Federal Court of Australia

Motor Yacht Sales Australia Pty Limited v Megisti Yacht Charters Limited (No 2) [2020] FCA 1459

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| File number: |  |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 13 October 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – non-party costs order – whether director of companies giving instructions to pursue litigation did so in own interests – whether non-party is connected with unsuccessful respondent companies – whether notwithstanding being respondents the companies were the moving parties – whether just and equitable to make non-party costs order  **SHIPPING AND NAVIGATION** – whether person who lodges a caveat for a caveator can be liable to pay compensation under s 47E of the *Shipping Registration Act 1981* (Cth) – whether without reasonable cause – alternative basis for claim – not necessary to decide |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43  *Shipping Registration Act 1981* (Cth) ss 47A(1), 47B(2), 47E  *Federal Court Rules 2011* (Cth) r 40.02(b)  General Practice Note: Costs Practice Note (GPN-COSTS) paras 4.1, 4.10-4.14 |
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| Cases cited: | *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10)* [2009] FCA 498  *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50; 200 FCR 154  *Gore v Justice Corporation Pty Ltd* [2002] FCAFC 83; 119 FCR 429  *House v The King* [1936] HCA 40; 55 CLR 499  *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5  *Knight v FP Special Assets Ltd* [1992] HCA 28; 174 CLR 178  *Latoudis v Casey* [1990] HCA 59; 170 CLR 534  *Motor Yacht Sales Australia Pty Ltd v Megisti Yacht Charters Ltd* [2019] FCA 1454  *Paciocco v Australia and New Zealand Banking Group Ltd (No 2)* [2017] FCAFC 146; 253 FCR 403  *Tremaine Developments Pty Ltd (in liq) v Courtney Developments Pty Ltd* [2011] VSC 112  *Vanguard 2017 Pty Ltd, Re Modena Properties Pty Ltd v Modena Properties Pty Ltd (No 2)* [2018] FCA 1461  *Vestris v Cashman* (1998) 72 SASR 449  *WA Property Holdings Pty Ltd v Hampton Transport Services* [2017] FCA 1310  *Yates Property Corporation Pty Ltd v Boland (No 2)* [1997] FCA 760; 147 ALR 685  *Yu v Cao* [2015] NSWCA 276; 91 NSWLR 190 |
|  |  |
| Date of hearing: | 1 May 2020 |
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| Registry: | New South Wales |
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| Division: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 41 |
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| Counsel for the Applicant: | J K Kennedy |
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| Solicitor for the Applicant: | Baker McKenzie |
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| Counsel for the Respondents: | R M Higgins (written submissions by C Sweeney QC and R M Higgins) |
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| Solicitor for the Respondents: | Menassa Lawyers |

ORDERS

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|  | | NSD 1346 of 2019 |
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| BETWEEN: | MOTOR YACHT SALES AUSTRALIA PTY LIMITED ACN 139 438 494  Applicant | |
| AND: | MEGISTI YACHT CHARTERS LIMITED  First Respondent  MEGISTI PROTEUS NEPA  Second Respondent  MEGISTI IRIS NEPA  Third Respondent  **MEGISTI NEMESIS NEPA**  Fourth Respondent  **JOHN MICHAEL BARBOUTTIS**  Fifth Respondent | |

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| order made by: | STEWART J |
| DATE OF ORDER: | 13 October 2020 |

THE COURT ORDERS THAT:

1. The fifth respondent, John Michael Barbouttis, is to pay the applicant’s costs of the whole proceeding.
2. The first to fourth respondents are to pay the costs of the proceeding subsequent to 4 September 2019.
3. The liability for costs in Order 1 above is joint and several with the first to fourth respondents’ liability for costs under Order 3 of the orders of 4 September 2019 and Order 2 above.
4. In terms of r 40.02(b) of the *Federal Court Rules 2011* (Cth), the costs referred to in Orders 1 and 2 above and Order 3 of the orders of 4 September 2019 shall be determined on a lump sum basis.
5. Within 14 days, the parties file any agreed proposed minutes of order fixing a lump sum for the costs referred to in Order 4.
6. In the absence of any agreement referred to in Order 5:
7. within a further 7 days, the applicant is to file and serve an affidavit constituting a Costs Summary in accordance with paras 4.10 to 4.12 of the Costs Practice Note;
8. on or before 14 days thereafter, the respondents file and serve any Costs Response in accordance with paras 4.13 to 4.14 of the Costs Practice Note; and
9. a hearing for the making of a lump-sum order be listed (with an estimate of one hour) on a date to be arranged.

