SUPREME COURT OF QUEENSLAND

CITATION:	*Yamacoe P/L v Michel Survey Group P/L & Anor* [2002] QSC 393
PARTIES:	**YAMACOE PTY LTD** ACN 063 840 068 (plaintiff) v **MICHEL SURVEY GROUP PTY LTD** ACN 061 695 807 (defendant) **ANTHONY JAMES THOMPSON** (third party)
FILE NO/S:	SC No 6474 of 1996
DIVISION:	Trial Division
PROCEEDING:	Costs application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 December 2002
DELIVERED AT:	Brisbane
HEARING DATES:	2 – 6 September 2002; 9 September 2002; 20 September 2002
JUDGE:	Fryberg J
ORDER:	**1. Order that the plaintiff, Graham George Currie and Motel Appraisals Pty Ltd pay the defendant's costs of and incidental to the plaintiff's claim to be assessed on the indemnity basis.** **2. Order that the defendant pay the third party's costs of and incidental to the defendant's claim, to be assessed on the standard basis.** **3. Order that Graham George Currie pay the third party the difference between the amount of his costs assessed on the indemnity basis and the amount of those costs assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – Costs – General rule – Costs against non-party – Costs on the indemnity basis – Deception of the court by plaintiff PROCEDURE – Costs – General rule – Third parties – Defendant successful against plaintiff – Whether *Bullock* or *Sanderson* type of order appropriate regarding third party's costs *Uniform Civil Procedure Rules* (Qld), r 703, r 704

Burke v Gillett [1996] 1 VR 196, followed
Fennel v Supervision and Engineering Services Holdings Pty Ltd (1988) 47 SASR 6, applied
Gould v Vaggelas (1985) 157 CLR 215, followed
Naomi Marble and Granite Pty Ltd v FAI General Insurance Company Ltd (No. 2) [1999] 1 Qd R 518, applied
Steppke v National Capital Development Commission (1978) 21 ACTR 23, applied

COUNSEL: A J H Morris QC, with A C Barlow, for the plaintiff and for Motel Appraisals Pty Ltd and G G Currie
S S W Couper QC for the defendant
D R Cooper SC, with I R Perkins, for the third party

SOLICITORS: Saunders Downing Hely Solicitors for the plaintiff
Gadens Lawyers for the defendant
McCabe Terrill Lawyers for the third party

[1] The plaintiff (a developer) sued the defendant (a surveyor) for negligence, breach of contract and breach of s 52 of the *Trade Practices Act 1974*. In broad terms, it alleged that, through its architect (the third party), it engaged the defendant to prepare a drawing showing the shadow effects of a tall building on certain land at the Gold Coast; that the defendant prepared the drawing negligently and incorrectly; that in reliance on the drawing it purchased the land; and that as a result of the purchase it lost money. In particular, it alleged that it relied on a representation that it could lawfully construct a quality 28-storey building on the site. The defendant admitted that it drew a diagram purporting to show shadow effects but denied that it did so pursuant to any contract with the plaintiff. It alleged that it made the diagram for another company of which the principal of the plaintiff was a director (Bogumi Pty Ltd). It denied that the diagram was made negligently and denied misleading or deceptive conduct. It also denied that the plaintiff relied on the diagram and that the plaintiff suffered any damage.

[2] The defendant brought third party proceedings against the architect. Broadly, it alleged that the relevant error in its diagram was caused by reliance on a sketch provided by the architect and that the architect failed to alert it to the requirements of the town plan relating to shadow diagrams. It further alleged that the architect knew or ought to have known of the error and promptly disclosed it to the plaintiff, and that he did not do so. It alleged that by reason of these matters he was liable to the plaintiff. It sought contribution from him as a concurrent tortfeasor. The third party denied negligence and alleged that he did disclose relevant matters to the defendant.

[3] Senior counsel for the plaintiff closed his case a little after 3 pm on Friday, 6 September 2002; the fifth day of the trial. After a brief adjournment, counsel for the defendant foreshadowed a submission of no case to answer and sought an adjournment until the following week. After a ruling was given regarding whether he was obliged to elect not to call evidence, the trial was adjourned. When it resumed on the following Monday, counsel for the plaintiff informed the Court that the plaintiff was not proceeding with the action. The defendant thereupon sought, and in the absence of resistance was granted, judgment against the plaintiff.

[4] Thereupon, the defendant applied for costs on the indemnity basis against the plaintiff, its principal officer and shareholder Graham George Currie and Motel Appraisals Pty Ltd, another of Mr Currie's companies. The third party applied for costs against Mr Currie and the defendant.[1]

[5] The plaintiff conceded that the defendant was entitled to costs against it but, it submitted, only on the standard basis. Mr Currie and Motel Appraisals Pty Ltd opposed any order against themselves.

Costs basis as between the defendant and the plaintiff

[6] The defendant sought a number of findings to found its application. The first four were not resisted by the plaintiff and the other respondents. They were:

1. The plaintiff did not rely on any representation or advice from the defendant in deciding to tender the sum of $5.875 million for the purchase of the land.
2. The plaintiff is unable to pay a costs order.
3. Mr Currie caused the action to be brought and prosecuted by the plaintiff.
4. The action was brought and prosecuted for the benefit of Mr Currie or such of his companies as he chose to benefit including Motel Appraisals Pty Ltd and Bogumi Pty Ltd.

