMANTIC SOFTWARE ASIA PACIFIC LIMITED (ACN 134 067 691)Cross-Respondent |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 16 July 2020 |

THE COURT ORDERS THAT:

1. The applicant/cross-respondent bear its own costs of the proceeding and the cross-claim.
2. Otherwise, the proceeding be dismissed with no further order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GLEESON J:

1. The applicant (**SSAP**) sought declarations that funds totalling $210,459.20 (**funds**) held in bank account number 10820125 in the name of “Mark William Bradley and Vicki Rae Bradley as Trustees of MWB Online Super Fund” (**Account**) are the property of SSAP and are not property vested in the respondent (**trustee**), the trustee of the bankrupt estate of Mark William Bradley (**bankrupt**).
2. The trustee opposed SSAP’s claim, by a notice of opposition stated to be filed in accordance with r 2.06 of the *Federal Court (Bankruptcy) Rules 2016.* The notice of opposition referred to a cross-claim filed by the trustee in which the trustee sought determination of several questions concerning the ownership of the funds.
3. After the final hearing commenced and evidence was given by two witnesses for SSAP, the parties agreed that the funds were held on trust by the bankrupt for SSAP.
4. Accordingly, I made an order giving effect to that agreement.
5. The parties disagreed on the question of costs: the trustee argued that SSAP should pay its costs of the proceeding, while SSAP argued that a portion of its costs should be paid from the bankrupt estate.
6. The trustee informed the Court that he does not seek an order that his costs be paid from the bankrupt estate.

# Legal framework

1. Section 43 of the *Federal Court of Australia Act 1976* (Cth) **(Act)** gives the Court a wide discretion in awarding costs, which discretion must be exercised judicially with appropriate regard to guiding principles: *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 2)* [2020] FCAFC 95 at [7]. The exercise of the discretion is to be informed by the interests of justice considered with reference to the facts of the particular case: cf. *James v Royal Bank of Scotland* [2015] NSWSC 970 at [64].
2. The ordinary rule is that costs follow the event. The trustee submitted, in effect, that the relevant event was the answer to the questions on which the Court’s direction was required. However, the proceeding was commenced by SSAP, claiming beneficial ownership of the funds. That claim was opposed by the trustee in a notice of opposition filed on 15 August 2019. SSAP’s claim was vindicated. The fact, which I accept, that the trustee reasonably required directions from the Court as to the ownership of the relevant funds does not detract from the reality that the proceeding resolved SSAP’s claim in its favour. This is the relevant event and, accordingly, in the ordinary course, SSAP would be entitled to an order in its favour for the costs of vindicating its claim.
3. However, in certain circumstances, the Court may depart from the ordinary rule by depriving a successful party of its costs or even by ordering a successful party to pay the costs of its opponent.
4. In *Montes-Granados v Minister for Immigration and Multicultural Affairs* [2000] FCA 60 at [19], Burchett J observed:

The Supreme Court of Victoria held in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991]1 VR 129 that a discretion conferred in similar terms was wide enough to enable the Court, not only to deprive a successful defendant of costs, but even to make an order that the successful defendant pay costs to an unsuccessful plaintiff. In *Knight v Clifton* [1971] Ch 700 at 716, Sachs LJ had taken the same view. Of course, this could only be justified in an extremely rare case. The Court's discretion, as Viscount Cave LC said in an often cited judgment in *Donald Campbell & Co v Pollak* [1927] AC 732 at 811-812 “must ... be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.” See also *Tekmat Investments Pty Ltd v Ward* (1988) 81 ALR 278.

## Trustee’s argument

1. In support of his argument, the trustee referred to the judgment of the Victorian Court of Appeal in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129. That judgment was summarised by Warren CJ in *Sahin v National Australia Bank Ltd* [2013] VSCA 93 at [19] as follows:

… [T]he applicability of an insurance policy was at issue. The plaintiff had made a claim under the policy. After many months, the insurer refused to indemnify the plaintiff but gave no reason for its refusal. Proceedings were commenced. Until the second day of the hearing, the defendant insurer relied upon grounds of defence that were unmeritorious. It was not until the first day of the hearing that the defendant disclosed its true defences to the claim and only sought to rely upon them from the second day of the trial. The plaintiff failed in its claim. Although the defendant was successful, the judge ordered the defendant to pay the plaintiff’s costs on a solicitor/own client basis up to and including the first day of the trial. On appeal, the Full Court held that the circumstances were very exceptional and formed a proper basis for the trial judge to exercise his discretion as to costs in the way that he did.

