SUPREME COURT OF QUEENSLAND

CITATION:	*Makings Custodian Pty Ltd & Anor v CBRE (C) Pty Ltd & Ors (No 2)* [2018] QSC 25
PARTIES:	**MAKINGS CUSTODIAN PTY LTD ACN 139 197 130** (first plaintiff) and **MAKINGS PTY LTD ACN 120 563 260** (second plaintiff) **v** **CBRE (C) PTY LTD ACN 003 205 552** (first defendant) and **ORCHID AVENUE REALTY PTY LTD ACN 093 431 595** (second defendant) and **STEPHEN GUY SOLOMONS** (first third party) and **DUNCAN IAN ROBERT McINNES** (second third party)
FILE NO/S:	No 7764 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2017
JUDGE:	Dalton J
ORDER:	**1. The plaintiffs pay the first defendant's costs of the proceeding, including reserved costs, and including the costs of this costs application, except (i) so far as they relate to the applications made on 11 August 2016; (ii) they are costs incurred on the third party proceedings between the first and second defendants, and (iii) so far as they have been dealt with by another order of this Court.** **2. The second defendant pay the plaintiffs' costs of the proceedings between them, including the costs of this costs application, and including any reserved costs,**

but excluding the costs of the applications made on 11 August 2016.

3. The second defendant pay the costs of the first and second third parties on this proceeding, including the costs of this costs application and reserved costs.

COUNSEL: PJ Roney QC, with J Green for the plaintiff
DB O'Sullivan QC, with M Steele for the first defendant
R Perry QC for the second defendant

SOLICITORS: Ramsden Lawyers for the plaintiff
Kennedys for the first defendant
Carter Newell for the second defendant
Third Parties did not appear, but made written submissions

[1] I gave judgment in this matter on 19 May 2017 and now deal with the costs. In brief summary, the plaintiffs purchased a shopping centre on the Gold Coast. The second defendant was the real estate agent who acted for the vendor. I found that the second defendant misled the plaintiffs about the financial performance of the shopping centre, and that as a consequence the plaintiffs paid more for the property than it was worth. The first defendant was a property manager who was engaged to manage the shopping centre from the time the vendors built it. The first defendant produced accounts for the vendor every month for two-and-a-half years before the purchase. The accounts were inaccurate; nonetheless they showed that the performance of the shopping centre was poor. Had the plaintiffs been provided with a complete version of the information contained in the first defendant's accounts they would not have bought the shopping centre. However, the plaintiffs were not presented with a complete version of the matters shown in the first defendant's accounts. In fact the plaintiffs had no direct dealings with the first defendant of any relevance at all. The plaintiffs obtained information from the second defendant only and that information was not a complete or accurate version of what was contained in the first defendant's accounts. The second defendant did not obtain this information from the first defendant directly, but from the directors of the vendor, the third parties in the proceeding. My judgment was in favour of the first defendant against the plaintiffs and in favour of the plaintiffs against the second defendant.

Costs of the First Defendant

[2] The first defendant was wholly successful against the plaintiffs on the matters which went to trial.[1] The general rule is that the first defendant having succeeded, it should have its costs of the proceeding unless there is some reason to exercise my discretion otherwise – r 681 of the *Uniform Civil Procedure Rules 1999*. The first defendant's submission was that the plaintiffs ought to pay its costs in accordance with the general rule.

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[1] There was a claim of lesser significance by the plaintiffs against the first defendant based upon the first defendant's inaccuracies in managing the shopping centre after the purchase and while the first defendant was retained as the plaintiffs' property manager. This was settled before trial and the parties agreed about the costs of that part of the proceeding as part of that settlement.

[3] The plaintiffs submitted that the second defendant ought to pay the first defendant's costs, or at least part of them. Additionally to that main argument, the plaintiffs identified several areas of costs which ought to be excluded from any general costs order in favour of the first defendant against the plaintiffs (see paragraphs 24-28 of the plaintiffs' written submissions). I will deal first with the plaintiffs' general contention, and then come to deal with these particular areas separately.