[7] The defendant also sought a finding "that the plaintiff failed to prove any entitlement to damages". It argued that the plaintiff neither proved nor attempted to prove that there was any difference between the purchase price paid for the land and its value as at the date of purchase. That was the appropriate measure of damages.[2] In the absence of such evidence, the plaintiff failed to prove any entitlement to damages.[3]

[8] That submission was in my judgment correct, although, as the plaintiff pointed out, it involved a question of law. However I do not propose to devote time to explaining my reasons for that conclusion as it is a conclusion which does not, in my judgment, advance the defendant's application for indemnity costs.

[9] Two further findings sought by the defendant to found the application were "that Mr Currie, and therefore the plaintiff, knew or if properly advised, should have known that based on the true facts, the action had no prospect of success," and (the critical one in a lot of ways, as counsel for the defendant said), "that in conducting the action, Mr Currie at all times knew that his claim that he tendered $5.875 million for the land based upon advice or any representation by the defendant was false". The plaintiff and the other respondents resisted these findings.

[10] I turn first to the question of Mr Currie's honesty. The plaintiff was originally a joint venture company, the joint venturers being Motel Appraisals Pty Ltd and

---

1 Counsel for Mr Currie and Motel Appraisals expressly waived any requirement for the applications against those persons to be in writing.

2 *Potts v Miller* (1940) 64 CLR 282; *Gould v Vaggelas* (1985) 157 CLR 215; *Manwelland Pty Ltd v Dames and Moore Pty Ltd* [2001] QCA 436.

3 *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23; *Ray Teese Pty Ltd v Syntex Australia Limited* (1998) 1 Qld R 104.

Leonica Nominees Pty Ltd, a company controlled by a Melbourne businessman, Mr Alan Kozica. In 1994, when most of the relevant events occurred, Mr Currie was the plaintiff's representative on the Gold Coast, although important decisions were taken by him and Mr Kozica in conjunction.[4] The plaintiff's case was that Mr Currie, and through him, the plaintiff, relied on the defendant's diagram.

[11] As I have said, the plaintiff did not resist a finding that it did not rely on any representation or advice from the defendant in taking the step which it alleged led to its damage. It submitted that Mr Currie's evidence to the contrary was not knowingly false; that he honestly believed that the plaintiff had a genuine claim; and that he did not realise that he was mistaken until the contrary was forcefully pointed out to him in cross-examination. Faced, it was submitted, with contradictions between his own contemporaneous documents, which he had forgotten about, and his recollection of events, he accepted as an honest man that his recollection was mistaken. On the other hand, the defendant (and the third party) submitted that Mr Currie must have known that the allegation of reliance was false and that the plaintiff's claim had never been a genuine one.

[12] I have come to the conclusion that, in giving his evidence, Mr Currie was well aware of the true position and that his evidence was dishonest. I have done so essentially for four reasons. First, the evidence negating reliance was overwhelming (and, I find, was the reason for the plaintiff's abandonment of the claim), was in most cases known to Mr Currie at all material times, and was unable to be explained by him. Self-deception in relation to it, the only feasible alternative to dishonesty, would have required an incredible level of stupidity. Second, if Mr Currie had convinced himself that what he swore in evidence about reliance was true, he must have done so by the time the action was commenced in 1996. However his version was inconsistent with his conduct and documents (including an affidavit) created in the period 1994-6. It is unlikely that he could have been guilty of such self-deception so soon after the events occurred and the documents were written. Moreover, one would not expect to find inconsistencies between his evidence and an answer to interrogatories sworn in 1999 (answer 9(e)); continuous and evolving self-deception is less likely than deceit. Third, the longer Mr Currie gave evidence (which he did for about two and half days), the more satisfied I became that he was dissimulating. Initially, he presented as an elderly, imperfectly educated, somewhat eccentric self-made man, who was willing to guess at answers to questions in an endeavour to help the court. In the end, it all became too much. He was repeatedly unresponsive to questions despite explanations of the need for him to address the subject matter of the inquiry. On several occasions during cross-examination, I thought his prevarication was purposeful. Finally, if (as was submitted on his and the plaintiff's behalf) Mr Currie had only accepted that his recollection of events was mistaken when confronted with his own contemporaneous documents during cross-examination, one would have expected him to have made an affidavit to this effect.[5] There is no suggestion that the plaintiff's legal advisers were incompetent. On the contrary, he was represented by experienced senior counsel. It would be surprising if he had not seen the documents shown to him in cross-examination during preparation for trial. Neither he nor his solicitor has testified about what he was shown. He has not testified that he was

---

4 In June 1996, Motel Appraisals Pty Ltd became the sole shareholder and Mr Currie the sole director of the plaintiff.

5 Additional evidence on the costs hearing was given by way of affidavit.

unaware of or had forgotten the documents until shown them in his cross-examination. No explanation for this omission has been advanced. The most likely explanation is that Mr Currie was not in a position to depose to those matters truthfully and that he did not wish to be cross-examined about them.

[13] I shall not describe in detail the evidence referred to in my first reason. It has been collected helpfully in the written submission of Mr David Cooper SC on behalf of the third party.[6] Self-deception or forgetfulness might explain individual pieces of that evidence considered in isolation. It cannot explain the evidence relating to reliance taken as a whole.

[14] The defendant and the third party also sought to draw inferences from the nature of the damages alleged and inconsistencies in the evidence given by Mr Currie in relation to the claim. I do not think these matters advance their position in relation to costs; or at least, I am not persuaded that they do. Most of the inconsistencies referred to on behalf of the defendant, and some of those referred to on behalf of the third party, depend upon an assumption that the accounts of the joint venture demonstrate a business structure different from that asserted by Mr Currie. However, the accounts were prepared to reflect what was permissible under the tax laws. Neither they nor the cash flows into the joint venture established that the documented trust structure was a sham. I invited counsel to take me through the relevant taxation legislation to support their submissions, but the invitation was not accepted. In view of the conclusions which I have reached, apart from this aspect of the matter, it is unnecessary to elaborate on this point.

