SUPREME COURT OF QUEENSLAND

CITATION:	*Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd* [2019] QSC 13
PARTIES:	**CLARENCE PROPERTY CORPORATION LIMITED (ABN 67 094 710 942) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE WESTLAWN PROPERTY TRUST (ASRN 095 611 804)** (applicant) **v** **SENTINEL ROBINA OFFICE PTY LTD ACN 608 262 291 AS TRUSTEE FOR THE SENTINEL ROBINA OFFICE TRUST** (respondent)
FILE NO/S:	BS No 4329 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written Submissions
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The applicant pay the respondent's costs of the application for production of documents made on 27 November 2017.** **2. The respondent pay the applicant's costs of the application to amend the defence and counterclaim filed on 23 November 2017.** **3. The respondent otherwise pay the applicant's costs of the proceeding, including the costs of the originating application, the counterclaim and reserved costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – where contractual entitlement to have costs paid on an indemnity basis existed – where applicant failed to claim an order for indemnity costs in originating application or statement of claim - whether failure to plead in a timely way affects

discretion of the court

Chen v Kevin McNamara & Son Pty Ltd [2012] VSCA 229, cited
Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd [2018] QSC 95, cited
John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No 2) [2018] QSC 48, cited
Kyabram Property Investments Pty Limited v Murray [2005] NSWCA 87, considered
Lee v Australia and New Zealand Banking Group Ltd [2013] QCA 284, cited
Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd [2018] QCA 314, cited
Shepparton Projects Pty Ltd v Cave Investments Pty Ltd (No 2) [2011] VSC 384, cited

COUNSEL: P O'Shea QC and F Lubett for the applicant
T Pincus for the respondent

SOLICITORS: A J & Co for the applicant
Russells for the respondent

Jackson J:

1. Following the judgment I gave for the applicant in the proceeding,[1] the respondent and claimant by counterclaim appealed to the Court of Appeal. Following the Court of Appeal's order dismissing the appeal,[2] it is now necessary to resolve the questions of costs of the proceeding.

Costs questions

2. The starting point is that the applicant succeeded on its originating application for a declaration that it was not in default under the Co-Owners Deed as alleged by the respondent and that the respondent's counterclaim for relief based on the alleged default by the applicant was dismissed.

3. The applicant applies for an order that the respondent pay its costs of the proceeding on both the originating application and the counterclaim to be assessed on the indemnity basis. It is not in dispute that the applicant was the successful party in the proceeding, given that it succeeded on the originating application and the counterclaim was dismissed. Accordingly, an order or orders for costs that follow the event[3] on the originating application and counterclaim respectively

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1 *Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd* [2018] QSC 95.
2 *Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd* [2018] QCA 314.
3 *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).

would result in an order that the respondent pay the applicant's costs of the proceeding, including the counterclaim.

4. However, the applicant applies for a special order as to costs, that the applicant's costs of the proceeding be assessed on the indemnity basis, based on a contractual provision in the Co-Owners Deed.

5. Subject to particular orders in respect of three interlocutory applications, the respondent does not oppose an order that otherwise it should pay the applicant's costs of the proceeding, including the counterclaim. However, the respondent opposes any order that the applicant's costs should be assessed on the indemnity basis.

6. The respondent also applies for specific orders that:

   (a) the applicant be ordered to pay the respondent's costs, to be assessed on the indemnity basis, of the application for an interlocutory injunction to restrain the respondent from taking steps under clause 11 of the Co-Owners Deed, based on the default alleged by the respondent;

   (b) the applicant be ordered to pay the respondent's costs of the application for production of documents that the respondent claimed were subject to legal professional privilege on the ground of waiver made on 27 November 2017; and

   (c) there be no order as to the costs of an application to amend the defence and counterclaim (save for the costs thrown away by the amendment).

