SUPREME COURT OF QUEENSLAND

CITATION:	*Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd & Ors* [2002] QSC 048
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (First Plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (Second Plaintiff) **v** **GLENGALLAN INVESTMENTS PTY LTD** (Defendant)
FILE NO:	1688 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (First Plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED IN LIQUIDATION)** (Second Plaintiff) **v** **HGT INVESTMENTS PTY LTD** (Defendant)
FILE NO:	1689 OF 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (First Plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (Second Plaintiff) **v** **BARRY THORNTON** (Defendant)
FILE NO:	1690 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (First Plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (Second Plaintiff) **v** **BRIAN JAMES PRENDERGAST**

(Defendant)

FILE NO:	1691 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (First Plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (Second Plaintiff) **v** **DAVID ANDERSON** (Defendant)
FILE NO:	1692 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (First Plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (Second Plaintiff) **v** **EDWIN THOMAS CODD** (Defendant)
FILE NO:	9485 of 1998
DIVISION:	Trial Division
DELIVERED ON:	5 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2002
JUDGE:	Helman J.
CATCHWORDS:	COSTS – ASSESSMENT – NON-PARTIES *Knight v. F.P. Special Assets Ltd* (1992) 174 C.L.R. 178 CONS
COUNSEL:	Mr S.S.W. Couper Q.C. for the plaintiffs Mr D.R. Cooper S.C. and Mr C.L. Francis for the defendants
SOLICITORS:	Gadens Lawyers for the plaintiffs Lees Marshall Warnick for the defendants

[1] **HELMAN J:** There is a dispute in these proceedings as to what, if any, orders as to costs should be made. I shall deal first with the general arguments put to me, and then with the particular arguments about reserved costs.

[2] The successful defendants seek orders for the payment of their costs by Mr Nicola Russo, the managing director of the first plaintiff, in the event that the first plaintiff can adduce no evidence of its ability to meet any costs order against it; but, alternatively to those orders, orders for the payment of their costs by the first

plaintiff 'in the first instance' and by Mr Russo in the event that the first plaintiff does not pay the assessed costs ordered against it within one month of demand. The defendants also seek orders for the payment of their costs by Messrs Philip Hennessy and Michael Dwyer, the receivers and managers of the second plaintiff appointed by the first plaintiff in 1991, in each instance from the date when the second plaintiff was joined as a plaintiff. Furthermore, the defendants seek each order to be for the payment of costs on the indemnity basis. No order is sought against the second plaintiff, which has been in liquidation since 6 March 1996.

[3] On behalf of the defendants it was argued that orders for costs on the indemnity basis are justified for a number of reasons, including: that the plaintiffs' cases were 'fundamentally flawed from the outset' but were nonetheless persevered with; that the plaintiffs were aware of their inability to adduce evidence in support of their claims; that there was late disclosure of the report dated 23 November 1992 by Messrs Hennessy and Dwyer referred to in para. 27 of my reasons for judgment published on 30 November 2001; that the plaintiffs were guilty of conduct which grossly prolonged the litigation; and that they were high-handed and presumptuous in pursuing the proceedings. The defendants elaborated their assertion that the plaintiffs' cases were fundamentally flawed from the outset by listing a number of matters in the conduct of the proceedings which they attribute to Mr Russo and to the receivers and managers of the second plaintiff. As I understand the submissions made on behalf of the defendants those matters justify both the making of orders on the indemnity basis and the making of orders against Mr Russo and the receivers and managers of the second plaintiff. Finally it is submitted on behalf of the defendants that it is appropriate that they, having been completely successful, should not be left badly out of pocket in respect of costs.

[4] With hindsight, in the light of my conclusions on the evidence at the trial, it could be said that the plaintiffs' cases were fundamentally flawed from the outset, but not I think so obviously so as to warrant the Draconian orders sought by the defendants. It was reasonable for the plaintiffs to conclude that they could rely on the loan agreement documents in pursuing their claims and that they could argue - as was done on their behalf - that the audit-trail transactions constituted fulfilment by the second plaintiff of its obligations under the loan agreements. It was also open to the plaintiffs to argue that the agreements, affirmations, acquiescences, and waivers to which I referred in my reasons at paras. 43 to 46 could be established on the evidence.

[5] In pursuing their claims the plaintiffs were entitled to, and did, place a good deal of reliance on the letters written on behalf of the defendants referred to in paras. 20 and 21 of my reasons. The plaintiffs' failure in the proceedings may warrant orders as to costs to follow the event, but their pursuit of their claims in the face of the matters which carried the day for the defendants does not warrant a departure from the standard basis of assessment of those costs. (I say 'may warrant orders as to costs to follow the event' since I have not yet dealt with the submissions, advanced on behalf of the plaintiffs, that there should be no order as to costs.) Mr Russo's actions after the proceedings were instituted were no more than might have been expected of a managing director concerned to ensure that his company's cases progressed, and the evidence before me does not reveal that the receivers and managers of the second plaintiff did any more than the rules required of them after the second plaintiff was made a party in each of the proceedings: pursuant to the

order of Fryberg J. recorded as having been made on 24 January and 17 February 1995 in proceeding no. 1688 of 1991, pursuant to the orders of Moynihan J. made on 20 March 1998 in proceedings nos. 1689, 1690, 1691, and 1692 of 1991, and pursuant to the order of Botting D.C.J. made on 11 June 1998 in the proceeding against Mr Codd which is now no. 9485 of 1998. I shall return to the subject of the parts played by Mr Russo and the receivers and managers of the second plaintiff.