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

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. On 4 September 2019, I ordered that a caveat entered in the Australian General Shipping Register in respect of the motor yacht *Hunter* be removed and that the respondent companies pay the costs: *Motor Yacht Sales Australia Pty Ltd v Megisti Yacht Charters Ltd* [2019] FCA 1454 (**first judgment**). The caveat had been lodged by the respondent companies under s 47A(1) of the *Shipping Registration Act 1981* (Cth) (**SR Act**). The applicant’s prayer for “such compensation as is just” by reason of any damage suffered by it on account of the caveat having been lodged “without reasonable cause” under s 47E of the SR Act was stood over for later determination.
2. By an interlocutory application dated 2 October 2019 (as subsequently amended), the applicant sought the following orders:
3. Mr John Michael Barbouttis be joined as a party to the proceeding as the fifth respondent.
4. Leave be granted to the applicant to file the amended originating application in the form annexed to the applicant’s submissions of 6 December 2019.
5. The applicant’s costs of the proceeding, including the costs the subject of Order 3 of the orders of 4 September 2019, be paid by Mr Barbouttis.
6. Liability under Order 3 above and Order 3 of the orders of 4 September 2019 be joint and several.
7. The applicant’s costs of the interlocutory application be paid by Mr Barbouttis.
8. The relief sought by the applicant can be separated into two categories. The first is the joinder of Mr Barbouttis to the proceeding, and amendment of the originating application so as to give effect to that joinder, by way of interlocutory application. The second is the question of costs and compensatory relief under s 47E of the SR Act, for final determination. These issues were listed to be heard together.
9. The interlocutory matters were resolved by consent by way of orders I made at the hearing. I ordered that Mr Barbouttis be joined as the fifth respondent to the proceeding, and granted leave to the applicant to rely on and file its amended originating application. I also ordered that the costs of the interlocutory application filed on 2 October 2019 be costs in the cause of the claims against Mr Barbouttis. Mr Barbouttis consented to his joinder, and I joined him, on the basis that the applicant’s claim against him for costs of the proceeding as a non-party would continue to be determined on the same basis as if he had not been joined, his joinder being necessary for the purpose of the alternative basis upon which costs are claimed against him, namely as compensation under s 47E of the SR Act. In the latter regard, it is to be noted that the applicant claims no compensation under s 47E other than the costs which it incurred in having the caveat removed. Moreover, it is content to claim those on the ordinary party-and-party scale with the result that there is no difference in the quantification of its claims on the alternate bases on which it puts them.
10. These reasons address the claims against Mr Barbouttis for the costs of the principal proceeding, and the costs of the application seeking those costs.

## The evidence

1. The applicant relied on the following evidence:
2. an affidavit of Heather Lindsay Sandell sworn 23 August 2019;
3. an affidavit of Paul George Forbes affirmed 2 October 2019;
4. an affidavit of Paul George Forbes affirmed 11 February 2020; and
5. Exhibit A2, a 189-page bundle of documents comprising extracts from the evidence and the transcript of the first hearing.
6. The respondents relied on the following evidence:
7. Exhibit JMB1 (parts of which form part of exhibit A2);
8. an affidavit of Rachel Therese Menassa sworn 3 March 2020; and
9. Exhibit R3, being an affidavit of Heather Lindsay Sandell sworn 6 December 2019.
10. It is noteworthy that Mr Barbouttis did not put on an affidavit dealing with the costs claim against him personally. He did not explain, for example, what motivated him to lodge the caveats on behalf of the caveators or what his interests were or were not, or to otherwise dispute or dispel the inferences that the applicant submitted were to be drawn against him. Those included that it was Mr Barbouttis and not the companies that paid the legal costs of lodging and defending the caveat. Mr Barbouttis had notice of those inferences in advance of the hearing by way of the applicant’s written submissions, but he still elected not to testify at the hearing. He was content to rely on the evidence that had been adduced in the proceeding to set aside the caveat. No objection was taken to me relying on that evidence, and I consider that I can notwithstanding that Mr Barbouttis was at that time not an actual party to the dispute, although he was the caveators’ director and giving instructions on their behalf. See ***Kebaro*** *Pty Ltd v Saunders* [2003] FCAFC 5 at [84] per Beaumont, Sundberg and Hely JJ.
11. For the same reasons, I consider that I can rely on factual findings made in the first judgment. There was no disagreement with this approach. See ***Yu v Cao*** [2015] NSWCA 276; 91 NSWLR 190 at [147] per McColl JA (Sackville AJA and Adamson J agreeing).