7. The applicant opposes those orders.

Contractual provision for the indemnity basis

8. It is not in dispute that in exercising the discretionary statutory power to order a party to pay another party's costs to be assessed on the indemnity basis,[4] the court may and ordinarily will have regard to a contractual provision under which a party agrees to fully indemnify the other party for legal costs incurred, or on the basis described as the indemnity basis for assessing costs.[5] It is always a matter of discretion, as the rules of court provide that a party cannot recover any costs of a proceeding from another party other than under the rules or an order of the court,[6] that the costs are in the discretion of the court unless the rules otherwise provide[7] and that the costs that a court may award must be decided in accordance with Chapter 17A of those rules.[8]

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4 *Uniform Civil Procedure Rules* 1999 (Qld), r 703.
5 *Lee v Australia and New Zealand Banking Group Ltd* [2013] QCA 284, [9].
6 *Uniform Civil Procedure Rules* 1999 (Qld), r 680.
7 *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1) and (2).
8 *Uniform Civil Procedure Rules* 1999 (Qld), r 682(1)(b).

9. In the present case, the applicant relies on clause 16.8 of the Co-Owners Deed, that provides:

> **"Attorneys' and solicitors' fees**
> In any judicial action between the parties to enforce any of the provisions of this deed or any right of any party under this deed, regardless of whether such action or proceedings is prosecuted to judgment and in addition to any other remedy, the unsuccessful party shall pay to the prevailing party all reasonable costs and expenses incurred therein by the prevailing party, including all legal costs and expenses on the greater of:
> (a) a full indemnity basis; or
> (b) a solicitor and own client basis unless the terms of any settlement provide to the contrary."

10. The respondent's opposition to the order or orders sought for assessment on the indemnity basis in the present case is based on two points. First, in relation to both the originating application and defence to the counterclaim, the applicant did not claim an order for costs on the indemnity basis in the originating application and did not plead clause 16.8 in the statement of claim or the answer. Second, the claim for a negative declaration in the originating application was not one to "enforce any of the provisions" of the Co-Owner's Deed or any "right… under" the deed within the meaning of clause 16.8, so that no order for indemnity costs could be made in respect of the application for declaratory relief.

11. In my view, the respondent's first point is a good one in the circumstances of this case. In *Kyabram Property Investments Pty Limited v Murray*,[9] Beazley JA said:

> "In this case senior counsel for Mr. and Mrs. Murray submitted that in the exercise of its discretion, the Court should not accede to the application that costs be on an indemnity basis because, in its claim, repeated through three versions of the Statement of Claim, Kyabram and Banksia sought an order for costs in terms which would conventionally be interpreted as costs on a party/party basis. It was submitted that had Kyabram and Banksia intended to claim costs under their contractual entitlement, they should have specified that in their pleadings. It was submitted that this was a matter of some significance, given that, because of the default under the mortgage, interest on such costs would also be at the default rate. The Murrays submitted that the failure of Kyabram and Banksia to claim costs other than as a conventional incident of the litigation prejudiced the Murrays in any consideration they might give to making an offer of compromise in the proceedings, because the full extent of the claim now made by Kyabram and Banksia had not been pleaded.
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> There is considerable force in this submission. When Kyabram and Banksia brought this matter to Court, it would be reasonable for the Murrays to assume that they were facing the entirety of their mortgagee's claim against them. On the face of the pleadings there was nothing to indicate that the claim for costs was other than the conventional claim for costs. If any other

[9] [2005] NSWCA 87.

> claim was being made, Kyabram and Banksia should, in my opinion, have specifically pleaded it in accordance with the requirement of Pt 15 r.13(1) of the Supreme Court Rules, which provides that a plaintiff shall plead specifically any matter which, if not pleaded specifically, may take the defendant by surprise.
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> The requirement is of no small moment. Costs of litigation are a heavy burden in any event. A costs order, if made in the terms of the contractual provision in this case, would be substantially more and would attract interest at the mortgage default rate. The Murrays were entitled to know what claim they were facing so that they could make informed decisions in respect of any step they might take in the litigation, including, but not limited to, making an offer of compromise. Accordingly, I would propose that costs, both at first instance and on the appeal, be on a party/party basis only and be the entirety of the costs to which Kyabram and Banksia are entitled."[10]