[15] My third reason depends in part, but only in part, upon Mr Currie's demeanour. Some sense of Mr Currie's predilection for prevarication can be gained from reading the transcript. One example (albeit lengthy) will suffice:

> "MR COUPER: Mr Currie, can I ask you about the sequence of events after the 5th of May 1994. On the 5th of May Yamacoe's tender was accepted; do you recall that?-- Yes.
>
> All right. And you've told us yesterday you then set about trying to work out what could, in fact, be built on this site to see whether something viable could be done; is that right?-- Yes.
>
> How far advanced did you get with that process?-- Didn't get anywhere fully.
>
> Well, did you engage architects?-- Yes.
>
> And who were they?-- Didn't engage, did research with architects.
>
> So you did not engage architects?-- Alan Kozica told me to speak to an architect and then another one after that.
>
> Well, let's take this in stages, if we may. Did you ever get to the stage of engaging an architect telling them you'd pay them some fees to do

---

6 MFI "B", pp. 3-6, para 1.

something?-- We spoke to MPS architects and they said that they were the experts in doing the work.

HIS HONOUR: Look, you weren't asked what did they say. You were asked, did you speak to them and agree to pay them some fees?-- I never ever agreed on a fee basis with them.

Did you speak to them on the basis that they would be paid something?-- Yes.

MR COUPER: … Who did you speak to at MPS architects? Was it a Mr Ragna Svensson?-- Yes.

What did you and Mr Svensson discuss at your first meeting with him about the Corniche site?-- I told him that we wanted to build a large residential high-rise tower and that the mistake had been made and by the sun shadow by Michel Survey Group.

Do I understand you to say that you never got to the stage where Ragna Svensson's firm, MPS architects, was engaged by Yamacoe to do detailed design work with a view to having a project constructed, never got that far; is that right?-- They were never officially appointed. They were working in the early place on research with us to see what they could produce to give us.

Right. At some stage Yamacoe decided to sell the site; is that right?-- Yes. When was that?-- Some time in September.

All right. Was that a matter which you and Mr Kozica discussed and agreed?-- Yes, there was a meeting in Melbourne in the lawyer's office.

Did both of you agree that Yamacoe could not profitably develop the site and, therefore, should be sold? Is that what happened?-- We couldn't get the building that we wanted on it and it was best to get it - it be sold.

So you and Mr Kozica both shared the view that you couldn't get the building that both of you wanted on the site so it was best that it be sold; is that right?-- Yes.

There was no difference of opinion between you and Mr Kozica about what should happen to this site or this development; is that right?-- We decided it was best to sell it because we couldn't build what was wanted on it.

Yes. Is it right to say there was no difference of opinion between you and Mr Kozica about what should be done with the site or the development?-- It was finally decided that it was best to sell it because we couldn't get what we wanted on it.

Does that mean you both agreed? Your opinions did not differ on that subject?-- Yes.

Could Mr Currie see the document marked A for identification, your Honour? Mr Currie, is that a copy of a deed dated the 20th of June 1996? Look at the top of the first page?-- Yes.

Look at the last page, did you sign it?-- Yes.

Did you read it before you signed it?-- Yes.

Would you please read recitals A, B, C and D.

…

MR COUPER: Have you read D?-- Yes.

D says, "It was the intention of the beneficiaries and Messrs Kozica and Currie to develop the land, however due to irreconcilable differences between Messrs Kozica and Currie it was decided that Yamacoe should sell the land." Is that true?-- Yes.

What were the irreconcilable differences between you and Mr Kozica?-- We couldn't - we couldn't get a 28 unit 8 foot 6 ceiling building on the site, so I was not agreeable to go ahead and it was best to sell it.

What was Mr Kozica's position? What did he want to do?-- He was happy to get out of it as well.

What were the irreconcilable differences between the two of you then?-- I can't recall if there was any more than the fact that we couldn't build what we wanted to on it.

HIS HONOUR: How was that difference between you?-- It was - I wasn't prepared to build anything more on it than that, your Honour, than the 26 floor - sorry, 28 floor 8 foot 6 ceiling building on it.

What was his attitude?-- He just wanted to be selling it as well.

Well, how was that a difference between you then?-- I can't really recall that there was any great difference about other than the fact that we couldn't build what we wanted to.

…

MR COUPER: Mr Currie, was it the case that because Mr Kozica and you were unable to reach agreement on behalf of your respective joint venture partners concerning the joint venture development of the land, Yamacoe resolved to resell the land?-- Would you ask me that again?

Was it the case that because Mr Kozica and you were unable to reach agreement on behalf of your respective joint venture partners concerning the joint venture development of the land, Yamacoe resolved to resell the land?--

It was a situation that we couldn't build - I couldn't build and he couldn't build what we wanted to on the hand.

So there was no disagreement between you about what should be done with the joint venture you say?-- Well, I wasn't prepared to do anything less than that.

Was there a disagreement between you about what should be done with the joint venture development?-- I can't recall any specific disagreement in the fact that - other than the fact that we couldn't build what I wanted to build on it.

Did you say both of you agreed that you couldn't build what you wanted so you had to sell it; is that right?-- Yes.

