SUPREME COURT OF QUEENSLAND

CITATION:	*Emanuel Management Pty Ltd (in liquidation) & Ors v. Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299
PARTIES:	**EMANUEL MANAGEMENT PTY LTD (IN LIQUIDATION) AND ORS** (plaintiffs) **v.** **FOSTER'S BREWING GROUP LTD AND ORS** (first group of defendants) AND **COOPERS & LYBRAND AND ORS** (second group of defendants)
FILE NO:	3723 of 1999
DIVISION:	Trial
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	11 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2003
JUDGE:	Chesterman J
ORDER:	**1. The plaintiffs pay the first group of defendants' costs of and incidental to the proceedings (including the costs of and incidental to the third party claims brought by and against the second defendants in these proceedings, the costs of this application and all reserved costs) to be assessed on the indemnity basis, subject to paragraph 3 of this order.** **2. Gordian Runoff Limited (ACN 052 179 647) pay the first defendants' costs of and incidental to the proceedings (including the costs of and incidental to the third party claims brought by and against the second defendants, the costs of this application and all reserved costs) to be assessed on the indemnity basis, subject to paragraph 3 of this order.** **3. The said costs are to be assessed on the basis that:** **(a) all costs are to be allowed, except so far as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, each of the first**

defendants will be completely indemnified for their costs.

(b) it was necessary and proper for the attainment of justice and for enforcing the first defendants' rights for the first defendants to have retained the counsel whose appearance was announced (being Mr Keane QC, Mr Sheahan SC, Mr Bond SC, Mr McKenna, Mr Pomerenke and Mr Fox) for the conduct of these proceedings.

(c) it was necessary and proper for the attainment of justice and for enforcing the first Group of Defendants' right for the First Group of Defendants to have engaged the expert witnesses called by them to given evidenced at the trial (being Professor Boymal, Mr Kendall, Mr Southwell and Mr Dover).

(d) it was necessary and proper for the attainment of justice and for enforcing the first defendants' rights for the first defendants to have caused the documents relevant to these proceedings to be converted to an electronic format.

(e) it was necessary and proper for the attainment of justice and for enforcing the first defendants' rights for the first defendants to have paid their share of the costs to e.Law as required by the court order dated 16 August 2002.

4. The plaintiffs and Gordian Runoff Limited pay interest, pursuant to the *Supreme Court Act* 1995 (Qld), on the costs that they have been ordered to pay, with interest at 10 per cent per annum to run from 17 July 2003.

5. The plaintiffs pay the second defendants' costs:

(a) of defending the claim against the thirteenth defendant on an indemnity basis, and

(b) other than those referred to in paragraph 5(a), on a standard basis until 18 January 2003 and, thereafter, on an indemnity basis.

6. The plaintiffs pay the second defendants' costs of the claim made by them for contribution against the first defendants and their costs of defending the cross-claim brought against them by the first defendants.

7. Gordian Runoff Limited (ABN 11 052 179 647) pay to the second defendants the costs ordered to be paid to them by the plaintiffs, being the second group of defendants' costs:

(a) of defending the claim against the thirteenth defendant on an indemnity basis, and

(b) other than those referred to in paragraph 7(a), on a standard basis until 18 January 2003 and, thereafter, on an indemnity basis.

8. The assessment of the second defendants' costs be made on the basis that except so far as they are of an unreasonable amount or were unreasonably incurred the following items are to be regarded as costs necessary and proper for the attainment of justice and for enforcing the second defendants' rights:

(a) The fees of Mr B C Oslington QC

(b) The fees of Mr G A Thompson SC

(c) The fees of Mr L F Kelly

(d) The costs of the expert reports of Mr G Leppinus

(e) The costs of the expert report of Mr D Van Homrigh

(f) The costs of the expert report of Mr D Lombe

(g) The second defendants' share of the costs paid to e.Law as required by the Court order dated 16 August 2002.