12. In my view, there are three points of general relevance that may be drawn from those paragraphs. First, a claim or application for an order for costs to be assessed on the indemnity basis under a contractual provision should be pleaded or notified because it may otherwise catch the opposite party by surprise.[11] Second, it is relevant to the exercise of the discretion that it is likely that the burden of costs assessed on the indemnity basis will be substantially more. Third, a purpose of the requirement to plead or notify the claim for an order that costs be assessed on the indemnity basis is to enable an opposite party to make informed decisions about the steps they might take in the litigation.

13. I observe that this approach is broadly consistent with the approach to whether a claim or application for costs to be assessed on the indemnity basis should be notified in advance, generally speaking, in cases not involving a contractual provision.[12]

14. The applicant seeks to avoid this approach by two points. First, it submits that the circumstances in *Kyabram Properties* are distinguishable because it was a case between a mortgagor and mortgagee, where it was reasonable for the mortgagors to assume that they were facing the entirety of the mortgagee's claim against them. But that suggested distinction will not explain *Kyabram* away. The mortgagors in that case also brought cross-claims for relief from the mortgage. On appeal the mortgagee sought an order under the contractual provision for the costs of the cross-claims to be assessed on the indemnity basis. Beazley JA said:

> "Kyabram and Banksia claim that the costs to which they are entitled on the Cross-Claim are also governed by clause 14 of the mortgage so that they are entitled to those costs on an indemnity basis. **I would not accept that claim for the same discretionary reasons relating to the costs of the Statement**

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[10] [2005] NSWCA 87, [15] to [17].
[11] *Uniform Civil Procedure Rules* 1999 (Qld), r 149(1)(c) and (d) and 150(4)(c).
[12] *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No 2)* [2018] QSC 48, [15]-[16].

> **of Claim**. There is, in any event, a question whether clause 14 of the mortgage includes the costs of the cross-claim."[13] (emphasis added)

15. Second, the applicant submits that the issue is one of procedural fairness and sufficient notice was given by the applicant in making the claim for indemnity costs, after the judgment of 4 May 2018, by the process of serving the applicant's written submissions seeking an order for costs to be assessed on the indemnity basis. Accordingly, as any delay in giving notice is only one factor to be taken into account in the exercise of the court's discretion,[14] it should not be deprived of an order that costs be assessed on the indemnity basis.

16. In my view, these submissions should not be accepted in the circumstances of this case. There are reasons why, in some cases, a failure to give timely notice of a claim or application for an order that costs be assessed on the indemnity basis should not deprive a successful party to the benefit of such an order. But where the claim or application is made under a contractual provision, a party claiming the benefit of such a provision may reasonably and ordinarily be expected to give timely notice of reliance on the provision for the costs to be incurred by it in the proceeding. There was no explanation in this case as to the reason why the applicant did not do so. [15]

17. It follows, in my view, that there should be no order that the applicant's costs of the proceeding be assessed on the indemnity basis.

Application for an interlocutory injunction

18. On 2 May 2017, the applicant filed the originating application. Paragraph 2 applied for an interlocutory injunction to restrain the respondent from taking any further steps under clause 11 of the Co-Owners Deed until the trial of the proceeding.

19. On 5 May 2017, the respondent gave notice of its intention at the hearing of the interlocutory injunction application to apply for costs on the indemnity basis.

20. On 10 August 2017, by consent, I ordered that the application for an interlocutory injunction be dismissed and reserved the costs. It was unnecessary to hear the application because it was not pressed. The separate costs associated with the application should not be a large sum.

21. The ground of the respondent's application for an order for costs to be assessed on the indemnity basis is that there was no sufficient justification for the application because, if the applicant was successful on the application for a declaration that it

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[13] [2005] NSWCA 87, [18].

[14] *Chen v Kevin McNamara & Son Pty Ltd* [2012] VSCA 229, [12]; *Shepparton Projects Pty Ltd v Cave Investments Pty Ltd (No 2)* [2011] VSC 384.

