



## HIGH COURT OF AUSTRALIA

**Manager, Public Information**

13 October 2009

**JEFFERY & KATAUSKAS PTY LTD v SST CONSULTING PTY LTD & ORS**  
**JEFFERY & KATAUSKAS PTY LTD v RICKARD CONSTRUCTIONS PTY LTD (SUBJECT TO DEED**  
**OF COMPANY ARRANGEMENT) & ORS**

[2009] HCA 43

The Supreme Court of New South Wales did not have the power to make a costs order against a company which was not a party to litigation merely because the company had, for commercial gain, funded litigation by an insolvent plaintiff without indemnifying the plaintiff against an adverse costs order. The Supreme Court could only make such an order if the funding arrangement amounted to an abuse of the court's process. The proposition that a party who funds another's litigation commits an abuse of process if that party does not agree to meet adverse costs orders imposed on the funded party was too broad and had no basis in legal principle, the High Court held today.

On 22 December 2000 Rickard Constructions Pty Ltd entered into a deed of company arrangement (DOCA) with its director Charles Rickard, SST Consulting Pty Ltd and SST Services Pty Ltd (together - the Secured Creditor). Under the DOCA the parties agreed, amongst other things, that Mr Rickard and the Secured Creditor would fund, up to a limit of \$150,000, Rickard Constructions' application filed on 5 September 2000 in the Supreme Court of New South Wales against Jeffery & Katauskas and others, in relation to a failed pavement construction. During the course of the litigation Jeffery & Katauskas obtained two separate orders that Rickard Constructions pay security for costs totalling \$187,750. After the agreed funding limit had been reached SST Consulting continued to fund Rickard Constructions' litigation. Rickard Constructions' application was eventually dismissed and it was ordered to pay the costs of the successful defendants. The shortfall between Jeffery & Katauskas' trial costs and the security provided exceeded \$450,000. Rickard Constructions was insolvent and incapable of paying the shortfall. Jeffery & Katauskas sought from the primary judge an order for costs against SST Consulting and its directors under rule 42.3(2) of the Uniform Civil Procedure Rules 2005 (the Rules). The primary judge refused to make the order and the Court of Appeal of New South Wales dismissed Jeffery & Katauskas' appeal. The High Court granted special leave to appeal.

Section 98(1)(a) of the *Civil Procedure Act* 2005 (NSW) provides that costs of civil proceedings are "in the discretion of the court". The power to award costs is however expressed to be "subject to the rules of court". Under rule 42.3(1) the court may not make an order for costs against a non-party. That prohibition is qualified by rule 42.3(2) which provides in paragraph (c) that rule 42.3(1) does not limit the power of the court to make an order for payment, by a person, of some or all of the costs of a party to a proceedings, where the costs arose out of the person's commission of contempt of court or abuse of process. Jeffery & Katauskas argued it was an abuse of process for SST Consulting to agree to fund proceedings by Rickard Constructions, an insolvent plaintiff, without also indemnifying Rickard Constructions for any costs which it might be ordered to pay if its action were unsuccessful, and therefore that SST Consulting should be ordered to pay the legal costs of the successful defendants under rule 42.3(2).

By majority the High Court rejected this argument. The Rules themselves provided that costs should not be ordered against a third party other than in the exceptional circumstance that the third party had committed contempt of court or had abused the processes of the court, and a third party's agreement to fund another party's litigation was not, of itself, an abuse of process. In this case, Jeffery & Katauskas' ability to recoup its legal costs from Rickard Constructions would not have improved if there had been no funding arrangement in place and, in any event, a plaintiff's inability to pay the costs of litigation is an issue which may be addressed by an order that the plaintiff pay security for costs before the litigation proceeds. The High Court found that SST Consulting had not been shown to have committed an abuse of process of the court and dismissed the appeals.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*