

SUPREME COURT OF QUEENSLAND

CITATION: *APGL (Palm Beach) Pty Ltd v Palm Beach Developments Pty Ltd (No 2)* [2020] QSC 22

PARTIES: **APGL (PALM BEACH) PTY LTD ACN 113 479 744**
(plaintiff)
v
PALM BEACH DEVELOPMENTS PTY LTD ACN 101 716 081
(defendant)

FILE NO/S: 11759 of 2018

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 February 2020

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Flanagan J

ORDER: **The defendant pay the plaintiff's costs of the proceedings to be assessed on the indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – OFFER OF COMPROMISE OR OFFER TO SETTLE OR CONSENT TO JUDGMENT PURSUANT TO RULES – MATTERS RELEVANT FOR COURT TO ORDER OTHERWISE – where the plaintiff obtained an order no less favourable than its offer to settle – where the defendant argued that the plaintiff made late substantive changes to its case – whether the defendant showed that another order for costs was appropriate in the circumstances
Uniform Civil Procedure Rules 1999 (Qld) r 360

COUNSEL: J W Peden QC with B A Reading for the plaintiff
G D Sheahan for the defendant

SOLICITORS: K & L Gates for the plaintiff
Cronin Miller Litigation for the defendant

- [1] On 31 January 2020, I made the following orders:
- “1. It is declared that the plaintiff is entitled to the amount of \$3 million presently held in the Trust Account of K and L Gates.
 2. The Court orders that the amount of \$3 million and any interest that has accrued on that amount be released from the Trust Account of K and L Gates to the plaintiff in accordance with cl 2(c) of the deed entered into on or around 9 June 2016.
 3. The defendant’s counterclaim is dismissed.
 4. The Court will hear the parties as to costs.”
- [2] The parties have now provided written submissions in relation to costs.
- [3] On 26 September 2019, the plaintiffs made an offer under Chapter 9, Part 5 of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)* in the following terms:
- “1. The Retention Amount and any interest that has accrued on the Retention Amount be released from the trust account of K&L Gates to the plaintiff in accordance with clause 2(c) of the Deed.
 2. The counterclaim be dismissed.
 3. Each party bears their own costs.”
- [4] Rule 360(1) of the UCPR provides:
- “(1) If–
- (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; and
 - (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
- the court must order the defendant to pay the plaintiff’s costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.”
- [5] This requires a comparison between the offer to settle and the “order” obtained by the plaintiff. In the present case, the offer was one in which the plaintiff would be paid the “Retention Amount” (which was an amount of \$3 million) and any interest that had accrued on the Retention Amount, which was the effect of orders 1 and 2. Accordingly, the plaintiff has obtained an order that is no less favourable than its offer to settle.
- [6] Under r 360, the Court must order the defendant to pay the plaintiff’s costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

[7] The defendant submits that the appropriate order for costs is that the plaintiff have its costs on the standard basis and limited to the costs of the four day trial, or alternatively to the costs of “the failure to fund issue”. This is submitted to be the appropriate costs order because:

- “(a) the late substantive changes in APGL Palm Beach’s pleaded case, which raised for the first time the issue that loans from ‘APGL Parent Co’ amounted to ‘Development Costs’ for the purposes of the Development Agreement (**Development Costs Issue**);
- (b) the evidence for the first time of the principal factual witnesses for APGL Palm Beach, Mr McMahon and Taylor (in affidavits delivered to the solicitors for PBD the Friday before trial) that the Master Income Statement provided to the defendant prior to the commencement of the proceeding in 2016 was ‘incorrect’ in its recording of the treatment of APGL Parent Co Loans and the references to APGL Palm Beach’s and PBD’s equity in the project (**Loans v Equity Issue**);
- (c) the absence of any prior identification to PBD, other than on the Friday before trial, that ‘outstanding Development Costs’ for the purposes of clause 11 of the Development Agreement (governing the priority of payments out of the Net Proceeds of Sale of the Project), included repayment of loans to APGL Parent Co.”¹