## Factual background

1. The relevant factual background is set out in the first judgment. It is sufficient to note for the present application that a caveat was lodged against *Hunter* on 9 August 2019 by Mr Barbouttis, a solicitor and a director of the respondents, who was involved in the purchase of several pleasure yachts including *Hunter*: first judgment at [30]-[33]. The named caveators are the four respondents in the proceeding, not Mr Barbouttis.

## The relevant law: non-party costs order

1. The court’s power to award costs under s 43 of the *Federal Court of Australia Act 1976* (Cth) includes the power to make costs orders against non-parties. In ***Dunghutti*** *Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50; 200 FCR 154 it was said that the power is enlivened where the non-party is connected with the unsuccessful party to the proceeding, and has caused that party to start, continue or prosecute the proceeding in circumstances where the non-party’s conduct makes it just and equitable that the non-party be visited with an order for costs in favour of the successful party either in addition to such an order against the unsuccessful party or in substitution for such an order: at [88] per Keane CJ, Lander and Foster JJ. The Court held that the only precondition to the exercise of the power is that the non-party has a sufficient connection with the unsuccessful party and the litigation to warrant the court exercising its jurisdiction: at [89]. That connection must be material to the question of costs: ***Vestris*** *v Cashman* (1998) 72 SASR 449 at 467 per Lander J.
2. It is recognised that there are no fixed categories of cases where a non-party costs order is appropriate: *Kebaro* at [103]. However, in ***Knight*** *v FP Special Assets Ltd* [1992] HCA 28; 174 CLR 178 the majority of the High Court identified a “general category” as being 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 they are acting or by whom they have 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: *Knight* at 192-193 per Mason CJ and Deane J (Gaudron J agreeing).
3. The exercise of the discretion to order costs against a non-party has been described as “rare and exceptional”, and should be approached with caution: *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10)* [2009] FCA 498 at [20] per Collier J, and the cases cited there. “Exceptional” in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit: *Yu v Cao* at [139].
4. In ***Yates*** *Property Corporation Pty Ltd v Boland (No 2)* [1997] FCA 760; 147 ALR 685, Branson J applied the above “general category” recognised in *Knight* to hold Mr Yates, a director and shareholder of the applicant company, personally liable for the costs of a failed suit. It was found that the applicant was a “man of straw” and on the basis of Mr Yates having been able to exercise three quarters of the total votes at a meeting of shareholders, having given all the significant instructions in the proceeding, and having had a real and personal interest in the subject of the litigation, that he should be personally liable for the costs: at 695.
5. Orders for costs were made on similar grounds against directors and shareholders of litigant companies who turned out to be unable to meet any costs order against them in *WA Property Holdings Pty Ltd v Hampton Transport Services*[2017] FCA 1310 at [19] per Gilmour J and *Tremaine Developments Pty Ltd (in liq) v Courtney Developments Pty Ltd* [2011] VSC 112 at [12] per Croft J. However, in *Vanguard 2017 Pty Ltd, Re Modena Properties Pty Ltd v Modena Properties Pty Ltd (No 2)* [2018] FCA 1461, Thawley J (at [46]) cautioned as follows:

There is often little difficulty connecting with the proceedings the actions of a director of a company which is a party to the proceedings. In the case of a sole director company, the director is the controlling mind of the company. However, it is obviously not sufficient of itself that the director, being actively involved in the proceedings, caused the company to defend proceedings. Such conduct is consistent with the director’s duties to the company and would not be described as “exceptional” so as to disengage the ordinary rule that it is the parties to the proceedings who bear the costs. However, there may be situations where the director’s conduct is such that a non-party costs order is appropriate. The question might arise, for example, where the director’s management of the litigation was in breach of a duty to the company or was in some material way improper, or where the director caused the litigation to be conducted in a manner intended to increase irrecoverable costs of the opposing party. Such circumstances are potentially capable of warranting the exercise of the discretion to award costs against a non-party director.