9. The plaintiffs and Gordian RunOff Limited pay interest, pursuant to the *Supreme Court Act* 1995, on the costs that they have been ordered to pay, with interest to run from 17 July 2003 at the rate of 10 per cent per annum.

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF THE ISSUES – whether costs of and incidental to the proceedings can be awarded

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – COSTS AGAINST A NON-PARTY – whether the defendants' application for costs can be assessed on the indemnity basis – whether the institution and prosecution of the action was unreasonable – where application for payment of costs by a non-party – whether an application for payment of costs by a non-party should be

heard by the trial judge – rule in *Bahai v Rashidian* [1985] 1 WLR 1337

Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 ALR 406
Australian Conservation Foundation v Forestry Commission 81 ALR 166
Bahai v Rashidian [1985] 1 WLR 1337
Belar Pty Ltd (in liq.) v. Mahaffey [2000] 1 Qd R 477
Colgate-Palmolive Co. v Cussons Pty Ltd (1993) 46 FCR 225
Gore v Justice Corporation Pty Ltd (2002)119 FCR 429
Elfic Ltd & Ors v Macks & Ors (2000) QSC 18
Hamilton v Al Fayed (2002) EWCA Civ. 665
In the matter of Addstone Pty Ltd (in liq.); *Peter Ivan Macks* (1998) 638 FCA
Knight v F.P. Special Assets Ltd (1992) 174 CLR 178
Metalloy Supplies Ltd v M.A. (UK) Ltd [1997] 1 WLR 1613
Mobile Innovations Ltd v Vodafone Pacific Ltd (2003) NSWSC 423
Oshlack v Richmond River Council (1998) 193 CLR 72 at 97
Rosniak v Government Insurance Office (1997) 41 NSWLR 608
Symphony Group PLC v Hodgson [1994] QB 179

Bankruptcy Act, s120
Supreme Court Act 1995, s 48
Uniform Civil Procedure Rules, Chapter 9, Part 5, r353, r 361, r 704(3)

COUNSEL: Mr P A Keane QC with Mr J D McKenna for the first group of defendants/applicants

Mr B C Oslington QC with Mr L F Kelly for the second group of defendants/applicants

Mr T E Lennon with Mr J W Peden for the plaintiff/respondent

Mr B O'Donnell QC for Gordian Runoff

SOLICITORS: Clayton Utz for the first group of defendants/applicant

Mallesons Stephen Jaques for the second group of defendants/applicant

Hunt & Hunt (Adelaide) for the plaintiff/respondent

Dibbs Barker Gosling for Gordian Runoff

[1] Consequent upon the dismissal of the action against the defendants, both the first and second defendants have applied for special orders as to costs. By application dated 21 July 2003 the first defendants seek orders that:

> The plaintiff pay their costs of and incidental to the proceedings on an indemnity basis, or on the standard basis until 7 August 2002 and thereafter on the indemnity basis; and in the further alternative on the standard basis until 19 August 2002 and thereafter on the indemnity basis.

[2] In addition to seeking costs on that basis against the plaintiffs the first defendants seek the same orders against Gordian Runoff Limited ("GRL") a company which provided the plaintiffs with the necessary finance to prosecute the action and which, in return, stood to recover about a third of the net proceeds of the action, had it succeeded.

[3] In addition the first defendants seek directions as to the inclusion of certain items in their bill of costs when it comes to be assessed.

[4] The second defendants have also applied for special costs orders. They seek orders that:

> The plaintiffs pay the second defendants' costs of defending the claim against the thirteenth defendant (Mr Cuming) on the indemnity basis and all other costs on the standard basis until 18 January 2003 and thereafter on the indemnity basis.

[5] As well the second defendants seek an order that the plaintiffs pay any costs they are ordered to pay to the first defendants in respect of the claims for contribution made between defendants.

[6] The second defendants, too, seek an order for costs against GRL in the same terms as the orders they seek against the plaintiffs. As well they seek directions about the inclusion of certain items of costs in the assessment.