1. In substance, the trustee contended that the litigation was caused by the inappropriate and suspicious conduct of Mr Bradley in transferring SSAP’s funds into a bank account in the name of a superannuation fund on the day of his bankruptcy and the following day. That conduct necessitated the trustee’s investigations into ownership of the Account and the funds in the Account. Although the trustee sought information to enable him to determine the question, by letter dated 14 November 2018, SSAP did not respond cooperatively. Instead, in June 2019, it commenced proceedings supported by affidavits that raised more questions than they answered. It was only shortly before the final hearing, and after SSAP retained new solicitors, that SSAP put forward an explanation that (with the benefit of cross-examination) led to the trustee’s acceptance that the funds were beneficially owned by SSAP.
2. The trustee submitted that SSAP provided shifting, contradictory and implausible explanations for the movement of the funds to and from the Account. Had SSAP provided a full and frank explanation when it first asserted ownership of the funds, the trustee’s application to the Court would have been straightforward and likely by consent.

## SSAP’s argument

1. SSAP accepted that it should not be awarded costs for the period prior to 1 May 2020 but argued that it should have a lump sum costs order of $20,000, being 65% of its costs thereafter on the basis that the trustee was put on notice by the Court that SSAP would probably succeed in its claim. That notice was said to have been given by the following comment made at a case management hearing on 1 May 2020:

HER HONOUR: … on one view of the evidence that has been served so far, it seems a distinct possibility that Mr Bradley might be found to have taken the money that eventually found its way into the super fund account, in which case I would have thought, Mr Petrie, that raises a question about whether that money should be regarded as the company’s money.

# Consideration

1. I accept that the trustee had good reason to scrutinise SSAP’s claim. The transfer of the funds of a public company into the superannuation account at the relevant times was inherently suspicious. I also accept that Mr Bradley’s claim, made in his first affidavit, that the transfers occurred because of his difficulties in using the Combiz Portal was unconvincing, and a very poor justification for the transfers, particularly where it was not accompanied by SSAP records to show that the directors of SSAP were informed of this practical problem and had endorsed Mr Bradley’s solution.
2. On the other hand, in June 2019, SSAP filed affidavits from Mr Bradley and Mr Mount deposing to facts relevant to the ownership of the funds. From that time, the trustee was on notice that, if SSAP’s evidence was accepted then it would succeed and, in the ordinary course, costs would follow the event. The trustee was also on notice that, for SSAP’s claim not to have been accepted, the Court would probably need to disbelieve the evidence of Mr Bradley and Mr Mount.
3. Further, the fact that the transfers were suspicious did not tend to suggest that the funds were owned by the bankrupt. To the contrary, it raised a suspicion that the funds were owned by SSAP. That point was noted at the 1 May 2020 case management heading.
4. I accept that Mr Bradley’s conduct, apparently on behalf of SSAP, in transferring the funds necessitated the proceeding and accordingly, it is appropriate that SSAP rather than the bankrupt estate (or the trustee) should bear SSAP’s costs. In the circumstances of the case, I consider that it was prudent for the trustee to seek to cross-examine Mr Bradley in order to satisfy himself and the Court that SSAP’s ownership of the relevant funds was the proper conclusion. Accordingly, SSAP should not have its costs from 1 May 2020.
5. I am also not persuaded that SSAP’s conduct justifies an order that SSAP pay the trustee’s costs of the proceeding. Contrary to the trustee’s submissions, I am not persuaded that the affidavits filed by SSAP involved any deliberate dissembling on the part of either deponent. Rather, in my view, it is a case where SSAP’s claim and evidence was treated by the trustee with a very high degree of scepticism, engendered no doubt by the highly suspicious nature of the relevant transactions. Otherwise, I am not persuaded that SSAP conducted itself in the proceeding in a manner that would justify the imposition of those costs upon SSAP. SSAP was entitled to bring the proceeding, which it was required to bring in order to recover its funds.
6. Mr Petrie asked rhetorically why the estate and Mr Bradley’s creditors should bear the trustee’s costs of the proceeding. The answer is that such a result is consistent with the ordinary positions that:
7. an unsuccessful trustee may obtain an order that the costs be paid from the trust fund, unless there are reasons why the trust’s right of indemnity should be denied: Dal Pont GE, *Law of Costs* (4th ed, LexisNexis Butterworths, 2018) at para [10.4]; and
8. on an application for judicial advice, if the application is made reasonably and in good faith, the trust fund bears the cost: *Wales v Wales* [2015] VSCA 345 at [55]; *Harrison v Mills* (1976) 1 NSWLR 42 at 46-47.

# Conclusion

1. Each party should bear its own costs of the proceeding. As the trustee does not seek an order for payment of his costs from the bankrupt estate, the appropriate orders are to the effect that SSAP bear its own costs and otherwise the proceeding be dismissed.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 16 July 2020