[4] In support of their main argument, the plaintiffs argued that it was proper and reasonable for them to have sued the first defendant.[2] Some material parts (but not all) of the misrepresentations conveyed by the second defendant had their origin in some of the information prepared by the first defendant in managing the shopping centre. However, information passed on in this way was only a tiny fraction of the information prepared by the first defendant. Further, the information passed on was selective, and misleadingly so. This would have been apparent to any reader who perused the monthly accounts prepared by the first defendant from the time the shopping centre commenced trading. All these reports were in the possession or power of the plaintiffs from the time of the settlement of the sale of the shopping centre, ie., before the litigation commenced. While the first defendant's accounts may never have been entirely accurate, they recorded such poor performance that the plaintiffs would never have bought the shopping centre had they been aware of their contents prior to purchase.

[5] It was the plaintiffs' case that the first defendant was asked, and refused, to provide any information to the second defendant to assist the defendant in marketing the shopping centre. The plaintiffs did not prove this at trial, and did not prove that the first defendant provided material to the second defendant which it passed on to the plaintiffs. In this respect, it was the second defendant's case that the first defendant did not provide it with the material upon which the misrepresentations alleged against it were made. The only evidence was that the third parties gave the second defendant the material it used to make misrepresentations to the plaintiffs.

[6] The only case the plaintiffs had against the first defendant was that the first defendant ought reasonably to have contemplated that the information it produced in its monthly accounts for the owner of the shopping centre might have been used as it was in fact used by the second defendant – [100] of the judgment. My findings were that there was just no sensible basis to say that in keeping records and accounts for the shopping centre as property manager for the vendor, the first defendant engaged in conduct which misled or deceived the plaintiffs. There was no basis for the first defendant to reasonably anticipate that the second defendant would selectively use small parts of the information it prepared and accompany those small selective parts with other independent misleading representations.[3]

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2 *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330, [176]-[193] and [269]-[299].

3 At one stage it was admitted by the first defendant in its defence (admission of paragraph 18(i) of the statement of claim by paragraph 9(c) of the defence) that it ought to have realised figures prepared by it might be presented to a potential purchaser if the building was sold. I allowed withdrawal of that admission on the first day of trial for the reasons given there – t 1-34 – largely that the admission was inconsistent with the remainder of the defence. It was never alleged that the first defendant ought to have reasonably anticipated that its figures would be misused the way they were by the second defendant, which is the real point. Although the plaintiff sought to re-agitate this paragraph 18(i) point again on this costs application, it cannot assist it.

[7] In these circumstances I cannot see that the plaintiffs ever had a reasonable and proper basis to sue the first defendant. The plaintiffs had no evidence that the first defendant was involved in providing information either directly to them, or to the second defendant for use in marketing the shopping centre. Before the litigation commenced, it was within the plaintiffs' power to obtain a full copy of all the information which the first defendant provided to the owner of the shopping centre on a monthly basis; that information revealed that the shopping centre was not performing anywhere near well enough to justify the purchase price paid for it. The plaintiffs said that there was evidence that managing agents quite often involved themselves in marketing a shopping centre such as this by providing information to those who were marketing. However that may be, it was not the case here, and not pleaded to be the case here.

[8] Likewise I cannot find anything in the conduct of the second defendant which supports the plaintiffs' argument that it should pay the first defendant's costs. Short of abandoning any defence of the proceeding and paying all the plaintiffs' claim, or substantially all of it, I cannot see that there was anything in the conduct of the second defendant during the proceedings which would assist the plaintiffs. Nor do I see anything in the conduct of the second defendant prior to the proceedings which does so.[4]

[9] That the plaintiffs may have had good claims against the first defendant for mismanagement of the shopping centre after the plaintiffs became the owners, did not justify any wider action against the first defendant.

[10] I commented in my judgment on the proceeding that Mr Makings had an unjustified anger towards the first defendant – [14] of the judgment. This was so evident that I thought it affected his credit at the trial. Another oddity was the close co-operation evident between the plaintiffs' lawyers and the two unrepresented third parties during the trial. Although the pleadings and evidence on the third party proceedings were not sufficient to warrant findings against them, they were, at least, negligent in their running of the Piazza. They were the only directors of the company which instructed the second defendant, and sold Mr Makings the Piazza at a price well above its value. Nevertheless, most unusually, the third parties were called by the plaintiffs as witnesses in the plaintiffs' case. It was evident at trial that there was close communication and co-operation between the plaintiffs and the third parties.

