Equity Division
Supreme Court
New South Wales

Case Name:	**In the matter of Pak Brothers Pty Ltd**
Medium Neutral Citation:	[2021] NSWSC 1247
Hearing Date(s):	Submissions on the papers 20 September 2021
Date of Orders:	1 October 2021
Date of Decision:	1 October 2021
Jurisdiction:	Equity - Corporations List
Before:	Black J
Decision:	Proceedings are dismissed, with the Defendant to pay the Plaintiff's costs of the proceedings as agreed or as assessed.
Catchwords:	COSTS — Party/Party — Where no determination on the merits — Whether effective surrender by the Defendant.
Legislation Cited:	*Civil Procedure Act* 2005 (NSW). s 98
Cases Cited:	- *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No 2)* [2018] NSWCA 266 - *Commonwealth of Australia v Gretton* [2008] NSWCA 117 - *Harman v Secretary of State for Home Department* [1983] 1 AC 280 - *Hunter Development Corporation v Save Our Rail NSW Inc (No 2)* [2016] NSWCA 375 - *One.Tel Ltd v Deputy Federal Commissioner of Taxation* (2000) 101 FCR 548 - *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 - *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622; (1997) 143 ALR 1; [1997] HCA 6
Texts Cited:	
Category:	Costs

Parties:	Thomas Pak (as Administrator of the Estate of the late Robert Pak) (Plaintiff) Pak Brothers Pty Limited (Defendant)
Representation:	Counsel: K J Young (Plaintiff) P Berg (Defendant) Solicitors: Dormer Stanhope (Plaintiff) Cambridge Lawyers (Defendant)
File Number(s):	2021/214216
Publication Restriction:	

JUDGMENT

Nature of the application and evidence

1 By Originating Process filed on 27 July 2021 the Plaintiff, Mr Thomas Pak as Administrator of the Estate of the late Robert Pak sought an order under s 247A of the *Corporations Act* 2001 (Cth) authorising him, or his solicitor, to inspect books of Pak Brothers Pty Ltd ("Company") within categories set out in an attached schedule. The matter was listed for directions on 9 August 2021 and orders were made for the service of evidence. On 1 September 2021, further orders were made, by consent, providing that the Company make and provide copies of documents described in the relevant schedule to Mr Pak's solicitors, on terms those solicitors pay the relevant copying costs and subject to an undertaking as to the purposes for which those documents would be used. On 13 September 2021, I made orders providing for the service of evidence and submissions as to costs, to be determined on the papers.

2 Mr Pak relied on the affidavit dated 20 September 2021 of his solicitor, Ms Dormer, which annexed correspondence between the parties including an email from the Company's solicitors consenting to an order that would have provided for production of the documents, subject to limiting the use of the

documents for the administration of Mr Pak's estate and subject to the *Harman* undertaking, being a reference to the implied undertaking recognised in *Harman v Secretary of State for Home Department* [1983] 1 AC 280 not to make use of information produced under compulsion in the proceedings other than for the purpose of the proceedings.

Applicable principles, submissions and determination

3 Section 98 of the *Civil Procedure Act* 2005 (NSW) provides for orders for costs. Rule 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") provides that, generally, costs will follow the event. A successful party has a "reasonable expectation" of being awarded costs against an unsuccessful party, unless there is good reason for that presumption to be displaced: *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 at [22], [134]. In *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121], Hodgson JA (with whom Mason P agreed) observed that:

> "... underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs."

4 In *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd (No 2)* [2018] NSWCA 266 at [7]–[9], McColl JA in turn observed that:

> "Section 98 of the *Civil Procedure Act* 2005 (NSW) confers a wide discretion on the court with respect to costs. The "general rule" is that court costs follow the event unless the court makes "some other order" pursuant to the discretion conferred by Uniform Civil Procedure Rules 2005 (NSW) (UCPR) r 42.1.
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> As Beazley JA explained in *Baker v Towle* [[2008] NSWCA 73; (2008) 39 Fam LR 323 at [11] (Mathews AJA agreeing)], in most litigation, UCPR r 42.1 "operates in a straightforward way, 'the event' being readily identifiable as a judgment for the plaintiff or the defendant on the claim. In that sense, 'the event' to which the rule refers is the result of the proceedings, so that the party who succeeds on the claim before the court is awarded costs, unless the court, pursuant to the discretion conferred by r 42.1, makes 'some other order'".
>
> Underlying both the general rule that costs follow the event, and qualifications to that rule, is the idea that costs should be paid in a way that is fair, having