[15] The question does not arise in this case, but if a successful party only gives notice of reliance on a contractual provision some time well after a proceeding has been started, it may be appropriate to order that the costs of the successful party after that date be assessed on the indemnity basis.

was not in default as alleged by the respondent, the steps that might be taken by the respondent under clause 11 would be invalid. Those steps included the appointment of a valuer, obtaining the valuation and possibly electing to purchase the applicant's interest in the joint venture property.

22. The ground of the applicant's resistance to the order sought by the respondent is that since the applicant was ultimately successful, the respondent had no entitlement to take any of the further steps provided for under clause 11. In retrospect, the applicant submits it was entitled to the injunction that it included in the originating application.

23. In my view, both parties' positions are overstated. As for the applicant's position, it does not necessarily follow that because it has been ultimately successful in the proceeding it would have obtained an interlocutory injunction. The applicant ignores the balance of convenience that determines whether an interlocutory injunction should be granted.

24. As for the respondent's position, whilst it is true that if the applicant succeeded in establishing that it was not in default, any subsequent steps taken by the respondent under clause 11 would also be invalid, the applicant might have been prejudiced if those steps had proceeded in the meantime. For example, if the applicant elected to participate in the valuation process, in the meantime, it would risk wasting time and expense.

25. In my view, overall, no separate order for costs should be made in respect of the order sought in the originating application for an interlocutory injunction, with the consequence that the reserved costs of the application in that respect will follow the event of the proceeding on the originating application.[16]

Application for production of documents

26. On 27 November 2017, which was the first day of the trial of the originating application and the counterclaim, after opening its case, the applicant made an application for an order for production of documents the subject of a claim for legal professional privilege on the ground of waiver. The argument on the application was argued mostly by written submissions. The oral argument and my brief extemporaneous reasons for decision dismissing the application took less than an hour.

27. The respondent applies for an order that the applicant pay the respondent's costs of the application for further disclosure, on the ground that it is a relevant and separate "event" for the purpose of a separate order for costs of that application.[17]

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16 *Uniform Civil Procedure Rules* 1999 (Qld), r 698.
17 *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).

28. The applicant resists the order sought relying on the contractual provision in clause 16.8 as an agreement that the costs should be paid by the respondent in respect of the "judicial action" comprised by the proceeding as a whole.

29. In my view, that submission should be rejected. I need not repeat what was said above about the effect of the applicant's failure to give timely notice of its intention to rely on clause 16.8. For the same reasons as previously expressed, I do not consider that the exercise of the discretionary statutory power to order costs of the application for production of documents should be exercised having regard to the contractual provision.

30. Accordingly, in my view, the applicant should be ordered to pay the respondent's costs of the application for production of documents made on 27 November 2017.

Application to amend the defence and counterclaim

31. On 23 and 27 November 2017, the respondent applied for leave to amend the defence and counterclaim.

32. Some of the amendments were uncontentious. Three were contested. I refused the contested amendments. I did not make any order for costs of the application at that time, and neither party applied for such an order at that time.

33. The applicant submits that the respondent should pay the applicant's costs of the application to be assessed on the indemnity basis under clause 16.8. For the same reasons as previously expressed, I do not consider that the exercise of the discretionary statutory power to order costs of the application to amend the defence should be exercised having regard to the contractual provision.

34. Alternatively, the applicant submits that the costs of the application should be ordered to be costs in the proceeding. The respondent submits that there should be no order for costs on the application. Both submissions seem to stem from an acceptance that overall each of the parties had some success on the application.

35. In my view, the respondent should pay the applicant's costs of the application. First, to the extent that there was an eventual contest that had to be decided, the applicant got the better of it. Second, it is a usual exercise of discretion where both sides have some success on such an application conducted at an interlocutory stage for the costs to be made costs in the proceeding, so that the ultimately successful party receives them. However, there is no point in making such an order now. The result of the proceeding is known. The applicant was the successful party.