[11] Whatever the origins of these rather odd alignments, the lawyers acting for the plaintiffs conducted the case in accordance with them so far as I could see both in the pleadings, trial, and submissions. The case run against the first defendant was in no way secondary to that run against the second defendant. In those circumstances I reject the plaintiffs' arguments based on the notion that, after the first defendant was named as a concurrent wrongdoer by the second defendant, the plaintiffs had no option but to continue to run the case against the first defendant as it did. As a matter of fact, that is simply not how this litigation was run by the plaintiffs.

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[4] See P Lyons J in *Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd* [2015] QSC 333, [45]ff and the cases cited there.

[12] In what is a standard approach in such circumstances, the second defendant made a third party claim against the first defendant which recited the plaintiffs' claims against the second defendant; reiterated the second defendant's denial of them, and then made an alternative case that if what the plaintiffs said was true, the first defendant was responsible or partly responsible. The costs of those proceedings can be dealt with between the second defendant and the third parties, but I do not see in this any warrant for the second defendant having to pay for the claim which the plaintiffs made against the first defendant.

[13] It seems to me that justice is best served by an application of the general rule, that is that the plaintiffs ought to pay for their decision to sue, and to persist in the case against, the first defendant. I turn to the array of more minor matters which the plaintiffs raise at paragraphs 24 to 28 of their written submissions.

[14] The plaintiffs say they should not pay the first defendant's costs of the part of the proceeding which settled at the commencement of trial. This was a separate claim by the plaintiffs against the first defendant for mismanagement of the shopping centre once the plaintiffs owned it. I need not deal with this, as the settlement contained provisions as to these costs.

[15] Next the plaintiffs say that the first defendant ought to pay the costs of the first day of trial for that was taken up with an application by the first defendant to amend its pleadings. That is partly true, and as I see I made abundantly clear at the time, I would not expect trial time to be wasted this way, especially in a matter which had been supervised. Nonetheless all the fault did not lie with the first defendant. The matter was listed for trial in April. The plaintiffs amended the statement of claim three times between then and the start of the trial on 11 August. Much more time than needed was spent on the application because counsel for the plaintiffs initially took the position that all the amendments the first defendant sought were opposed, whether they mattered or not. Argument about the first defendant's amendments did not take the whole day. There were matters relating to the third parties and the second defendant to be dealt with as well. Then, short of four o'clock, the plaintiffs' counsel asked for an adjournment because he was not ready to call a witness.

[16] I discern that a modern approach to litigation is not to spend time and money properly pleading or preparing for trial in the hope that a satisfactory settlement will be reached before a trial is run. While workload of the Court greatly benefits from the parties settling matters, I do think that a lawyer's duty, at common law, and as found in rule 5 of the UCPR, does require proper pleadings and other preparation in good time for trial.

[17] In all the circumstances here, the plaintiffs and first defendant can bear their own costs of the applications made on the first day of trial.

[18] It was said that the plaintiffs' costs of proving matters set out in a notice to admit facts sent to the first defendant ought to be paid by the first defendant. With one exception, I am not convinced that the evidence at trial was substantially different to what it would have been had the first defendant responded to this notice. The exception is the admission sought as to the value of the shopping centre. The defendant called its own

valuation evidence in relation to this matter and was unsuccessful on it. In my view the costs of this valuation evidence are more properly considered in the context of the law as to whether or not costs of a separate issue should be treated separately, not in the context of a failure to comply with a notice to admit.

[19] I will also note that the notice to admit was not carefully drafted; it was unreasonable to expect admissions in the terms of many admissions which were sought. So I am against the plaintiffs on this point.