Look at this document, please. A copy for his Honour. Mr Currie, look at that document, in particular the first and last pages and tell me whether that's a copy of an affidavit sworn by you on the 26th of July 1995. Look at the last page and confirm it's a copy of your signature on the last page. Mr Currie would, you look at the last page and confirm it's a copy of your signature on the last page?-- Sorry. Yes.

That's a copy of an affidavit which you swore on oath; is that right?-- Yes.

That was in respect of proceedings taken by Forester Parker developments against Yamacoe and Robinson Robinson & Downing; is that right?-- It's got Forester Parker and Robinson & Robinson at the top.

And those were the proceedings where Forester Parker was suing for the return of its deposit in respect of the contract which did not proceed; is that right?-- Yes, well, I haven't read it through. I presume that's what it is, yes.

And you intended in that affidavit to tell the truth, did you?-- Yes.

Look at paragraph 4 of the affidavit. Have you read paragraph 4?-- Yes, I have. It's a little confusing to me.

Well, let's just see what's confusing about it. The first sentence speaks of a purchase by Yamacoe of the land, the second sentence says this, "As Mr Kozica and I were unable to reach agreement on behalf of our respective joint venture partners concerning the joint venture development of the subject land, Yamacoe resolved to resell the land." What is confusing about that?-- I thought we purchased the land in May of '94 not September of '94.

Let's leave aside for the moment the date of the purchase of the land and look at the second sentence and tell me whether it suggests that that sentence is in some way confusing?-- What did you say, Mr Couper?

Look at the second sentence, read it and tell me whether you wish to assert that that sentence is in some way confusing?-- The second sentence?

Yes. "As Mr Kozica and I" - the sentence that's starting with those words. Have you read the second sentence?-- "Yamacoe resolved to sell the land" - because-----

Do you suggest that that sentence is in any way confusing?-- No, Yamacoe resolved to re - to resell the land, that's correct.

What about the first part, the reason why Yamacoe resolved to sell the land, Mr Currie, that's correct too, isn't it?-- But that's got we bought the land in September, but I thought we bought it in May.

Mr Currie, do you think it advantages you to appear to be a stupid person in these proceedings?-- No.

All right. The first part of the sentence says, Mr Currie, as you know, "As Mr Kozica and I were unable to reach agreement on behalf of our respective joint venture partners concerning the joint venture development of the subject land and that's the reason given why Yamacoe resolved to sell it." You understand that, don't you, what you swore was that you and Mr Kozica couldn't agree on what to do with the land so it was sold; correct?-- Yes.

That's the truth, isn't it?-- We agreed to sell the land.

HIS HONOUR: Mr Currie, I don't know if anyone's explained to you, but at the end of the trial when I have to consider my judgment one of the things I am going to have to make up my mind about is who is telling the truth out of the various witnesses-----?-- Yes.

-----in the event that there's a difference between the versions that I hear. One of the things that I have to take into account in working out which version of the evidence that I accept is the responsiveness of the various witnesses to questions that are asked of them. If witnesses don't give responsive answers to questions, that's something that counts against accepting their evidence. So that if a witness is asked a clear question and talks about something else, that sounds like the witness is trying to be unresponsive and that mitigates against accepting the witness's evidence. Do you understand that?-- I understand what you mean.

So that if you are asked a clear question about the second sentence here and then you go and start talking about the first sentence when you haven't been asked about it, it makes it much harder for me to accept your evidence. Do you understand that?-- Yes, I see what you mean. I'm confused.

Listen carefully to the question and try to be responsive, because if you aren't responsive it makes it much harder for me to accept your evidence. I just want you to understand that?-- I can understand. As long as I can understand what they are meaning.

HIS HONOUR: Go on.

MR COUPER: Mr Currie, tell me what you think that second sentence says?-- As far as I'm concerned are you talking about as - Mr Kozica and I were unable? Is that-----

Yes?-- We were unable to reach an agreement on behalf of our respective joint venture because we couldn't agree - I couldn't agree on anything less than 28 storeys.

Are you saying that Mr Kozica wanted to build something less than 28 storeys, are you?-- I can't recall what Allen actually wanted, but I wouldn't agree to anything less than 28 floors and he was getting tired of it as well.

I'll ask you my question again. What do you say that second sentence means?-- That we couldn't agree to build - we couldn't agree on the project because I wasn't happy to build anything less than the 28 floors.

Are you saying now that Mr Kozica disagreed with your view? He was happy to build something less than 28 floors?-- I don't recall him ever wanting to build less than 28 floors.

Then what do you say was the source of your disagreement?-- It wasn't a viable proposition.

Mr Currie, the truth is this, is it not, that the reason that a building was not constructed by Yamacoe on that land was because you and Mr Kozica couldn't agree about how the joint venture should be operated; is that right?-- I don't really agree with you there because I was up there on the Gold Coast running it and unless I was there and was able to construct and run a 28-unit building - if we could have-----

Can I suggest this to you: by September 1994 the relationship of trust between you and Mr Kozica had broken down and he wanted to get out of the joint venture?-- We both decided it wasn't a goer.

Do you agree with my proposition that by about September 1994 the relationship of trust between you and Mr Kozica had broken down?-- He of his own accord had stopped - told the architects not to do any more.

Was that because the relationship of trust between you and Mr Kozica had broken down?-- Yes, it was at the stage of going no further, yes."