## The submissions of the parties

1. The applicant submitted that a non-party costs order against Mr Barbouttis is justified, and set out five reasons why this is so. These can be summarised as follows:
2. The respondents are foreign companies with no apparent assets.
3. The caveat was lodged in order to defend Mr Barbouttis’s personal interests.
4. The proceedings in which the respondents sought to maintain the caveat were pursued by the respondents at the direction of Mr Barbouttis.
5. Although the applicant brought the application to remove the caveat, the onus was on the respondents to justify the maintenance of the caveat, in effect making the respondents the moving party.
6. The lodging and maintenance of the caveat was unreasonable in all of the circumstances.
7. The respondents submitted that a costs order against Mr Barbouttis would not be in the interests of justice. They gave four reasons for this, which can be summarised as follows:
8. Mr Barbouttis was not acting in his own personal interests, but to protect the interests of the companies.
9. The applicant knew, before it applied for the removal of the caveat, that the respondents were Greek companies and were likely to have no assets. The applicant was aware of Mr Barbouttis’s role in lodging the caveat, but did not seek to join him earlier in the proceedings. From this it can be inferred that the decision to seek orders against Mr Barbouttis came only after the outcome of the first judgment was known.
10. The applicant gave no notice of its intention to join Mr Barbouttis or to seek a costs order against him before the first hearing. Had notice been given, the respondents and Mr Barbouttis would have been able to consider the risk of such a costs order, and might have elected to withdraw the caveat. The question of notice is important in considering whether the costs order sought is in the interests of justice.
11. Parties should be discouraged from “testing the waters” by waiting for judgment before adding to their claims. In this case, the applicant waited for judgment, and for the time period within which to lodge an appeal to pass, before making an application for the non-party costs order. The court should discourage parties from seeking orders that they dared not seek or foreshadow before judgment.

## Consideration

1. The four respondent companies are incorporated in Greece, have no known assets overseas and no assets in Australia. Two of them, the second and fourth respondents, are in liquidation. In the circumstances, and I understood this to be common ground, the company respondents are rightly regarded as “straw figures”.
2. Mr Barbouttis was a director of each of the respondent companies, and he oversaw their operations.
3. In paragraph [50] of his affidavit for the first hearing, Mr Barbouttis swore to the following:

When I attended the Sydney International Boat Show in August 2019, I was told that *Hunter* had been sold subject to survey, as a result I decided to lodge a caveat on the title to protect my interests. Neil Sutton has previously refused to pay me on several occasions when he had previously agreed to make those payments.

