Federal Court of Australia

 Zhang v Yan (No 2) [2021] FCA 1076

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **O'BRYAN J** |
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| Date of judgment: | 7 September 2021 |
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| Catchwords: | **COSTS** – award of costs – where not all of the successful respondents’ arguments were accepted – costs nevertheless awarded in favour of respondent – order for release of sum paid into court as security for costs – whether the unsuccessful appellant entitled to a costs certificate under *Federal Proceedings (Costs) Act 1981* (Cth) |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43*Federal Proceedings (Costs) Act 1981* (Cth) s 6(1) |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 18 |
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| Date of last submissions: | 19 August 2021 |
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| Date of hearing: | Determined on the papers  |
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| Counsel for the Appellant: | M G R Gronow QC with L Collaris |
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| Solicitor for the Appellant: | Hopkins Lawyers |
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| Counsel for the Respondents: | J P Tomlinson |
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| Solicitor for the Respondents: | SBA Law |

ORDERS

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|  | VID 1244 of 2019 |
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| BETWEEN: | HENG ZHANGAppellant |
| AND: | WEIMIN YANFirst RespondentSHANGHAI YINGYUE INVESTMENT GROUP CO PTY LTDSecond Respondent |

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| order made by: | O'BRYAN J |
| DATE OF ORDER: | 7 SEPTEMBER 2021 |

THE COURT ORDERS THAT:

1. The appellant pay the respondents’ costs of the appeal and of the notice of contention, to be taxed in default of agreement.
2. The sum of $30,000 paid into Court as security for the respondents’ costs of the appeal pursuant to order 1 made on 6 April 2020 be released to the solicitors for the respondents, SBA Law, on account of the respondents’ costs per order 1.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1. This proceeding is an appeal from a decision of the Federal Circuit Court of Australia dismissing an application for review of a sequestration order made by a registrar of the Federal Circuit Court in respect of the appellant.
2. On 5 August 2021, I made orders that:
3. the respondents’ notice of contention be allowed in part;
4. the appeal be dismissed; and
5. within 14 days, the parties are to file and serve written submissions in relation to the costs of the appeal, limited to 3 pages, to be determined on the papers.
6. Each of the parties filed submissions in relation to the costs of the appeal. The respondents also filed an affidavit of Andrew John Green, a principal of SBA Law, the solicitors for the respondents.
7. I also note by way of background that, on 6 April 2020, I made orders by consent of the parties requiring the appellant to provide security for the respondents' costs in the sum of $30,000 by paying that sum into Court.

## Appellant’s submissions

1. The appellant submitted that, although he was ultimately unsuccessful on the appeal, the appropriate order to be made in the circumstances of the appeal is that each party bear their own costs.
2. The appellant observed (correctly) that five issues were determined on this appeal, two of which were raised by the appellant’s notice of appeal and three of which were raised by the respondents’ notice of contention. The issues were:
3. First Issue: whether the primary judge erred in exercising her Honour’s discretion to go behind the judgment (raised by the respondents);
4. Second Issue: whether the primary judge erred in concluding that clauses 1.10 to 1.12 of the Deed of Settlement entered into between the parties (and others) on or around 3 May 2017 (**Deed**) were unenforceable because they would stifle a prosecution (raised by the respondents);
5. Third Issue: whether the primary judge ought to have found that the question whether clauses 1.10 to 1.12 of the Deed were unenforceable did not need to be determined in circumstances where the obligations under those clauses had been performed and no application had been made to enforce those clauses (raised by the respondents);
6. Fourth Issue: whether the primary judge erred in concluding that clauses 1.10 to 1.12 of the Deed were severable such that the remainder of the Deed (and particularly clause 1.8) was enforceable (raised by the appellant); and
7. Fifth Issue: whether the primary judge erred in failing to find that clause 1.8 of the Deed is unenforceable on the grounds of duress (raised by the appellant).
8. The appellant submitted that, of the five issues argued on the appeal, the appellant was successful in respect of three issues (namely the first, third, and fourth issues) and the respondents were successful in respect of two issues (namely, the second and fifth issues). The appellant’s success in relation to the fourth issue would have, but for the notice of contention, resulted in the appeal being allowed.
9. If (contrary to the above submissions) the appellant is ordered to pay the respondents’ costs, the appellant sought a certificate pursuant to s 6(1) of the *Federal Proceedings (Costs) Act 1981* (Cth) in respect of the costs of and incidental to the appeal on the basis that he succeeded on three of the five issues raised, the appeal was dismissed on a different ground to that on which the order below was made, and he succeeded on one of his grounds of appeal (which would have been sufficient to sustain an appeal against the decision below in the absence of the further point raised by the notice of contention).

## Respondents’ submissions

1. The respondents submitted that, whilst both parties had various arguments accepted and rejected, only the respondents succeeded in the appeal. Accordingly, the orders should reflect that the appeal was dismissed and the usual order as to costs should follow, namely the respondents should be awarded their costs of the appeal and of the notice of contention, to be taxed in default of agreement. The respondents also sought a consequential order that the sum presently held in Court on account of security for costs be released to the respondents.
2. The respondents argued that costs should not be apportioned on an issues basis for the following reasons:
3. No party acted such as to unreasonably lengthen or unduly complicate the issues in the running of the appeal. Each party’s contentions appropriately raised all necessary and relevant issues.
4. Several of the issues arose in a manner which overlapped as between the appeal grounds and the notice of contention. That is, the issues cannot be easily separated out to allocate costs proportionally to each party’s success or failure on each individual issue. For example, the “Fourth Issue” necessarily required analysis of the legality or extent and character of illegality of clauses 1.10 to 1.12 of the Deed, which itself required analysis of the substance of arguments which founded the Second Issue.
5. The appeal was advanced on two bases, being the Fourth and Fifth Issues. The Fourth Issue was rendered irrelevant as a result of the respondents’ success on the Second Issue and the appellant failed on the Fifth Issue.
6. The orders sought by the respondents with respect to costs are as follows:

1. The Appellant pay the Respondents’ costs of the appeal and of the notice of contention, to be taxed in default of agreement.