[8] In my view, for the purposes of r 360(1), the defendant has failed to show that another order for costs is appropriate in the circumstances. As identified in the Reasons,² the primary issue at trial was whether the plaintiff or the defendant was entitled to part or the whole of the amount of \$3 million. The resolution of that issue turned upon the proper construction of the Development Agreement. Properly construed, the Development Agreement did not permit any repayment to the defendant in circumstances where the Total Development Costs of the Project exceeded the Net Proceeds on the Sale of the Project. As early as 24 March 2016, Mr McMahon for the plaintiff informed Mr Whitelaw for the defendant that “... the attached ‘project to date’ accounts and projections indicate there will be no Return payable to PBD...”³ Attached to the email of 24 March 2016, among other documents, was the first iteration of the Master Balance Sheet and Master Income Statement.

[9] Consistent with the advice in the email of 24 March 2016, the plaintiff’s claim and statement of claim (which has never been amended from its original filing date of 16 November 2018) asserted that as at 30 June 2018, the Total Development Costs of the Project exceeded the Net Proceeds on the Sale of the Project by approximately \$26 million. The plaintiff correctly submits that its case has always been that the defendant, as a mezzanine financier, was not entitled to any repayment of the PBD Loan Contribution following the sale of the Project.⁴ The changes to the

¹ Defendant’s Submissions on Costs, paragraph 13 (footnotes omitted).

² *APGL (Palm Beach) Pty Ltd v Palm Beach Developments Pty Ltd* [2020] QSC 2, [1].

³ *APGL (Palm Beach) Pty Ltd v Palm Beach Developments Pty Ltd* [2020] QSC 2, [31].

⁴ Plaintiff’s Submissions on Costs, paragraph 11.

plaintiff's case identified by the defendant were in response to amendments to the defendant's counterclaim. I accept the plaintiff's submissions that the defendant first raised the issue of whether or not repayment of loans to APGL Parent Co were Development Costs within the meaning of the Development Agreement.⁵ This was an allegation made by the defendants one week prior to trial. By the plaintiff's amended reply and further amended answer filed 17 October 2019, it was pleaded in response that the repayment of loans from APGL Parent Co were Development Costs within the meaning of the Development Agreement. This did not, in my view, constitute a "late substantive change in the plaintiff's case", but rather a response to late amendments made by the defendant, as reflected in its amended defence and further amended counterclaim filed 18 October 2019.

- [10] The defendant submits that the Master Income Statement was shown to be "incorrect" only after the late service of the affidavits of Mr McMahon and Mr Taylor. This submission ignores that prior to the commencement of the proceedings, the plaintiff provided the defendant with a copy of all the transactions in the general ledger for the plaintiff from inception of the Project to 30 June 2018 that evidenced an inter-company loan account between APGL Parent Co and the plaintiff, which was conceded by Mr Whitelaw in cross-examination.⁶ Further, as correctly submitted by the plaintiff, it was the defendant's witness, Grant Williams, who made the allegations about the defendant's intention to seek to rely on the bottom 12 rows of the Master Income Statement as being relevant to the issue of the meaning of terms in the Development Agreement.⁷ Mr McMahon's affidavit sworn 11 October 2019 was sworn and provided in response to the affidavit of Mr Williams.⁸
- [11] The defendant's submissions also ignore the fact that the defendant made significant amendments to its own case.⁹ Further, the defendant's pleaded case in relation to "the failure to fund issue" failed at every turn.¹⁰

Disposition

1. The defendant pay the plaintiff's costs of the proceedings to be assessed on the indemnity basis.

⁵ Plaintiff's Submissions on Costs, paragraph 14(d).

⁶ Plaintiff's Submissions on Costs, paragraph 17(c); Exhibit 10, affidavit of Michael James Taylor filed 9 September 2019, paragraph 14(a); Transcript of Proceedings 16 October 2019, 3-13, lines 9-35.

⁷ Plaintiff's Submissions on Costs, paragraph 17(d).

⁸ Plaintiff's Submissions on Costs, paragraph 17(e).

⁹ Plaintiff's Submissions on Costs, paragraphs 18 and 19.

¹⁰ *APGL (Palm Beach) Pty Ltd v Palm Beach Developments Pty Ltd* [2020] QSC 2, [61].