SUPREME COURT OF QUEENSLAND

CITATION:	*McDowall v Reynolds* [2002] QSC 142
PARTIES:	**ALBERT JAMES McDOWALL** (Applicant/Plaintiff) **JOHN REYNOLDS** (Respondent/Defendant)
FILE NO/S:	199 of 1989
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	
DELIVERED ON:	12 March, 2002
DELIVERED AT:	Cairns
HEARING DATE:	6 November 2001
JUDGE:	Jones J
ORDER:	**1. That the defendant's application is allowed.** **2. That Action No. 1999 of 1989 is dismissed for want of prosecution.** **3. That the plaintiff's application for leave to proceed is dismissed.** **4. That the plaintiff is to pay the defendant's costs of and incidental to the action, except in respect of those matters where specific orders have been made.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND PRACTICE UNDER RULES OF COURT – TIME–DELAY SINCE LAST PROCEEDINGS – OTHER MATTERS – where plaintiff had delayed for more than two years in further proceeding with the action – where plaintiff had hitherto twice been granted the leave of the court – whether a further application by the plaintiff for leave to proceed should be dismissed. *Supreme Court of Queensland Act* 1991, S 85 *Uniform Civil Procedure Rules*, r 5(3), r 280, r 371(2000] *Cooper v Hopgood & Ganim* (1999) 2 QdR 113 considered *Quinlan v Rothwell & Anor* [2001] QCA176, considered
COUNSEL:	Mr. D.B. Fraser QC for the applicant/plaintiff Mr. D. North SC for the respondent/defendant
SOLICITORS:	Williams Graham & Carman for the applicant/defendant

Corsetti Lawyers for the respondent/defendant

[1] In this matter the plaintiff applies pursuant to R.389(2) of the Uniform Civil Procedure Rules (UCPR) for leave to proceed with his action in which no step has been taken for more than two years. The defendant brings a cross-application for the dismissal of the action for the want of prosecution.

[2] Whilst the onus in each instance is on the party making the application and the respective tests to be applied are stated differently, the applications fall to be determined on similar considerations. In the circumstances the outcome of both applications can be determined by consideration of the application to dismiss in which the defendant bears the onus.

[3] The plaintiff's cause of action arises from an agreement he entered into with one William George Robbins on 15 October 1947. The plaintiff and his brother, in partnership with Robbins, had mined limestone for a number of years on part of the land then owned by Robbins which, in the main, was used as a cane farm. That agreement provided for the sale of an area of land of approximately 14 acres which was to be excised from Robbins' freehold land which was described as Portion 110, County of Solander, Parish of Mowbray contained in Deed of Grant No. N2652 Vol 97 Fol 4 (hereinafter "Por 110"). That area of land to be excised (hereinafter "the subject land") included an area of approximately 10 acres over which there was a mining tenement and the other land by which access could be gained to the mining tenement.

Background facts

[4] The history of dealings relevant to the subject land and to the plaintiff's cause of action have been set out in considerable detail in the reasons for judgment of White J dated 2 September 1994 and I adopt those as being a correct narrative. However, for ease of reference I shall identify the relevant agreements and events which define the plaintiff's claims in a broad sense.

[5] **On 15 October 1947** Robbins agreed to sell part of Portion 110 ("the subject land") to the plaintiff for the sum of £420. The agreement provided that the plaintiff would bear the costs of the survey of the subdivision and the registration of the excised land.

[6] **On 27 August 1950**, with the relevant surveys not yet having been undertaken, Robbins granted to the plaintiff an option to purchase the balance of Por 110. The option was for a period of 10 years and was to be exercised not earlier than 1 July 1959 nor later than 31 July 1959. In the meantime the plaintiff, inter alia, would –

(i) Not press for the surveys or registration to be carried out;
(ii) Continue to allow the subject land to remain mortgaged to National Bank.

It was agreed also that in the event the option was not exercised, Robbins would immediately undertake a survey to establish the boundaries of the subject and the access to that land. The plaintiff was to pay the costs of such survey.

[7] **On 25 November 1959** the plaintiff gave notice of his intention not to exercise the option. He called on Robbins at that time and again in April 1960 and October 1960 to undertake the survey.