2. The sum of $30,000 paid into Court as security for the Respondents’ costs of the appeal pursuant to order 1 made on 6 April 2020, be released to the solicitors for the Respondents, SBA Law, on account of the Respondents’ costs per order 1.

1. In support of proposed order 2, the respondents submitted (through the affidavit of their solicitor, Mr Green) that, given the appellant is an undischarged bankrupt, it is appropriate for the Court to make an order for the sum of $30,000 paid into Court as security for costs to be released to the respondents’ solicitors, SBA Law, on account of the amount that would be recoverable if costs were assessed or taxed. The respondents submitted that, if the Court were to adopt this course, it would obviate the need for the respondents to take formal steps to recover their costs, which would involve further costs that would not be recoverable given the appellant is an undischarged bankrupt. In support of that submission, Mr Green gave evidence that:
2. in a report dated 26 February 2020 prepared by Mr Chris Grisenti of Blackstone Legal Consulting (which was annexed to Mr Green’s affidavit of 26 February 2020 prepared in connection with the respondents’ application for security for costs), Mr Grisenti estimated the respondents' recoverable party/party costs of the appeal would be $46,903.72;
3. the respondents have incurred actual legal costs (including counsel’s fees) of $54,599.77 excluding GST as follows:
	1. professional fees $29,117.50;
	2. filing fee on application $1,255.00;
	3. counsel's fees $22,227.27;
	4. Blackstone Legal Costing $2,000.00;
4. Mr Green estimated that 100% of disbursements and approximately 75% of the professional fees are likely to be recoverable on a party/party assessment or taxation given the nature of the matter and the seniority of counsel retained, being a total amount of $47,282.27.

## Consideration

1. The applicable principles governing the award of costs are well known. The Court’s discretion to award costs under s 43 of the *Federal Court of Australia Act 1976* (Cth) is broad and is not bound by rigid or inflexible rules. The discretion must be exercised judicially, consistently with the purpose of the power and taking account of relevant facts and circumstances of the litigation. Usually, the discretion to award costs is exercised in favour of a successful party. However, a successful party may be deprived of a proportion of its costs, or even required to pay costs to the other party, if the successful party succeeded only upon a portion of its claim, or failed on issues that were not reasonably pursued, or where the result of the litigation might be described as mixed. Nevertheless, the mere fact that a court does not accept all of a successful party’s arguments does not make it appropriate to apportion costs on an issue by issue basis.
2. I accept the respondents’ submissions that they were successful on the appeal. Although I did not accept all of the arguments advanced by the respondents on the appeal (I did not accept two of the contentions raised by the respondents by way of notice of contention), I do not consider that the respondents should be deprived of a proportion of their costs. The contentions on which the respondents ultimately failed did not add significantly to the length or complexity of the issues to be determined. Accordingly, I consider that it is appropriate for the respondents to be awarded their costs on a party/party basis, to be taxed in default of agreement.
3. I also consider that it is appropriate in the circumstances of this case to make an order that the sum of $30,000 paid into Court as security for the respondents’ costs of the appeal pursuant to order 1 made on 6 April 2020 be released to the solicitors for the respondents, SBA Law, on account of the respondents’ costs. Having regard to the evidence of Mr Green, I am satisfied that the costs that likely to be awarded to the respondents on a taxation would exceed the amount of security that has been given. An order in the form sought by the respondents will, in my view, best promote the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. I infer from the evidence given by Mr Green that upon release of the amount of security to SBA Law, the respondents are unlikely to take further steps to have their costs taxed as any further amount of costs awarded (including the costs of taxation) are unlikely to be recoverable from the appellant.
4. As to the appellant’s application for a costs certificate under s 6(1) of the *Federal Proceedings (Costs) Act 1981* (Cth), in my view the power to issue a certificate is not enlivened in this case. Section 6(1) provides as follows:

Subject to this Act, where a Federal appeal succeeds on a question of law, the court that heard the appeal may, on the application of a respondent to the appeal, grant to the respondent a costs certificate in respect of the appeal.

1. It can be seen that the section applies where an appeal succeeds on a question of law, and the section empowers the Court to grant a cost certificate to the unsuccessful respondent (on the application of the respondent). In the present case, the appellant’s appeal did not succeed. The section does not empower the Court to grant a costs certificate in favour of an unsuccessful appellant even if, as is the case here, the appeal was dismissed on a different ground to that on which the order below was made, and the appellant succeeded on one of his grounds of appeal (which would have been sufficient to sustain an appeal against the decision below in the absence of the further point raised by the respondents’ notice of contention).

## Conclusion

1. In conclusion, I will make orders in the form sought by the respondents, being:
2. the appellant pay the respondents' costs of the appeal and of the notice of contention, to be taxed in default of agreement; and
3. the sum of $30,000 paid into Court as security for the respondents' costs of the appeal pursuant to order 1 made on 6 April 2020 be released to the solicitors for the respondents, SBA Law, on account of the respondents' costs per order 1.

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| I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan. |

Associate:

Dated: 7 September 2021