[16] In making my assessment of Mr Currie as a witness, I have not overlooked the fact that he was sometimes unresponsive to questions even during his evidence-in-chief. I have considered whether evasiveness was "his natural habit, his inability to understand the questions, his inability to focus, his inability to respond" (as his counsel put it). I formed the view that Mr Currie did not want to commit himself to any precise or detailed statement beyond the various elements necessary to establish his case. He was, however, quite willing to advance assertions in general terms where he thought they would advance his case. On several occasions during his evidence-in-chief, he plainly departed from, or at least failed to come up to, his

proof of evidence. The overall pattern is one of deliberation in his answers, not one of confusion or personal deficiency.

[17] For these reasons, I have reached the conclusion that Mr Currie, and through him, the plaintiff, knew that if the truth were told in relation to the issue of reliance, the plaintiff had no chance of success in the litigation. He resolved not to tell the truth on that issue and he did not do so. The plaintiff's claim and his evidence were deceitful.

[18] Under the *Uniform Civil Procedure Rules*, costs must be assessed on the standard basis unless the rules or an order of the court otherwise provide.[7] No relevant rule otherwise provides. The court has power to order that costs be assessed on the indemnity basis.[8] Some examples of when this may be done are set out in the rule which confers the power, but the present case does not fall under any of those examples. However, the categories of cases in which costs may be ordered on an indemnity basis are not closed.[9] In *Naomi Marble and Granite Pty Ltd v FAI General Insurance Company Limited (No 2),*[10] Shepherdson J took into account that in pursuing fraudulent claims, the plaintiff attempted to deceive not only the defendants but also the court. For this, among other reasons, he ordered costs against the plaintiff on an indemnity basis. That case is analogous to the present.

[19] In my judgment, the plaintiff should pay the defendant's costs of the claim against it assessed on the indemnity basis.

Costs as between the defendant and Motel Appraisals Pty Ltd and Mr Currie

[20] The action was brought and prosecuted for the benefit of Motel Appraisals Pty Ltd and Mr Currie, although neither of them was a party. The plaintiff has no assets and cannot pay costs from its own resources. The court has an undoubted jurisdiction to order costs against a non-party, although the prima-facie general principle is that an order is made only against a party.[11] One exceptional case which has been recognised -

> "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."[12]

There can be little doubt that the present case falls within that category.

[21] For the plaintiff, it was argued that an important consideration operating against the making of an order against the non-parties was the fact that the defendant had been

---

7 Rule 703.
8 Rule 704.
9 *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151.
10 [1999] 1 Qd R 518 at p 528.
11 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178. Although that decision was made in respect of the old RSC O 91 r 1, r 689 of the *Uniform Civil Procedure Rules* is not materially different.
12 *Ibid* at p 193.

given security for costs. The plaintiff voluntarily provided a bank guarantee in the sum of $20,000 on 8 September 2000, and pursuant to the order of Mackenzie J made on 18 April 2002 provided a further guarantee in the sum of $30,000. That was considerably less than the further $80,000 which the defendant had sought. The total provided ($50,000) may well be insufficient to cover the costs ordered against the plaintiff. I infer that the guarantees were provided by or at the behest of Mr Currie.

[22] These matters are relevant considerations in exercising the discretion regarding costs. It must also be borne in mind that orders for security for costs are usually conservative as regards the amount fixed. They certainly are not normally intended to cover costs on the indemnity basis. Much more is known now of the merits of the case than was known at the time of the application.

[23] I conclude that orders should be made against Motel Appraisals Pty Ltd and Mr Currie. Having regard to my findings in para [17], the order against Mr Currie should be made on the indemnity basis. Motel Appraisals Pty Ltd was his vehicle and he was its operative mind. The order against it should also be on the indemnity basis.

Costs as between the third party and the defendant

[24] The third party sought an order that the defendant pay its costs. It submitted that it was clear that the defendant must pay those costs to be assessed on the standard basis at least; and somewhat hopefully it submitted that the Court might consider it appropriate that they should be assessed on the indemnity basis. Perhaps because of the decision in *Allman v Daly (No 2)*[13], the third party did not seek an order that the claim against it be dismissed. However the only relief sought by the defendant was contribution under the *Law Reform Act 1995*. An element of its claim was liability in the defendant to the plaintiff. Once the defendant obtained judgment against the plaintiff, the defendant's claim must inevitably have failed.

[25] The defendant opposed costs on the ground that the issues between it and the third party had not been resolved; and that it had been reasonable for the defendant to join the third party. It submitted that the costs should lie where they fell; that is, that there should be no order as to costs as between those parties. It placed no reliance on the third party's failure to obtain judgment against it.

[26] In my judgment, no ground has been shown for departing from the usual order envisaged by r 689; namely, that costs follow the event.[14] Unsuccessful litigants do not escape costs orders merely by showing that it was reasonable to prosecute or defend the action. In the absence of argument I am not prepared to hold that the lack of a formal judgment prevents the happening of an "event". The defendant should pay the third party's costs. No reason has been shown why the costs should not be assessed on the standard basis.

Inclusion of the defendant's costs of the third party claim and the costs payable to the third party in costs recoverable by the defendant from the plaintiff and the non-parties

---

13 [1959] VR 614.

14 *Burke v Gillett* [1996] 1 VR 196; *Johnson v Ribbins* [1977] 1 WLR 1458.

[27] The defendant submitted that if an order for costs were made in favour of the third party against it, it should have those costs included in the costs ordered to be paid by the plaintiff and the non-parties. It argued that it was reasonable for the defendant to join the third party, and that the need for it to do so arose only because the plaintiff brought a false claim against the defendant at the behest of Mr Currie and for the benefit of the non-parties.