[8] **In 1961** Robbins informed the plaintiff he intended to sell the balance of Por 110 to the defendant.

[9] **On 22 February 1961** Robbins entered into an agreement to sell to the defendant the balance of the land described in the following way:-

> "(a) An unencumbered estate in fee simple in all that part (estimated to contain 84 acres more or less) of Portion 110, County Solander, Parish of Mowbray, remaining after the sale, pursuant to Sale Contract dated the 15th day of October, 1947 of an estimated area of 14 acres of such land to Albert Thomas McDowall – the approximate boundaries of the land so sold to Albert Thomas McDowall and of the land being sold to the purchaser under these presents being shown on the sketch plan hereinafter appearing."

By clause 2 of that same agreement Robbins agreed (subject to the approval of the Central Cane Prices Board of the assignment of Robbins' canegrowers' entitlements) to execute a Memorandum of Transfer of the whole of Por 110 to the defendant on terms that –

> "The purchaser [the defendant] will, pursuant to his undertaking hereinafter contained for conveyance to the said Albert Thomas McDowall of title to the part of the said Portion 110 purchased by him, execute and deliver to the solicitor for the parties a Memorandum of Transfer in favour of the said Albert Thomas McDowall and an authority to complete the same by including therein, when known, the appropriate subdivisional number for the area to be transferred to the said Albert Thomas McDowall;"

The agreement further provided –

> "4. WHEREAS it has been agreed between the parties that, for the speedier finalisation of the within transaction, the whole of the said Portion 110 be transferred to the purchaser, with re-transfer by him to Albert Thomas McDowall of the parcel so being purchased by him as aforesaid, it is hereby agreed between the parties that
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> (a) The vendor will arrange for the surveying, without delay, of the said Portion 110 for the purpose of transferring to the said Albert Thomas McDowall the part being purchased by him and of issue of balance title for the remainder, hereby sold to the within Purchaser. Whereas the costs of such survey are, by virtue of the said Agreement of 15th October 1947, payable by the said Albert Thomas McDowall, the Vendor will undertake the responsibility of seeing to the payment of such costs by the said Albert Thomas McDowall and will in any case indemnify the Purchaser against liability for such survey costs.
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> (b) On the tendering to him of the plan of such survey the Purchaser will, as registered proprietor of the land, sign such plan and will cause the title deed for the said land to be made available at the

> Titles Office in Townsville for registration of such plan and of the Memorandum of Transfer in favour of Albert Thomas McDowall mentioned in paragraph (b)(ii) of Clause 2 of these presents."

[10] Throughout 1961 and 1962 the plaintiff, (who had not seen the terms of the agreement set out above) assumed that Robbins and/or the defendant would be responsible for carrying out the survey. He expressed his concerned to the defendant about the lack of protection of his beneficial interest in the subject land and he requested the survey. There was a suggestion in 1962 that the defendant might buy back the subject land from the plaintiff. However, in March 1963 the plaintiff withdrew from such negotiations and asked for access to the sale documents. In the upshot, the full documentation was not obtained by the plaintiff until 1989.

[11] This action was commenced on 19 October 1989. By his original statement of claim the plaintiff sought declarations as to his beneficial interest in the subject land and the enforceability of the 1961 agreement against the defendant and order that the agreements be specifically performed.

[12] By his defence the defendant denied that the plaintiff had purchased the land, that the defendant had any obligation to request the survey and subdivision of the land and raised defences of laches and acquiescence.

[13] I noted in my reasons on an earlier application in this matter, the peculiarly tortured path of this action. After the issue of the writ on 19 October 1989 the defendant made an application to have the application struck out on the basis that the relief sought was exclusively within the jurisdiction of the Mining Wardens Court pursuant to s 80(4) of the prevailing legislation, the *Mining Act* 1968. That application was dismissed and an order for directions made consequent upon which the pleadings were delivered and an exchange of affidavits of documents took place in April/May 1990. The aim of the directions was to achieve readiness for trial in the second half of 1990. No further step was taken in the action before 7 April 1994 when the defendant applied to have the action struck out for the want of prosecution and the plaintiff applied for liberty to proceed.