[7] The corporate plaintiffs do not oppose an order that they pay the defendants' costs of and incidental to the proceedings to be assessed on the standard basis. They oppose any order for costs on the indemnity basis. The sixty-sixth plaintiff, Mr Macks, opposes any order for costs being made against him save in respect of what might be regarded as 'his' causes of action. He too opposes any order for indemnity costs.

[8] GRL opposes any order for costs being made against it.

[9] The defendants also seek an award of interest on the costs which will be awarded in their favour.

Liability of Mr Macks to the Same Extent as the Other Plaintiffs

[10] The corporate plaintiffs are destitute. The liquidator has been unable to pay a dividend, however minute. Any order for costs against them will be worthless.

[11] As I mentioned Mr Macks does not oppose an order that he pay costs, assessed on the standard basis, in respect of the causes of action which he himself advanced. The distinction is untenable because Mr Macks' claims exactly duplicated those of the corporate plaintiffs. His claims and causes of action replicated theirs. There was a complete coincidence between the claims by the liquidator and by the companies. There can be no separation between the corporate causes of action and the liquidator's. It was a case of 'one for all and all for one'.

[12] Secondly the Court of Appeal has recognised that in cases of this type it is appropriate to make orders for costs against the liquidator. The point was made by the Court of Appeal in *Belar Pty Ltd (in liq.) v. Mahaffey* [2000] 1 Qd R 477 at 491:

> 'When an insolvent company, under the control of a liquidator, unsuccessfully brings litigation against another party, a simple order for costs against the company would carry a considerable risk … that the costs would not be recovered. … The most usual order in such a case is that the liquidator pay the costs, and it is recognised that this makes the liquidator personally liable for such costs … The exercise of such a discretion … is consonant with the principles under which orders for costs may be made against non-parties …'

[13] There is a third reason why the order for costs should be made against Mr Macks. He has a right to be indemnified by GRL against any costs he must pay the defendants. The corporate plaintiffs do not have such an indemnity. The evidence suggests that Mr Macks is not a man of great substance. The costs of the trial have been enormous. An order for costs against the corporate plaintiffs will go unsatisfied. An order for costs against Mr Macks will trigger his right to indemnity so that there would be an expectation that the costs would be paid.

[14] The plaintiffs relied upon *Metalloy Supplies Ltd v M.A. (UK) Ltd* [1997] 1 WLR 1613 and *Hamilton v Al Fayed* [2002] EWCA Civ. 665 for the proposition that a liquidator who causes an impecunious plaintiff to bring unsuccessful litigation should not be ordered to pay the costs in favour of the successful defendant, at least where the conduct of the litigation has not been unreasonable. Those cases are clearly distinguishable, not least on the basis that they did not have in mind a speculator who funded litigation in return for a large share of the plaintiffs' remedy. That apart the approach taken in *Metalloy* appears inconsistent with what was said in *Knight* and in *Belar* which are binding on me.

[15] Accordingly whatever orders for costs should be made in favour of the defendants against the plaintiffs should be made against all plaintiffs, including Mr Macks.

Indemnity Costs

[16] The first defendants' application for costs to be assessed on the indemnity basis is put on two foundations:

(a) That the institution and prosecution of the action was unreasonable.

(b) That an offer of compromise was made at the commencement of the trial which, if accepted, would have given the plaintiffs a better result than they achieved by judgment.

[17] The authority to which attention is usually directed is *Colgate-Palmolive Co. v Cussons Pty Ltd* (1993) 46 FCR 225 in which Sheppard J identified a number of circumstances in which it may be appropriate to make an order for indemnity costs. They include:

(i) Making allegations of fraud knowing them to be false or making irrelevant allegations of fraud.

(ii) Misconduct that causes loss of time to the court and the opponent.

(iii) Commencing or continuing proceedings for some ulterior motive or in wilful disregard of known facts or clear law.

(iv) Making groundless allegations.

(v) An imprudent refusal of an offer to compromise.