1. The applicant placed emphasis on the statement in that paragraph that Mr Barbouttis lodged the caveat to protect his own interests, and submitted that as a solicitor he must be taken to have chosen his words deliberately. I am not sure that it adds much to the case in this respect that Mr Barbouttis is a solicitor. His words are plain enough, solicitor or not. It was, however, submitted on his behalf that his reference to the protection of his interests refers to the rights of the respondent companies to retain control of the vessel until completion of the sale had occurred.
2. The reference in Mr Barbouttis’s paragraph [50] quoted above to Mr Sutton previously having refused to pay him on several occasions is, as I read the affidavit, a reference to the personal claims of Mr Barbouttis at paragraphs [33], [36] and [40]. Some of those claims, at least, were not derivative of the companies’ debts – they were Mr Barbouttis’s consulting fees.
3. The extent to which the lodging of the caveat was to protect Mr Barbouttis’s own interests, as opposed to only the interests of the companies, has to be answered with reference to what the parties’ respective interests were. As explained in the first judgment at [44], Mr Barbouttis faced significant personal tax liabilities on account of the Sutton chartering business being closed down in Greece. Further, the removal of the yachts from Greece would give rise to further tax obligations which, if not met, would be visited on Mr Barbouttis.
4. The suite of agreements (referred to in the first judgment at [47]-[59]) concluded for the purpose of closing down the arrangements that had been in place included a deed of indemnity by which Mr Barbouttis was to be indemnified by the Sutton group for his personal liabilities. After execution of the suite of agreements, various debts were claimed in Greece that had to be paid, as had been anticipated prior to the agreements being concluded: first judgment at [70]. Ultimately, there was a dispute as to Mr Barbouttis and the respondent companies being indemnified for their liabilities and expenses arising from Mr Barbouttis’s work for the Sutton group in relation to the Greek charter business: first judgment at [75].
5. Thereafter there was solicitor correspondence on behalf of Mr Barbouttis and George Barbouttis seeking payment of Mr Barbouttis’s claimed debts against Mr Sutton and his companies: first judgment at [78].
6. It is also to be noted that one of the bases on which senior counsel for the respondent companies sought to justify the caveat at the first hearing was that the caveatable interest was a trustee’s indemnity under a resulting trust. That concerned Mr Barbouttis’s claimed position as trustee of the alleged resulting trust who, it must follow, held the relevant caveatable interest.
7. In the circumstances referred to, by which I mean the words used by Mr Barbouttis in his affidavit in context, the extensive personal liabilities of Mr Barbouttis and hence his personal claims, the solicitor correspondence on his behalf and the assertion of a cause of action in his own interests, I have little hesitation in concluding that Mr Barbouttis lodged the caveat to protect and pursue his own interests. It was really and substantially his interests that he sought to protect, and it was in his interests that he sought to put pressure on Mr Sutton by lodging the caveat.
8. It is also noteworthy that Mr Barbouttis was the driving force behind not only the lodging of the caveat, but also defending it – he instructed lawyers to act for the companies, he was the only witness for the companies and he was present during the hearing to give instructions. The companies’ financial positions were such that they are unlikely to have paid the lawyers; in the absence of any explanation from him to the contrary, I infer that Mr Barbouttis paid. Also, those lawyers are now his lawyers, further demonstrating the close association of interests. There is also a serious question as to whether Mr Barbouttis was authorised to act for the companies, but I prefer not to decide the case with reference to that question and put it to one side.
9. I also accept the submission that the effective moving party was the respondents; the caveat was lodged in their names and they retained the onus to justify it. The fact that the applicant had to move the Court to remove the caveat does not alter that reality.
10. I am, of course, cognisant of the importance of recognising the separate corporate personalities of the respondent companies as being distinct from Mr Barbouttis. However, in the circumstances identified above and, in addition, recognising that the companies have ceased trading and have ceased having any continued purpose other than to be wound up, Mr Barbouttis’s role behind the companies and his own interests take on greater prominence.
11. As identified above, the respondents, including Mr Barbouttis, submitted that the applicant could have cited Mr Barbouttis as a respondent from the outset and it gave no notice to him in advance that it would seek a costs order against him. They submitted that those circumstances mean that a costs order should not be made against Mr Barbouttis, in particular because of the prejudice that they say that he faces as a consequence of the applicant’s approach in these respects. In particular, they submitted that Mr Barbouttis was denied the opportunity to decide whether, because of the threat of a costs award against him, to withdraw the caveat. They also submitted that he was denied the opportunity to decide whether to appeal against the first judgment with knowledge that a costs order would be sought against him. That is not only because the time period to appeal had expired, but also – in recognition that the time period could have been extended on application – that the vessel would by then have been transferred to the purchaser so the justification for the caveat would have been moot. They referred to ***Gore*** *v Justice Corporation Pty Ltd* [2002] FCAFC 83; 119 FCR 429 at [52] per O’Loughlin, Whitlam and Marshall JJ.
12. The Court in *Gore* warned that the principles, criteria or guidelines that assist in the exercise of the discretion that is reposed in the court with regard to a non-party costs order are neither a substitute for, nor a fetter upon, the general discretion of the court: at [49], citing *Latoudis v Casey* [1990] HCA 59; 170 CLR 534 at 538-541 per Mason CJ. The Court acknowledged that in *Yates* the non-party, Mr Yates, was not warned that he was at risk of a claim for costs but nevertheless a costs order was made against him – and on an indemnity basis: at [51]. The Court then stated (at [52]):

There may be a case for saying that, within a particular category, notice of intention to seek costs from a third party may be a necessary prerequisite, but probably it might be more appropriate to say that the question of the need for prior notice is no more than one of many relevant matters that should be considered when considering an application for costs against a stranger to a litigation.  As Lander J said in *Vestris* at 468:

It is not desirable to lay down any rules which would fetter the exercise of a trial judge to make such an order but some guidance as to the exercise of the discretion can be obtained from the decided cases.