[28] The plaintiff and the non-parties submitted that the third party proceedings were manifestly misconceived. They argued that the plaintiff did not sue the third party and did not allege he was liable to it. Further, the defendant had pleaded that the third party was at fault for not informing it of the requirements of the Council for a shadow diagram when its own employee had admitted to it that the relevant information had been provided. Finally, they argued that every matter raised against the third party as a ground of negligence would, if proved, have exonerated the defendant. Consequently, those matters should have been pleaded by way of defence, not raised by third party proceedings.

[29] The form of order sought by the defendant is analogous to the Bullock order sometimes made when a plaintiff succeeds against one defendant and fails against another. That was the view of the Appeal Division of the Supreme Court of Victoria in *Burke v Gillett*[15]. I do not understand anything said in *Gladstone Park Shopping Centre Pty Ltd v Ross Wills*[16] to stand contrary. In *Gould v Vaggelas*[17] Wilson J, with whom Murphy and Brennan JJ agreed, said:

> "Such an order may be made where the costs in question have been reasonably and properly incurred by the plaintiff as between him and the unsuccessful defendant: *Bullock* (1907) 1 K.B. 264 at p 269; *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation* (1948) 77 CLR 544 at p 572*; Altamura v Victorian Railways Commissioners* (1974) VR 33. The making of such an order is a matter for the discretion of the trial judge".[18]

In the present case the plaintiff conceded that as a matter of principle, if the defendant acted reasonably in joining the third party, it would ordinarily be entitled to recover from the plaintiff any costs awarded against it in favour of the third party.

[30] It is important to observe that the reasonableness here under consideration is reasonableness as between the party claiming the benefit of the Bullock order (who, ex hypothesi, joined the ultimately successful party) and the party putatively liable under it. It is not simply a question of reasonableness as between the claimant and the party joined. In the context of the present case, the question is whether it was reasonable, as between the plaintiff and the defendant, for the defendant to join the third party. Unless the defendant establishes that it was, it does not bring itself within the dictum of Wilson J just quoted.

[31] The defendant's claim against the third party was for contribution under the *Law Reform Act 1995*. The claim would succeed if the defendant were liable to the plaintiff in tort, and if it proved that the third party was also a tortfeasor who, if sued

---

15 [1996] 1 VR 196.
16 (1984) 6 FCR 496.
17 (1985) 157 CLR 215.
18 At p 247.

by the plaintiff, would have been found liable. The plaintiff did not sue the third party, and even when he was joined by the defendant, the plaintiff chose not to add him as a defendant to its claim. Nothing in its statement of claim against the defendant alleged negligence on the part of the third party. On the material before me, the initiative for the commencement of the third party proceedings came only from the defendant. Those are considerations material to the question whether as between the plaintiff and the defendant it was reasonable for the defendant to make and continue the third party proceedings.

[32] It is now necessary to analyse the claim against the third party a little more closely in order to identify the basis upon which the defendant alleged that the third party was liable to the plaintiff. The statement of claim against the third party alleged two duties owed by the third party to the plaintiff: to take reasonable care to ensure that advice given by him to the plaintiff was accurate and competent; and, having become aware of a possible error in the defendant's diagram, to inform the plaintiff expeditiously that advice based on it may have been in error. It alleged that those duties were breached in a number of respects. Mr Morris QC for the plaintiff divided the breaches into four categories.

[33] The first comprised paras 6 and 7 of the statement of claim:

> "6. At no time during the course of discussions between Michel and the third party, nor between Krause and the third party, did the third party inform or discuss the requirement by the Gold Coast City Council that true north be utilised in determining shadow lines and shadow lengths, rather than survey north.
>
> 7. During the course of discussions between Michel and the third party, nor between Krause and the third party, did the third party advise the defendant of the purpose for which the defendant's diagram was required, beyond stating that it was for the purpose of a meeting with a Gold Coast City Council officer."

[34] Both the plaintiff and the third parties submitted that these claims were at odds with the facts as known to the defendant when it brought the third party proceedings in October 1998. It was common ground that the fundamental deficiency in the diagram was that it was prepared using survey north rather than true north as required by the Town Plan for the City of Gold Coast. The evidence showed that, in June 1994, only two and a half months after the diagram was prepared, the defendant (or its insurer) obtained a statement from Krause, the employee of the defendant who prepared the diagram. In that statement Krause admitted that, at the time of the defendant's engagement, the third party gave him a copy of the relevant page of the Town Plan and that he mentioned the words "true north" during the briefing. He said:

> "I considered I could solve the geometry problem he presented me with from the data supplied verbally, without considering the words 'true north'. … I considered that [the third party] had clearly specified on the sketch what was required and supplied all the data needed on the sketch plan, and therefore I did not need to refer to the page of the Gold Coast City Council regulations he had provided me with."

There is force in the submission that this is at odds with para 6 of the statement of claim.

[35] In addition, the third party gave evidence (he was called by the plaintiff) that he did explain to Krause the purpose for which the diagram was required:

> "Did you have any discussion with Mr Krause at any of these conversations about the purpose for which you wanted the plan or the time by which you needed it?-- Firstly, the purpose that required the plan was to establish the length of the shadow line from points on the site so that we could establish a height of a building at a point on the site."

[36] That evidence was not challenged in cross-examination. I infer that at least by the time of trial, the defendant was not in possession of evidence to affirm para 7 of the statement of claim.

[37] These matters were relevant to the allegation in para 9 of the statement of claim that the defendant used the shadow angle depicted on the third party's sketch because it was instructed to do so by the third party. That proposition was not put in cross-examination and evidently was not correct.