'The question must always be whether the particular facts and circumstances … warrant the making of an order for payment of costs other than on a party into party basis.'

[18] *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 (at 616) has perhaps taken the position furthest in deciding that it is not necessary for the party seeking the protection of indemnity costs to establish ethical or moral delinquency by its opponent. It is enough to show 'unreasonable conduct' of some sort. That case itself demonstrates that the inexactness of such a test can give rise to difficulty in its application.

[19] Paragraphs 31-52 of the first defendants' submission on costs identify a number of instances in which allegations of dishonesty or deliberate misconduct were made against the first defendants' officers or solicitors which went unsupported by any evidence. I accept the content of those submissions. I have, perhaps, little choice considering that most of them rely upon findings of fact I made in the reasons for the judgment. I have not changed my mind about those findings and I did not make them lightly. It was of concern that the plaintiffs made and persisted in allegations of the most serious misbehaviour by solicitors and senior officers of public companies when no evidence was adduced to support them, and the plaintiffs avoided putting the allegations to the witnesses in cross-examination when they could have been answered directly. It is enough to recall the many allegations of undue influence concerning Mr Emanuele and that he was not called to support them. Other evidence suggested that he was a man most unlikely to be put upon. No other evidence in support of such a case was led.

[20] I do not wish to revisit my reasons for judgment but it may be remembered that two of the three components of the '1995 Scheme' foundered at the first ripple. The February 1995 judgment could not be set aside without evidence that it was obtained by a dishonest agreement. Not only was there no evidence of agreement the evidence which the plaintiffs led showed there was no agreement.

[21] The claim to set aside the judgment was always, I think, doomed to fail and its fate should have been apparent. Not only was there no evidence led of an agreement to enter judgment for an amount known to be exaggerated, the objective facts established that the plaintiffs had no prospect of challenging the amount for which judgment was entered. There was never any doubt about the existence of a debt owed by the corporate plaintiffs to the second, third and fourth defendants. The amount was fixed by the DOOR. That deed had been the subject of litigation in the

Federal Court and could not again be assailed in litigation, however limited a view one might take of the operation of *Anshun* estoppel. Consequently the amount of the debt was unalterably fixed as at March 1993. Its computation as it grew with compounding interest over the next two years was not a matter of particular difficulty. The amount so computed was the debt for which judgment was given.

[22] There being a real debt for an unchallengeable amount there was no basis for setting the judgment aside.

[23] The third component, that land was transferred at an under-value, failed when the plaintiffs led evidence from Mr Purvis and Mr Slect that the land could not be worth as much as the figure advanced by the plaintiffs' own valuer. In addition the case that the value was fixed arbitrarily at a known under-value was never advanced at all in the evidence. The valuer who undertook the valuations was not taxed with the point.

[24] The second component of the 1995 Scheme, the operation and making of DOFR, gave rise to greater difficulties of analysis and called for a more detailed examination of the facts surrounding them. I found in favour of the first defendants but I would not say that than outcome was clearly inevitable from the commencement of the trial. It should have been, however, by the time the first defendants had waived privilege and disclosed communications between them and their solicitors and the delivery of their witness statements. Notwithstanding the delivery of that information the plaintiffs persisted with their claim that DOFR was tainted with fraud and bribery.

[25] The real point to my mind is that had the plaintiffs succeeded on that aspect only of the 1995 Scheme it would have produced no more than a return of the money paid to Simionato Holdings less the amount recovered from that company by the liquidator. The amount is less than $3,000,000 which would have to be set off against the judgment debt owed in favour of the first defendants. That claim could not have produced any positive outcome for the plaintiffs.

[26] The plaintiffs' inability to mount an argument to have the judgment set aside had a number of consequences. The existence of the judgment made the prosecution of the other causes of action worthless. It precluded the prosecution of the claim in respect of the preference shares. The statement of claim itself made it clear that the debt in respect to which judgment was entered took account of the monies (wrongfully it was claimed) recovered from Emanuel Management by way of dividends and redemption. While the judgment debt stood the plaintiffs could not prosecute that claim.

