

Article Information

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Service: Dispute Resolution & Litigation

Litigation funders on notice: Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors [2016] VSCA 236

The Victorian Court of Appeal has upheld a decision to award costs against two non-parties.

This was a dispute as to whether the trial judge was correct in awarding costs against a litigation funder and its director. The funder and director had funded the litigation brought by Bakers Investment Group (Bakers) and Bakers ultimately failed at trial. Security for costs orders had been made but these fell short of the amount claimed by the defendants. The defendants sought non-party costs against persons associated with Bakers, the litigation funder, and the funder's sole shareholder, Esplanade Holdings Pty Ltd (Esplanade), as well as Ryan Carter as the sole director of Esplanade.

The Court noted that there were common factors that should be looked at when assessing whether to order costs against non-parties including the financial position of a party against whom costs orders would be made, whether the non-party has a real interest in the litigation and if so, to what extent, the amount of funding contributed by the non-party, and whether the non-party has agreed to provide an indemnity if an adverse costs order is made against a funded party.

The financial position of Bakers was that of a "person of straw". The funding agreement between Bakers and the funder provided that Bakers retained ultimate control of its proceedings with the funder having significant oversight rights. The funder's investment was secured by a security interest over Bakers' interest in the proceeding and Bakers' were not to settle or reject settlement offers without prior consultation with the funder. The funder had a substantial interest in the proceedings given that under the agreement, if Bakers was successful, it would be entitled to the entire amount it provided in funding and a percentage of the amount awarded to Bakers.

The trial judge also noted that whilst the other non-parties were party to the litigation to uphold their duties owed to Bakers', the funder's only involvement was for its own commercial gain. It was in essence funding a private dispute between the parties it had no association with prior to the litigation. As the funder had only \$100 paid up capital, the trial judge held that the Court should pierce the corporate veil to reach the parties that stood behind Bakers' and ordered that Carter and Esplanade be liable for costs.

Appeal

An appeal brought by the funder, Carter and Esplanade was dismissed as not having any real prospect of success. The Court held that the funder's role and rights over the litigation, as well as the defendants putting the funder on notice that it would claim costs in the event of Bakers' being unsuccessful, was enough of a basis for the trial judge to award costs against the it.

In relation to Carter and Esplanade, the Court agreed with the trial judge that Carter and Esplanade were in a different position to the other non-associated parties in that they had never had a relationship with Bakers' prior to the funding of its litigation. The Court also noted that it would not be a just outcome if the successful party was left out of pocket because the funder had no capacity to do so and thus, the trial judge was right in the circumstances to pierce the corporate veil.