[38] These matters satisfy me that the defendant ought to have realised that there was little or no prospect of establishing negligence on the part of the third party in this respect.

[39] The second category of negligent breach alleged against the third party revolved around paras 12 and 13 of the statement of claim. There the defendant alleged that the third party told the plaintiff that calculations by reference to the shadow length (shown in the defendant's diagram) showed that a 28-storey building could be constructed on the land with a ceiling height of at least eight feet six inches. That was the information which Mr Currie said was of critical importance to him.[19] The defendant alleged that the statement was incorrect, and that on the basis of the shadow length in the diagram lower ceilings or fewer stories would have been required. Evidence adduced during the plaintiff's case established that this was true in respect of a building whose envelope was in the position shown on the third party's sketch. If the third party said it by reference to a building in that position, he was arguably negligent.

[40] On their face, those allegations are capable of establishing a cause of action in the plaintiff against the third party and they can reasonably be regarded as induced by the plaintiff's claim. However the plaintiff argued that they proved too much. It argued that if they were made out, they would have provided the defendant with a complete defence, because then the diagram would not have shown what the third party thought it showed and the plaintiff's loss would have been solely and exclusively due to the third party's negligence. In my view that is not a correct analysis of the hypothetical fact situation. In that situation the plaintiff would have been entitled to receive correct advice from both the defendant and the third party. They would have been successive independent tortfeasors. In such a situation it is not uncommon to find that the plaintiff's loss would not have occurred if either of

---

[19] Mr Currie said that in his view, such a ceiling height was the minimum required for a "quality" building.

the tortfeasors had not been negligent, but that does not break the chain of causation or operate to exculpate either tortfeasor. Each would have been liable.

[41] The question remains whether the architect's statement, incorrect in relation to a building in the position on his sketch, was wrong in relation to a building elsewhere on the site. The defendant invited me to infer that it was, having regard to minimum setbacks and the planning requirements referred to in the evidence. While I accept that I may take judicial notice of the Town Plan of the City of Gold Coast as it stood at the relevant time, I do not think it is within my expertise to apply the requirements of that plan to obtain the answer to this question. The building designs possible on the site, if not infinitely variable, depended to a considerable degree upon the skill and imagination of an architect. It was open to the parties to address the question by evidence. None sought to do so. In the result, I am not satisfied on the balance of probabilities that the third party's statement to the plaintiff was wrong.

[42] The third category of negligence alleged by the defendant centred on para 17 of the statement of claim against the third party. It relied on the allegation that the third party knew that the plaintiff was considering making an offer to purchase the land. He became aware of a possible error in the defendant's diagram at about 11 am on 5 May 1994, but did not communicate that possibility to the plaintiff until after 4 pm on that day. In the meantime the plaintiff had become contractually bound to buy the land.

[43] In my judgment the case so pleaded was weak. It was not alleged that the third party knew, or ought to have known, that the plaintiff was considering making an offer that very day, or that the vendor was likely to accept it immediately. Moreover the allegation is only that the third party became aware of the possibility of error. One would ordinarily expect in such circumstances that the possibility would be checked and referred back to the defendant before the plaintiff was disturbed, as indeed occurred. This allegation was not induced by anything the plaintiff alleged. It is an example of the defendant grasping at straws.

[44] The last category of negligence was found in para 20A and following of the statement of claim against the third party. Those paragraphs were expressly abandoned by the defendant at trial.

[45] In the result, I am not satisfied that, as between it and the plaintiff, it was reasonable for the defendant to commence and maintain the third party proceedings. The defendant has not satisfied what Asche CJ described as "the threshold test"[20]. For reasons which I shall develop below, I do not think that this is a test which must be applied in every conceivable situation, but it is difficult to imagine a case where it will not be an important consideration. In the present case, such reasonableness was central to the defendant's argument in support of an order. Not having demonstrated reasonableness, the defendant is not entitled to an order in the nature of a Bullock order.

Costs as between the third party and Mr Currie

---

20 *Lackersteen v Jones (No 2)* (1988) 93 FLR 442.

[46] The third party submitted that he should recover his costs directly from Mr Currie on the indemnity basis. He did not seek orders against the plaintiff or Motel Appraisals Pty Ltd. The defendant submitted that the third party should recover his costs directly from those two parties as well as from Mr Currie, but in the absence of an application to that effect by the third party, I am not prepared to entertain that submission.

[47] On 10 April 2001 the Court ordered that the third party have leave to defend the plaintiff's action against the defendant in respect of liability and quantum issues.[21] The words "in respect of liability and quantum issues" do not appear to impose any limitation on the ambit of the leave. Why it was thought that leave was necessary, I do not understand. Because the claim against the third party was for contribution in respect of the defendant's liability to the plaintiff, the existence of that liability was an element of the defendant's cause of action against the third party under the *Law Reform Act 1995*. Inevitably, that meant that the third party was entitled to participate fully in the case in relation to that liability. The duty of disclosure arose between the third party and the plaintiff.[22] As one would expect, the case was conducted on the basis that the third party had an unrestricted right to cross-examine and address in relation to issues between the plaintiff and the defendant. I mention these matters because both the defendant and the third party submitted that the existence of this order strengthened the third party's claim for costs against Mr Currie. In my judgment, the order does not affect the situation.

[48] The order which the third party seeks is analogous to the so-called Sanderson order. In *Johnson's Tyne Foundry Pty Ltd v Shire of Maffra*[23], Williams J suggested that the Sanderson order was the modern form of the Bullock order. If this were a complete description of the order, it would seem to imply that the order would be made only in circumstances where a Bullock order would be made. In the absence of argument, I am not persuaded that this is correct. Nevertheless, the two orders have many features in common. The findings which I have already made in relation to a Bullock order mitigate against a Sanderson order in this case.