[14] **On 2 September 1994** pursuant to the order of White J the plaintiff was given leave to proceed. Thereafter followed some activity for the next six months when interrogatories were delivered, answers to interrogatories filed and further and better particulars supplied. After a year's inaction, each of the parties gave to the other a notice of intention to proceed and thereafter the plaintiff delivered his reply, filed supplementary affidavits of documents and undertook the process of discovery.

[15] **In early 1997** the plaintiff issued a summons to have the matter set down for hearing, notwithstanding the defendant's failure to sign a Certificate of Readiness. The defendant countered with an application seeking the production of a report of a valuer, G.R. Ryan and Associates Pty Ltd (hereinafter "Ryan Valuers"). Both summonses were dismissed and directions given that the plaintiff deliver an amended statement of claim by 4 March 1997 the purpose being to claim relief in the form of damages.

[16] **On 21 March 1997** the attempted delivery of the statement of claim out of time was not accepted by the defendant. This resulted in an application being made before Justice Byrne on 12 May 1997 for extension of time for the delivery of the amended statement of claim. His Honour examined the proposed amendment and determined that the claim for damages could not succeed as it was then formulated and adjourned the application to permit a re-casting of the terms of the proposed amendment.

[17] **On 8 December 1997** the adjourned application for extension of time for delivery of the amended statement of claim was heard together with an application brought by the defendant to strike out the action. The amended Statement of Claim was delivered on 15 December 1997. My order allowing the extension of time was the subject of appeal which was determined on 9 September 1998.

[18] **On 20 October 1998** the amended defence was delivered. Despite letters from the defendant's solicitors expressing concern about the effects of delay and the prejudice to their client since then,[1] the plaintiff has taken no further step since that date. The only explanations for inaction during this time are some dilatoriness on the part of the plaintiff's then counsel (not the present counsel) and the belief on the part of the plaintiff's solicitors that by pursuing non-party discovery they were taking a step in the proceeding. The decision of the Court of Appeal in *Smiley v Watson*[2] was drawn to their attention in mid 2001 well after two years had elapsed.

The issues for trial

[19] Having regard to the terms of the amended statement of claim, the amended defence and the reply (delivered on 26 May 1996 prior to the amended pleadings) the issues have somewhat crystallised.

[20] Mr. D. Fraser of Queen's Counsel for the plaintiff identified the issues in annexure 'B' attached to his submissions. Mr. D. North, Senior Counsel, for the defendant argues that the written terms of the 1961 agreement might not encompass the full terms of the agreement which determines the respective party's rights.[3] There are some preliminary questions which might be capable of easy resolution. The first amongst these is whether the subdivision can occur so as to treat the subject land as a separate lot. Changes in town planning provisions since 1980 suggest that the subdivision cannot proceed and, if this is so, the specific performance of the agreement cannot be ordered.

[21] The effect of the amendment to the statement of claim is to provide what is most probably the only realistic form of relief – equitable damages. This relief is founded upon –

(a) Breach of the alleged express trust created by the defendant's execution the 1961 agreement;

(b) Breach of an alleged constructive trust based on the fact that but for the defendant's acknowledgments in the 1961 agreement Robbins would not have transferred Portion 110 to him;

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1 Exs BT8, BT9 and BT10 to affidavit of Bernard Treston sworn 26 October 2001

2 [2001] QCA 269 – 20.07.01

3 See transcript 28/10

(c) Unjust enrichment based on the circumstances of the transfer of Portion 110 to the defendant and his refusal to transfer the subject land to the plaintiff.

[22] The next question is, if any such breach is established, what is the measure of equitable damages. The plaintiff simply claims $400,000 damages but does not particularise his claim. The question of the nature of the damages and how they might be calculated was not considered on the earlier applications before this Court. For the first time a valuation report prepared by G.R. Ryan & Associates Pty Ltd ("Ryan Valuers") dated October 1996 was provided to the Court.[4] The valuation range for the subject land was between $175,000 - $400,000. The plaintiff has arbitrarily chosen the top of the range as the measure of damages. But if there is no right to mine the subject land its value, according to the report, is nil. The valuation report notes uncertainty as to the size of the limestone deposit, the cost of its extraction, the scope of the market and whether that market could be penetrated with product from the subject land. The report sets out market prices for limestone and production costs which I assume are based on 1996 conditions. The valuation is based on assumptions as to demand for and quality of the mined product.