[20] As to the costs of the separate issue of the value of the Piazza, it is true to say that the first defendant's case on this point was wholly rejected. While it is very clear from this vantage point that the first defendant's valuation case was most unlikely to succeed, I do not think that, looking at the matter prospectively, the first defendant ought not to have run its valuation case. While it is true that the valuation evidence was discrete, I am not persuaded that in the overall context of this litigation it would be just to make a separate order as to the costs of this issue.[5]

[21] The plaintiffs ask for costs of reviews before a supervising Judge on 18 November 2015 and 8 December 2015. These mentions occurred as part of supervised case list reviews which would have taken place whether or not issues as to the first defendant's disclosure had been raised. Issues about the first defendant's disclosure were not the only subject of those mentions.

[22] On this application for costs I was told only that each of these mentions resulted in orders being made that the first defendant make further disclosure, and that in consequence the first defendant did make further disclosure. Presumably if the Judge who reserved costs had felt that the only matter which bore on costs was the first defendant's failure to comply with its disclosure obligations, orders would have been made against the first defendant then, rather than costs having been reserved. To reserve costs on such an occasion would in the ordinary course be prompted by the supervising Judge's view that the trial Judge who determined the merits of the action overall would be better placed to determine whether in truth the first defendant ought pay costs – having regard perhaps to whether or not the further disclosure proved to be at all material to matters determined at trial. On this costs hearing I was given no information other than that the costs were reserved. I was not told what documents were originally not disclosed by the first defendant, and I am in no position to judge whether or not they were material to the outcome of this proceeding. In those circumstances I have no basis to exempt these costs from my general order.

[23] The plaintiffs relied upon the fact that the first defendant amended its defence from time to time. So it did, sometimes in consequence of the plaintiffs having amended their pleading. Rules 386 and 378 of the UCPR will apply. There is no need for me to make any order in relation to these matters; they are for an assessor.

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[5] Mansfield J, *APRA v Holloway* (2000) 35 ACSR 276, cited in *Tabtill Pty Ltd v Creswick; Creswick v Creswick & Ors* [2012] QCA 78, [9]. See also *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)* [2009] QCA 239, [3]-[4] citing McHugh J in *Oshlack v Richmond River Council* (1998) 193 CLR 72, [67]-[68].

[24] Lastly, it was said that the first defendant's costs of resisting the third party claim brought against it by the second defendant ought not be borne by the plaintiffs. I accept that submission. The third party proceedings between the second defendant and the first defendant were settled, and I am unaware whether the costs of those proceedings were dealt with in the settlement. Rather than make a formal order that the second defendant pay the first defendant's costs of those proceedings, I will just indicate my view that such an order would be appropriate if the costs are not dealt with by the settlement. If either party needs a formal order, they can re-apply. I will exempt these costs from the general order which I make against the plaintiffs.

Costs between the Plaintiffs and the Second Defendant

[25] The second defendant submitted that costs as between it and the plaintiffs ought not follow the event because my finding was that the case as pleaded by the plaintiffs would have failed. In my view the second defendant ought to have acted on the basis that, whatever the pleading said, the substance of the plaintiffs' case against it was good, and that the plaintiffs were likely to amend their pleading before or at the trial, or that failing that course by the plaintiffs, the trial Judge would do as I did, and determine the case on the evidence rather than the flawed pleading. I therefore reject this contention.

[26] Next it was said that because the second defendant (together with the first defendant) made a pre-trial offer it should not pay the plaintiffs' costs. The offer was in an amount of around $700,000, less than half the amount which the plaintiffs received by way of judgment. I cannot see how this fact puts the second defendant in a position to ask for anything other than the normal order. Nor do I see that the combination of the flaw in the plaintiffs' pleaded case and the fact of the offer could do so.

[27] As discussed, I do not consider that the second defendant should pay for the plaintiffs' prosecution of their case against the first defendant. I think the order most likely to do justice between the parties is that the second defendant ought to pay the plaintiffs' costs of the proceedings between them.

Third Parties' Costs

[28] The third parties sought their costs of the proceeding against the second defendant. They represented themselves at trial, but it was apparent that at times during the proceeding they had incurred legal costs, so there will be some legitimate claim there. The second defendant did not resist the order sought; it seems the correct result to me, and so I make the order sought.

Costs of this Application

[29] These costs will form part of the costs I deal with in the orders made today.