> regard to what the court considers to be the responsibility of each party for the incurring of the costs." [footnotes omitted]

5 However, the principle that costs follow the event under r 42.1 of the UCPR has no application where, as here, there has been no determination of these proceedings on their merits. In *Re Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex Parte Lai Qin* (1997) 186 CLR 622 at 624-625, (1997) 143 ALR 1; [1997] HCA 6 McHugh J in turn observed that, where proceedings are determined without a hearing on the merits, the Court can generally not make an order for costs, where that would require the determination of a hypothetical proceeding, in order to determine the question of costs. That principle may be displaced if the result reflects a capitulation by one party so that the Court can be satisfied one party won and the other party lost. In *One.Tel Ltd v Deputy Federal Commissioner of Taxation* (2000) 101 FCR 548 at 553; [2000] FCA 270, to which Ms Young referred, Burchett J in turn observed that:

> "In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party. It is the latter type of case which more often creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs."

6 By lengthy written submissions in respect of costs, Ms Young referred to the background to the proceedings and contended that, although there had been no hearing on the merits, the Company had "effectively surrendered" and Mr Pak was "entitled" to his costs on an ordinary basis. Ms Young set out, at some length, the background facts and correspondence relating to them, by reference to evidence that would have been read in the proceedings had they gone to a hearing on the merits. Ms Young referred to the Court's power to award costs of the proceedings under s 98 of the *Civil Procedure Act*, to which I have referred above, and recognised that the power to order costs involved the exercise of a judicial discretion. Ms Young also referred to the general rule that costs follow the event, unless it appears that some other

order should be made, under UCPR r 42.1. There is, of course, no event here since the proceedings had not been determined on their merits.

7 Ms Young in turn recognised the application of the principles stated by McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* above and submitted that a costs order could be made on the basis that the Company had "effectively surrendered" to the other. In particular, Ms Young submitted that the Company had "effectively surrendered" in consenting to the orders sought by Mr Pak, and referred to an earlier offer of a confidentiality undertaking by Mr Pak and contended that the Company had not identified any grounds to object to an inspection of its books. Ms Young also submitted that Mr Pak had acted in good faith and for a proper purpose, although that is a matter that has not been determined on the merits.

8 Mr Berg, who appears for the Company, points out that Mr Pak's original request for production of documents, prior to the commencement of the proceedings, did not offer to pay the costs of producing them for inspection, or offer an undertaking as to confidentiality, or any limitation on the use of the books and records produced for inspection and allowed several days for the Company to reply to the request. Mr Berg points out that the documents originally requested, by letter dated 22 June 2021, sought production of legal advice obtained by Mr Pak, apparently in a personal capacity, which would the subject of legal professional privilege and which the Company did not have power to waive, and submits that the Company could reasonably not accede to the request for documents in that category. That is of limited relevance to the position after the proceedings were commenced in respect of a narrower range of documents

9 Mr Berg notes the proceedings were commenced on 27 July 2021 and that the consent orders made on 1 September 2021 include a requirement for Mr Pak's solicitor to pay reasonable copying costs and an undertaking as to the use of the relevant documents. He points out that the documents sought for production under the Originating Process filed on 27 July 2021 narrowed the relevant categories. Mr Berg also points out that, where the documents are

produced under an order for inspection under s 247A of the *Act*, then they are subject to a statutory non-disclosure obligation arising under s 247C of the *Act* but not to a limit on use of the relevant information which was recorded in the consent orders. Mr Berg also refers to *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* above.

10 These proceedings have not been determined on their merits. The evidence led by Mr Pak in support of the application has not been read at a substantive hearing and there has been no determination as to the purposes of the application. However, the consent orders made require production of the documents sought by Mr Pak in the proceedings, albeit subject to restrictions as to use of the documents which extend beyond those specified in s 247C of the *Act*. The Company did not consent to those orders until the point at which it was required to file its evidence in the proceedings, and could have sought such a condition at an earlier point, if that was its only objection to production of the documents sought by Mr Pak.

11 In these circumstances, it seems to me that it can be said that the Company has "effectively surrendered" to Mr Pak's claim, after putting Mr Pak to the costs of pursuing it for some time. I make the following orders:

1. The proceedings be dismissed.

2. The Defendant pay the Plaintiff's costs of the proceedings as agreed or as assessed.

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I certify that this and the preceding 5 pages are a true copy of the reasons for judgment herein of his Honour Justice Black

Associate
Date: 1 October 2021