[23] With the prospect of specific performance having been lost, or at least unlikely, what confronts the defendant is a claim for equitable damages in respect of the subject land which for him is of no discernible value. Ryan valuers described the uses of the subject land in the following terms:-

- Agriculture: the physical nature of the land precludes any use for agricultural purposes.
- Forestry: there are very few trees of commercial value on the subject land.
- Real estate: the quarry overlooks the valley of the Mowbray River in one direction, and the coast in the other. It is no more difficult to access than other house sites that are to be seen along the Marlin Coast, and it is not inconceivable that it could be developed as a residential site if Shire approval was forthcoming. The author is not qualified to carry out a real estate valuation.
- Mineral production: the presence of the limestone body on the land comprises the principal source of value, and the land may be valued on that basis, as discussed below.

The valuation report then goes on to consider the factors which might affect the market for the product and sets out certain assumptions about the quality of the product.

[24] If the only realistic use of the land for the plaintiff, or anyone else, is the exploitation of the limestone deposit, then its value depends upon the grant of a mining lease. Further, any contest about the valuation of the subject land for this particular use would most likely require a assessment of a notional mining venture. That in turn would most likely require of preparation of reports by various experts with the attendant expense and uncertainty. I am not persuaded by the suggestion of Mr. Fraser on behalf of the plaintiff, to the approach that "one would just go to the market value of the land and say, "well, what's it worth?" because that's the

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4 See Ex 1

way one ordinarily values these (interests)".[5] In fact, if the difficulties associated with the assessment of damages had been raised on the application for leave to deliver the amended statement of claim, the plaintiff's success on that application might not have been assured.

[25] Whilst this action has proceeded in the manner outlined, there have also been on foot in the Mining Wardens Court proceedings which now stand adjourned sine die pending the outcome of this action. The plaintiff has since 16 May 1974 held a mining lease over part of the subject land. The background to, and present status of, the plaintiff's claim for a mining lease are set out in a letter from the Department of Mines and Energy dated 15 April 1998[6] which contains the following passage:-

> "On 2 February 1990 an application for renewal of the lease was lodged, applying for a further term of 21 years. This application is still current and pursuant to Section 286(7) of the Mineral Resources Act 1989, the lease continues in force until the application is withdrawn, rejected or granted.
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> The application for renewal has not proceeded to grant as compensation has not been determined either by agreement between the parties or by a determination of the Wardens Court. As you are aware there is a dispute over ownership of the background tenure of this Mining Lease. In normal circumstances the Mining Lease holder would be requested to lodge a compensation agreement or if he was unable to obtain an agreement, then to apply to the Wardens Court for determination."

[26] I accept that the plaintiff's position with respect to the mining lease is that, once compensation is either agreed with the defendant or determined by the Land and Resources Tribunal (hereinafter "the Tribunal")[7], he is entitled to seek the renewal of his existing lease. The renewal is subject to ministerial discretion, but is nothing before me to indicate that the normal course of granting the renewal would not occur. The plaintiff presently suffers some ill health[8] but the task of mining the resource would most likely be performed by employees and contractors in any event.

[27] There is also pending in the Mining Warden's Court a claim by the plaintiff for damages and a cross-claim by the defendant for damages for trespass[9]. These proceedings too have been adjourned pending the outcome of this action.

Principles to be applied to the application

[28] As Thomas JA identified in *Quinlan v Rothwell & Anor*[10], since the introduction of UCPR there are several sources of jurisdiction to dismiss for non-compliance with rules or for want of prosecution of proceedings. They are:-

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5 Transcript 22/60-23/2

6 Ex "GCP1" to the affidavit of Gregory Parr filed 1 November 2001

7 The function of, and matters pending before, the Wardens Court has been transferred to the Tribunal pursuant to s 86 of the *Land and Resources Tribunal Act* 1999