[27] Even assuming complete victory for the plaintiffs on their claims in respect of the issue and redemption of preference shares, the amount recoverable was only a fraction of the judgment debt. A set off of judgments which would have been the only appropriate course would have left the plaintiffs very substantial net judgment debtors.

[28] The plaintiffs and GRL both argued that this view of the litigation was unduly censorious. Their argument was that although the result went against the plaintiffs it was only after a thorough investigation of the facts at the trial, and that it was reasonable for the plaintiffs to believe that the materials they had gave rise to a reasonable belief that the case was a good one. They should not be penalised, they

submit, by an order for indemnity costs because their view was not, in the end, shared by the trial judge.

[29] The submission was made by counsel who did not appear at the trial. The view that the documents gave rise to an arguable case of a conspiracy to defraud, wide ranging dishonesty and cynical misuse of a fiduciary position could not be advanced by anyone who had taken the necessary weeks to read the documents which were put forward as evidence of the transactions the plaintiffs sought to impugn. As I mentioned in the reasons for judgment the documents tendered by the plaintiffs offered no support for their case but rather proved the first defendants' contention that there had been honest negotiations between the parties dealing at arms length.

[30] The liquidator is responsible for the conduct of the corporate plaintiff's claims, as well as his own.

[31] I have said enough to indicate that in my opinion there was a degree of irresponsibility in the plaintiffs' bringing and prosecuting their action against the first defendants. It is significant that extravagant claims of dishonesty, corruption and gross impropriety were made in support of which not the slightest evidence was called. It is a case in which it is right to regard to the defendants as having been vexed. It is therefore an appropriate case in which to order an order of indemnity costs.

[32] The first defendants' criticisms of the claims brought by Mr Macks (see paragraphs 53-60 of the submissions) should also be accepted. The claims based upon s 120 of the *Bankruptcy Act* should never have been brought. There was no question of any impugned payment amounting to a settlement. The claims based upon s 121 ignored the requirement spelt out in *Cannane* that there be an actual subjective intention to cheat.

Offers

[33] On 7 August 2002 the first defendants' solicitors wrote to the plaintiffs' solicitors 'without prejudice except as to costs' to make an offer to compromise the litigation. The offer was open for acceptance until 10.00 am on 19 August 2002 which was the day the trial commenced. By the letter the first defendants offered:

> (a) To pay the plaintiffs $15,000,000 plus the costs of the action to that date to be assessed on the standard basis.
>
> (b) To release the unpaid balance of the judgment debt and any supporting securities for the debt and to withdraw all proofs of debt they had lodged.
>
> In return for which the plaintiffs were to:
>
> (c) Consent to the action being dismissed.
>
> (d) Indemnify the first defendants in respect of claims for contribution brought against the first defendants as a consequence of litigation brought by the plaintiffs against their former solicitors in South Australia.

[34] The offer was not accepted. A second offer was made pursuant to *UCPR* 353 immediately on the expiration of the first offer, i.e. 19 August 2002. This offer was in the same terms as (a) and (b) above. The plaintiffs did not accept it either.

[35] The second offer was expressed to be made pursuant to chapter 9 part 5 of the *UCPR* and remained open for acceptance for fourteen days. Rule 361 which regulates offers to settle made by defendants provides that if a defendant makes an offer to settle which is not accepted by the plaintiff which then obtains a judgment no more favourable than the offer, and the offer was made on the first or later day of the trial (as happened here) the defendant is entitled to its costs from the commencement of the trial on the indemnity basis.

[36] The rule is not applicable because the plaintiffs did not obtain any judgment. This may be an oversight in the Rules but r 361 does not give rise to a *prima facie* right in the defendants to have their costs on the indemnity basis from the commencement of the trial subject only to the court 'otherwise' ordering.