[49] One reason for the evolution of the Sanderson order, instead of the Bullock order, was the need to ensure that an unsuccessful defendant should bear the costs of a successful defendant notwithstanding the insolvency of the plaintiff. Making an order for payment of costs directly as between defendants was seen as a means of ensuring that result. Applying the analogy to the present case, there is no suggestion that the defendant is insolvent or will be unable to pay the third party's costs. There is no need to impose a direct liability on Mr Currie in order to preserve the costs order in favour of the third party from ineffectuality.

[50] However relief for the purpose of overcoming insolvency is not the only reason why the successful party might seek an order directly against the unsuccessful one. In the present case, there is the possibility that a costs order made directly against Mr Currie might be made on an indemnity basis, whereas for the reasons already given, the costs order against the defendant is on the standard basis. It seems to me

---

21 It also ordered that the evidence in the proceedings between the plaintiff and the defendant be evidence in proceedings between the defendant and the third party. That was a common form of order under the previous *Rules of the Supreme Court*, but would seem to be unnecessary having regard to r 203(2) of the *Uniform Civil Procedure Rules*.

22 *Uniform Civil Procedure Rules*, r 202(2).

23 (1948) 77 CLR 544 at p 572.

that it is as legitimate to take this consideration into account as it is to take insolvency into account.

[51] In assessing whether to make orders of the type under discussion, a court is not restricted to consideration of the position existing at the time the action is commenced. In *Fennel v Supervision and Engineering Services Holdings Pty Ltd*[24] von Doussa J agreed with a statement by Kaye J that "circumstances of the case may require that [the decision to join a defendant] should be adjudged by the conduct of the defendants after the joinder of the successful defendant and even up until the jury's verdict"[25]. I see no reason why the same approach should not be taken in relation to all aspects of the exercise of the discretion.

[52] In *Steppke v National Capital Development Commission*, Blackburn CJ said:

> "There is a condition for the making of a Bullock order, in addition to the question whether the suing of the successful defendant was reasonable, namely that the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant."[26]

That passage was cited with approval by Gibbs CJ in *Gould v Vaggelas*.[27] In this context I take the reference to the condition of fairness to be to the wide discretion necessarily exercised by courts in the enormously varied factual circumstances which come before them. As such, it applies equally to a Sanderson order as to a Bullock order, and to orders analogous to them.

[53] Does this mean that, unless it is demonstrated that the defendant acted reasonably (as between itself and the plaintiff) in joining the third party, the third party cannot obtain an order in the nature of the Sanderson order? As noted above, support for this view is found in *Lackersteen v Jones (No 2)*[28], where such reasonableness was described as "a threshold question". Whether that description is accurate in the typical situation where a Sanderson order is sought, I need not decide.[29] The present case was not between a plaintiff and two defendants but between a plaintiff, a defendant and the third party. It was not the plaintiff but the defendant which added the successful party, and it was not a defendant who was unsuccessful but the plaintiff. A Sanderson order is sought in the present case only by analogy. In my view, there is no threshold requirement to be met before the wide discretion as to costs granted by r 689 of the *Uniform Civil Procedure Rules* may be exercised.

[54] What, then, is the fair outcome as between the third party and the plaintiff? On the one hand the plaintiff did nothing to cause the defendant to join the third party and it was not reasonable as between the defendant and the plaintiff for the defendant to do so. The defendant used the third party proceedings to maintain some allegations against the third party which it ought to have known were false. On the other hand, from the third party's point of view, liability in the defendant to the plaintiff was an element of the cause of action against him. He was entitled to have that case

---

24 (1988) 47 SASR 6 at p 20.

25 *Altamura v Victorian Railways Commissioners* (1974) VR 33 at p 35.

26 (1978) 21 ACTR 23 at 30 – 31.

27 (1985) 157 CLR 215 at p 230

28 (1988) 93 FLR 442.

29 It has been suggested that the two-step analysis could lead to error: *McCracken & McCracken v Pippett* [2000] VSCA 20.

presented honestly. By reason of the conduct of Mr Currie on behalf of the plaintiff, he has been put to expense for which he will not be compensated by the order for costs made in his favour against the defendant. Even though Mr Currie did nothing to bring about the joinder of the third party, he must have been aware that his deceit would cost the third party money. His conduct would make it fair to impose some liability on the plaintiff for the third party's costs.

[55] However no order has been sought by the third party against the plaintiff. Rather, the order has been sought against Mr Currie. It is appropriate to make an order against him, but I do not think he should be ordered to pay the whole of the third party's costs on the indemnity basis. That might render the order for such costs against the defendant redundant. It would fail to reflect the fact that he did not cause the joinder nor contribute to the unmaintainable case raised against the third party. He should pay the difference between the amount of the third party's costs assessed on the indemnity basis and the amount assessed on the standard basis.

Order

[56] For these reasons, the orders as to costs should be:

1. Order that the plaintiff, Graham George Currie and Motel Appraisals Pty Ltd pay the defendant's costs of and incidental to the plaintiff's claim to be assessed on the indemnity basis.
2. Order that the defendant pay the third party's costs of and incidental to the defendant's claim, to be assessed on the standard basis.
3. Order that Graham George Currie pay the third party the difference between the amount of his costs assessed on the indemnity basis and the amount of those costs assessed on the standard basis.