8 Ex "GCP 12" to affidavit of Gregory Parr – 3.10.01

9 Plaint No. 1/1992 Mossman Wardens Court

10 [2001] QCA 176

(a) The statutory discretion pursuant to s 85 of the Supreme Court of Queensland Act 1991 when two years have passed since the last step was taken;
(b) Rule 5(3) UCPR which recognises an implied undertaking to the court and to the other parties to proceed expeditiously and R 5(4) which permits the court to "impose appropriate sanctions";
(c) Rule 280 which permits the making of an order dismissing the proceedings if a plaintiff fails to take a step required by the rules or complying with an order of the court within a stated time;
(d) Rule 371(2) which restates the longstanding power of the court to set aside all or part of the proceeding if there has been a failure to comply with the rules, at the same time recognising that a failure to comply with the rules is an irregularity only.

[29] His Honour in paragraph 24 of his reasons said:-

> "There is a distinction between the setting aside of a proceeding for a specific non-compliance and a dismissal for want of prosecution. The dismissal of an action or proceeding because of non-compliance with a rule or a court direction has long been authorised by particular rules of court, as has the power to set aside proceedings, such as that recognised in the former Order 93 rule 17. The powers of dismissal for abuse of process and for want of prosecution have generally been regarded as recognition of a wider inherent power…Repeated non-compliance with the rules or directions thereunder was sometimes regarded as evidence of "contumelious disregard" of the rules and therefore as relevant to the exercise of a court's discretion to dismiss for want of prosecution or to excuse delay."

[30] In *Cooper v Hopgood & Ganim*[11] McPherson JA set out a list of relevant factors without suggesting that the list was in anyway exhaustive. He said:-

> "*Birkett v James* suggests only some of the factors relevant in exercising the discretion, which include matters such as the duration of the time lapse involved; the cogency of any explanation for delay; the probable impact of procrastination on fading recollection; the death or disappearance of critical witnesses or records; costs already or likely in future to be expended or thrown away; the apparent prospects of success or otherwise at a trial of the action; and the progressively growing problem of effectively hearing and determining questions of fact arising out of events that have taken place many years before. The list is not, and is not intended to be, exhaustive; and it takes no account of another factor that is often likely to be material, which is that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them. The psychological as well as the commercial effects of such a state of affairs ought not to be underestimated."

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11 (1999) 2 QdR 113 at p 124

This statement of the effect of delay is echoed in a number of cases which have been drawn to my attention.

The present application

[31] The plaintiff asserts that delay does not affect the determination of the primary issue at trial – the existence of trust. Mr. Fraser contends that this will be determined on documents, the more significant terms of which I have reproduced above. Mr. North, on behalf of the defendant, argues that the court could not be certain on this point. He refers to a written comment by Mr. Davis, solicitor for all parties at the time of the 1961 transaction which suggests there may have been oral as well as written terms to the agreement which constituted the trust. The defendant argues that even if oral evidence is not determinative of the terms of the agreement, oral evidence may be necessary to explain or to put in context the alleged agreement. Persons relevantly involved in both the 1947 agreement and 1961 agreement are now dead or difficult to locate. Mr. Davis has long since passed away and his absence, it is said, gives rise to serious prejudice to the defendant.

[32] This argument, among others, was advanced in earlier applications. Both before White J in 1994 and myself in 1997, it was determined that existence or otherwise of the trust would be determined by reference to documents, letters and written memoranda. But that does not mean the defendant is to be denied the opportunity to argue differently or to rely upon extrinsic evidence to define or qualify the terms of the trust. Mr. North also contends that the consideration of all factors touching this application starts anew. I accept that submission as correctly stating the approach to be followed.

[33] To counter the defendant's argument in this respect the plaintiff has established the whereabouts of certain officers of the Public Trustee Office who were involved in the 1961 transaction. However, there can be no doubt that their memory of the events and the detail of any discussion they may have been a party to would be seriously impaired by the passing of such a length of time.