1. It is thus clear that that there is no particular rule or principle against ordering costs against a non-party if no notice of the intention to make such a claim was given to them in advance of the hearing or judgment in the principal proceeding. However, the fact or otherwise of such notice may be a relevant circumstance to take into consideration.
2. In my view the absence of such notice in the present case does not weigh so heavily as to prevent a non-party costs order being made against Mr Barbouttis. First, there was no reason to cite Mr Barbouttis as a respondent in the proceeding. The applicant was required to “summon the caveator”: s 47B(2) of the SR Act. In the present case, that was clearly the named caveators, i.e. the respondent companies. Moreover, the proceeding was rightly and inevitably brought as a matter of urgency and came to hearing very quickly. It was only once the respondents’ evidence was served that the possible grounds for a non-party costs order against Mr Barbouttis became apparent to the applicant, and, additionally, it relies on submissions made at the hearing that preceded the first judgment. In those circumstances, the applicant could not have been expected to cite Mr Barbouttis as a respondent or to give notice of the intended non-party costs order before the first judgment.
3. I also do not see that the fact that Mr Barbouttis was not given notice of the intention to seek a non-party costs order against him before he had the opportunity, on behalf of the company respondents, to lodge an appeal against the first judgment as significant. The avoidance of liability for costs would not have been an adequate basis to stay the first judgment and in that way to preserve the caveat and hence the point of any appeal, and once the caveat had been removed and the vessel transferred the avoidance of liability for costs would not have been an adequate basis to pursue an appeal which would otherwise have been inutile.
4. It needs also to be observed that there is no evidence to support the premise underlying the two points that the respondents made about lack of notice. That premise is that had Mr Barbouttis known that a costs order would be sought against him personally he might have withdrawn the caveat or pursued an appeal. He has not gone into evidence to explain or justify what he would have done. That also means that he was not able to be cross-examined on the point. Instead he sheltered behind the submission that he may have done one or the other of those things. As a matter of fact, I am unable to find that that is so.
5. In every respect, Mr Barbouttis was the driving force behind the caveat and its defence, and thus the incurring of costs by the applicant, and as it turned out none of that was justified on the facts. Moreover, on his argument he could have done that free of risk of costs. In the exercise of my discretion, I consider that the interests of justice and fairness are best served by Mr Barbouttis being held liable to the applicant for its costs in the proceeding.
6. In that regard, with reference to *Dunghutti*, Mr Barbouttis is connected with the unsuccessful respondent companies, he caused them to start the proceeding, and his conduct makes it just and equitable that he be visited with an order for costs in favour of the successful applicant.

## Section 47E of the SR Act

1. In view of my conclusion with regard to a non-party costs order, it is not necessary to go on to consider the alternative basis for the claim for costs against Mr Barbouttis, namely as compensation under s 47E of the SR Act. Notwithstanding the possibility of an appeal against my decision set out above, I do not consider it to be appropriate or necessary for me to go on and consider the alternative claim. The reasons for that are the following. First, the s 47E point is novel. It is better decided in a case where it matters, rather than in an obiter discussion. Secondly, what is at issue at present is the costs of the principal proceeding. It is disproportionate to go on and consider the novel point, which involves the analysis of a number of cases across several jurisdictions decided in the context of analogous provisions in Torrens legislation, in order to decide an alternative basis on which costs might be claimed. Thirdly, if this point was to be raised by way of notice of contention in an appeal, the appeal court would be in as good a position to decide the point, if it became necessary to decide it. In that regard, I am also conscious of the fact that for any appeal to succeed it would have to be shown on *House v The King* ([1936] HCA 40; 55 CLR 499) grounds that my discretion with regard to non-party costs miscarried.

## Lump sum costs

1. The applicant submitted that its costs should be assessed by way of a lump sum costs order. It drew attention to the *General Practice Note: Costs Practice Note (GPN-COSTS)*, 25 October 2016 at [4.1] which records that it is the Court’s preference to make a lump sum costs order. The purpose of this is to “avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation”: *Paciocco v Australia and New Zealand Banking Group Ltd (No 2)* [2017] FCAFC 146; 253 FCR 403 at [15] per Allsop CJ, Besanko and Middleton JJ.
2. I accept the applicant’s submissions. The respondents made no submissions to the contrary. In the circumstances I will make an order that the costs be assessed on a lump-sum basis with programming orders for that assessment.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart. |

Associate:

Dated: 13 October 2020