[6] There were delays in the proceedings but they may properly be attributed to both plaintiffs and defendants. Annexed to Moynihan J.'s. reasons of 5 February 1998 is a chronology which shows the history of the proceedings, apart from no. 9485 of 1998, to then. As his Honour said, 'The parties seem to have conducted the actions at a pace which suited them and it seems that it is only fairly recently that the defendants' solicitors had been actively complaining about delay'.

[7] While it is true that the plaintiffs failed to disclose the report of 23 November 1992 until shortly before the beginning of the trial, they were not alone in failing to perform their duty of disclosure. The defendants too failed to disclose documents dealt with in a ruling I gave on 26 September 2000, which was the subject of an appeal: see *Glengallan Investments Pty Ltd v. Arthur Andersen* [2002] 1 Qd. R. 233. The result of the latter failure was to cause substantial delay in the completion of the trial.

[8] Except in the - sometimes lengthy - interludes of inactivity in the proceedings they were conducted vigorously on both sides, but I am not persuaded that the plaintiffs' conduct could properly be described as high-handed or presumptuous.

[9] It is convenient to deal with the submissions concerning proposed costs orders against Messrs Hennessy and Dwyer before dealing with those concerning proposed orders against Mr Russo.

[10] The second plaintiff became a party in each proceeding on the application of the first plaintiff. The receivers' colleague Mr David Anderson, a partner in KPMG familiar with the books and records of the second plaintiff of which the receivers took possession, gave evidence but only to identify documents. The conduct of the plaintiffs' cases was clearly enough in the hands of the first plaintiff.

[11] In letters dated 8 December 1994 from the defendants' solicitors to Messrs Hennessy and Dwyer attention was drawn to the decision of the High Court in *Knight v. F.P. Special Assets Ltd* (1992) 174 C.L.R. 178, and Messrs Hennessy and Dwyer were notified that the defendants would hold them personally liable for any costs the defendants might incur as a result of the joinder of the second plaintiff in proceeding no. 1688 of 1991, then being sought by the first plaintiff. Notice was also given that the defendants would seek those costs 'on a full indemnity basis'. In *Knight v. F.P. Special Assets Ltd* it was held that the discretion to award costs under order 91 rule 1 of the *Rules of the Supreme Court* was not confined to orders against parties and so the rule permitted the making of an order for costs against the receivers of companies which were unsuccessful parties in proceedings, even though the receivers were not themselves parties to the proceedings. It was not in issue before me that such an order could also be made under the current rules, the *Uniform Civil Procedure Rules*, 1999.

[12] In *Knight v. F.P. Special Assets Ltd* special leave to appeal to the High Court from the decision of the Full Court of the Supreme Court of Queensland was confined to

the question whether the Supreme Court had jurisdiction to make orders against non-party receivers. The *ratio* of the case was accordingly so confined. In the reasons of Mason C.J. and Deane J., with whom Gaudron J. agreed, there were, however, authoritative *obiter dicta* concerning the way in which the discretion to award costs against a non-party could be exercised:

> Obviously, the prima facie general principle is that an order for costs is only made against a party to the litigation. As our discussion of the earlier authorities indicates, there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. Thus, for example, there are several long-established categories of case in which equity recognized that it may be appropriate for such an order to be made . .
>
> For our part, we consider it appropriate to recognize a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.

[13] I am not persuaded that the circumstances of the receivers and managers of the second plaintiff fall into that category. The second plaintiff was brought in as a party because - although as far as it and the first plaintiff were concerned the second plaintiff's interests in the alleged loan agreements had been validly assigned to the first plaintiff - the defendants challenged the assignments. Consistently with that stance on the assignments, the receivers and managers did not play an active part in initiating or conducting the proceedings. On 24 January 1995 Mr Couper informed Fryberg J., who was hearing the application by the first plaintiff for leave to join the second plaintiff as a plaintiff in proceeding no. 1688 of 1991, that he had instructions from the receivers and managers of the second plaintiff to consent to the joinder although they regarded their consent as unnecessary. Moynihan J., in his reasons of 5 February 1998, merely concluded that it was appropriate to allow the first plaintiff to join the second plaintiff as a plaintiff in proceedings nos. 1689 to 1692 of 1991 inclusive adding, 'This does not preclude the receiver or liquidator (or whoever has the standing to do so) taking such steps as they might be advised to protect whatever interest they might have in the situation'. The joinder of the second plaintiff in proceeding no. 9485 of 1998 followed as a matter of course from its joinder in the other proceedings. Accordingly, I conclude that the interests of justice referred to in *Knight v. F.P. Special Assets Ltd*, so far as they apply to the part in the proceedings played by Messrs Hennessy and Dwyer, will be adequately served if orders for costs are made against the first plaintiff, which appointed them.