[34] I should have regard also to the nature of the plaintiff's claim, the defences raised against it and the apparent prospects of success at trial. This can only be done in the broadest sense. The defendant raises a defence of laches and acquiescence relying particularly on the delay between the plaintiff's awareness in 1961 of his right to have the subject land subdivided from Portion 110 and commencement of these proceedings in 1989. Mr. Fraser QC argues on behalf of the plaintiff that the success of this defence depends upon some detriment to the defendant being established as a result of the failure of the plaintiff to prosecute his rights more promptly. Mr. Fraser QC points to extensive correspondence over the lengthy period in which the plaintiff has consistently maintained his rights such that there was no abandonment of his claim to become registered proprietor of the subject land. Whether this argument is correct does not fall to be determined now but the period over which the conduct of each party is to be examined is quite long and the availability of witnesses to that conduct could be a matter of concern.

[35] More importantly, changes in the town planning provisions which occurred in the 1980's (and one assumes after some notice to the community) have significantly changed the nature of the plaintiff's claim. The amount of the claim for damages is

of a magnitude which the defendant might never have expected to bear when he agreed to accept the registration of Por 110 in his name. There can be no doubt that the nature of the plaintiff's cause of action, and the complexity of its presentation and the defendant's ability to defend it has changed significantly as a consequence of the amendments to the statement of claim having been allowed. There has now, in my view, been introduced an element of uncertainty as to the defendant's potential liability. There is a likelihood also of his having to incur considerable expense in preparing to meet the plaintiff's claim.

[36] There is also the question of the plaintiff's continuing right to exploit the mineral resource of the subject land independently of these proceedings. The value of this right must impact on the question of damages.

[37] I am satisfied also that this matter is not ready for trial as the plaintiff asserts. It is clear that particulars of the damage need to be provided, there are serious questions as to the date at which damage was suffered and the bases upon which damages are to be calculated. This will inevitably result in further delay and expense.

[38] Finally, the effect on the capacity of the defendant to carry on his own business as a canefarmer while facing the expense of preparing for trial and the uncertainty of the outcome of the litigation are consequences also of the plaintiff's delay in commencing and in pursuing this action.

[39] By contrast, the plaintiff's position with respect to the exploitation of the resources of the subject land is not similarly prejudiced. The plaintiff can reactivate the proceedings in the Tribunal for the determination of compensation. The worth of his mining lease has to be considered on the question of mitigation of damages in any event. This step would involve much less expense.

[40] I am satisfied that the prospect of a fair trial has been significantly reduced because of the delay. This arises from the effect of delay itself as well as from lost witnesses and dimmed recollection. I am satisfied that the defendant is significantly prejudiced by the delay. The amendment allowing the plaintiff's claim for equitable damages and the now revealed difficulty in assessing those damages has compounded the effects of that delay.

[41] The plaintiff is in a position of having again to seek the indulgence of the court because of his failure to comply with the rules. Despite the elapse of 12 years since the proceedings were instituted, the action is not ready for trial nor will it be until particulars of damages are given and those particulars subject to the scrutiny of experts. In that 12 year period, the plaintiff has sought the leave of the court to proceed in September 1994, the leave of the court to deliver an amended statement of claim out of time in 1997 and now further leave to proceed. Some of the delays are explained by the defendant taking a hard line about compliance with time directions and by appealing an earlier decision. But for most of this period the reason for prolonged delay lies with the inaction of the plaintiff or his advisers.

[42] When instituting the proceedings in 1989 the plaintiff was aware that the claims were based on agreements and perhaps discussions and conduct incurring in 1947 and 1961. In such circumstances there was a clear obligation on the part of the plaintiff to bring the matter quickly to finality. That obligation has been flouted

and, as a consequence, the defendant suffers prejudice by the loss of potential witnesses or by their diminished memory and by the impact of delay generally. The late identification by the plaintiff of what seems to be now his principal form of relief adds to the prejudice suffered by the defendant, because of the uncertainty it brings to the defendant's conduct of his business.

[43] Having regard to all these matters I would exercise the court's inherent power to dismiss the action for want of prosecution.

[44] It follows that the plaintiff's application for leave to proceed is dismissed.

Orders

[45] 1. The defendant's application is allowed.

2. Action No.199 of 1989 is dismissed for want of prosecution.

3. The plaintiff's application for leave to proceed is dismissed.

4. The plaintiff is to pay the defendant's costs of and incidental to the action, except in respect of those matters where specific orders have been made.