[14] On behalf of the defendants a number of matters were put forward as justifying orders for costs against Mr Russo. On 2 September 1999 Ms Susan Forrest, the

solicitor employed by the plaintiffs' solicitors who had the conduct of the proceedings, swore in an affidavit that the instructions she received on behalf of the first plaintiff had come 'almost exclusively' from Mr Russo. Many of the matters relied on by the defendants concerned the conduct of the proceedings on behalf of the plaintiffs. Underlying much of what is put forward on behalf of the defendants is the assumption that Mr Russo must have known at all relevant times that the first plaintiff's case was bound to fail. But Mr Russo was entitled to believe the loan agreement documents and the letters to which I have referred would support the first plaintiff's case, encouraged no doubt by advice from the first plaintiff's solicitors and counsel. The first plaintiff lost, but I see nothing in those circumstances to warrant departure from the conventional orders for costs and the making of orders against Mr Russo.

[15] There are, however, aspects of the first plaintiff's position which support the defendants' argument for orders against Mr Russo. There is cause for concern as to whether the first plaintiff could meet orders for costs made against it if one bears in mind that the defendants' costs are likely to come to a sizeable sum. In *Perpetual Trustees (W.A.) Ltd v. Equuscorp Pty Ltd & Ors* [2000] N.S.W.S.C. 1120 Bergin J. recorded, in reasons delivered on 5 December 2000, that the first plaintiff had settled for $500,000 a cross-claim against it for $4,064,995 'on the basis that the payment was greater than that which would be available to the [claimant of the $4,064,995] if it attempted to enforce any judgment which it might obtain on the Cross Claim' (para. 14). In an affidavit sworn on 22 December 2001 by Ms Katie Russo, a director of the first plaintiff, she said that the directors of the first plaintiff (i.e., she and her father Mr Russo) 'maintain an honest and genuine belief that Equus has the capacity to pay its debts as and when they fall due' (para. 17), and 'Equus has never failed to pay costs orders made against it in any of the recovery litigation cases in which it has been involved for over the past 10 years or so'. (para. 34). But a balance sheet as at 30 June 2001 shows a deficiency in net assets of $620,731, and major assets of the first plaintiff are taken at the directors' valuations. (In para. 17 Ms Russo endeavours to explain that the real position of the first plaintiff is that it has a surplus of net assets of nearly $3 million, but nonetheless the deficiency figure is the one shown in the balance sheet.) Giving all due weight to the contents of Ms Russo's affidavit, I conclude there is a not insubstantial risk that the first plaintiff will be unable to satisfy orders for costs made against it.

[16] Should, however, orders for costs be made against Mr Russo to take effect if the first plaintiff does not pay assessed costs ordered against it within one month of demand? A company called Targridge Pty Ltd holds all the shares in the first plaintiff and Mr Russo and his wife are the only directors of and shareholders in that company. The first plaintiff has granted four charges now in favour of Katesara Pty Ltd, the trustee of the Russo Family Trust. Mrs Russo and another daughter, Sarah, are the only directors of, and Mr and Mrs Russo the only shareholders in, Katesara. Mr Russo and members of his family are then those beneficially interested in, and in control of, the first plaintiff, although one might reasonably conclude that Mr Russo's interest and control is dominant. The evidence of Mr Stewart-Hesketh, who was referred to in para. 35 of my reasons, confirms that: he said Mr Russo 'was the boss' (transcript, p. 468) and the first plaintiff's was 'Mr Russo's business' (transcript, p. 574). In those circumstances I shall make the alternative orders sought against Mr Russo - if it is appropriate to award costs to the defendants.

[17] It follows from what I have said that any orders for costs in favour of the defendants should be against the first plaintiff and Mr Russo and not against any other persons not parties to the proceedings, and that those costs should be assessed on the standard basis. But should the defendants be awarded costs at all?

[18] On behalf of the plaintiffs it was submitted that there should be no order as to costs. In making that submission counsel for the plaintiffs referred to: the loan agreement documents; the letters written on behalf of the defendants referred to in paras. 20 and 21 of my reasons; amendments to the defendants' pleadings; discrepancies between the evidence given at the trial and particulars given; the late raising of issues; the delay in disclosure to which I have referred; issues upon which the defendants failed which are referred to in paras. 48 and 49 of my reasons; and a ruling given against the defendants concerning the evidence of Mr John Watter. Giving those matters all due weight, I nonetheless conclude that, subject to any orders I might make concerning reserved costs, there is no justification for depriving the defendants of orders for costs. I should add that the defendants made no application for security for costs against the first plaintiff, but they were justified in not doing so since it has at all times asserted that it is solvent: see a copy of a letter dated 25 November 1994 from its solicitors to the defendants' solicitors which is part of exhibit 174, and Ms Katie Russo's affidavit.

[19] I shall invite oral argument concerning the costs reserved in interlocutory applications in the proceedings.