[37] Nevertheless it is clear that r 361 does not by implication prevent an order for indemnity costs being made in favour of a defendant save in the particular circumstances covered by the rule. A defendant who has been completely successful and has made an offer to settle better than the result for the plaintiff should not be in a worse position than a partly unsuccessful defendant who made such an offer.

[38] I was referred to a debate in the authorities as to what response is appropriate where a successful defendant had offered to compromise on terms which gave the plaintiff something and the offer was rejected. There are slightly conflicting views: on the one hand there is said to be a 'presumption' that the defendant should have its costs on the indemnity basis and the plaintiff must show some good reason why another order should be made. The second view is that the defendant must show that the offer was rejected unreasonably, judged in the circumstances known at the time it was made.

[39] An order of costs being a matter always for the discretion of the court I do not know that it is sensible to adopt either position as a 'rule'. The making of an offer in the circumstances in question is a very relevant circumstance to be taken into account when exercising the discretion. If there are no countervailing circumstances the order for indemnity costs is likely to be made.

[40] In this case I can see no countervailing circumstances. Indeed as I have explained the plaintiffs should have appreciated that their case had no worthwhile prospect of success. It was, therefore, unreasonable not to accept the offer.

[41] If I had not been satisfied that the first basis discussed entitled the first defendants to an order for indemnity costs for the whole of the action I would have ordered indemnity costs from the first day of the trial and costs on the standard basis to that date.

Costs Against GRL

[42] The means by which this very expensive litigation was funded has been the subject of discussion in an action and an appeal in this court and an application in the Federal Court: *Elfic Ltd & Ors v Macks & Ors* [2000] QSC 18; 2001 QCA 219;

In the matter of Addstone Pty Ltd (in liq.); *Peter Ivan Macks* (1998) 638 FCA. Those judgments refer to the role played by Government Insurance Office in funding the plaintiffs. For reasons which do not matter and which were not explained to me GRL has replaced Government Insurance Officer as the funder. I was told that it can be regarded as an emanation of and substitute for the insurer.

[43] In *Knight v F.P. Special Assets Ltd* (1992) 174 CLR 178 the High Court declared that a non-party to litigation would ordinarily become liable to pay the costs of the successful party where the unsuccessful party could not pay them, where the non-party played an active role in the litigation and had a financial interest in the outcome.

[44] The first defendants' costs are substantial being in the order of $19,000,000. The corporate plaintiffs are destitute and Mr Macks' means are modest.

[45] The role of GRL in the litigation and the reward it hoped to obtain from it have been set out at length in the judgments I mentioned. I see no point in repeating them. GRL's solicitor was given contractual powers to supervise the conduct of the litigation and to be kept informed of its progress and the developments in it. By the terms of the arrangements between the liquidator and GRL the former had to appoint GRL's solicitor 'in relation to the bringing of the main action … Ward & Partners … were the solicitors retained by the liquidator. The … agreement provided that (GRL's solicitor) could appoint Ward & Partners to be his agents to run the main action … Ward & Partners would report to (the solicitor) directly in all matters concerning the claim …'

GRL had to give approval to the retainer of counsel, commencing the trial, settling the action or appealing against a final judgment. The liquidator was obliged to keep GRL informed in writing of any change in information 'given (it) before (it) entered into this contract', and any other information it reasonably asked to be given. As well it could inspect any documents in the case and was to receive quarterly reports on the progress of the proceedings.

GRL could insist upon the liquidator obtaining professional advice as to the prospects of success and whether it should be compromised. The liquidator was bound to 'pay full regard to the professional advice' that he received pursuant to this obligation.

[46] In return for funding the litigation GRL was to receive about thirty-five per cent of any judgment received by the plaintiffs. The precise percentage varied according to the amount actually received but it was to be about a third of any money or monies' worth recovered.

[47] In these circumstances an order for costs against GRL is inevitable. See *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406; *Gore v Justice Corporation Pty Ltd* (2002)119 FCR 429.

[48] The only substantial reason advanced by GRL against such an order is that under the terms of an insurance policy which it issued to the liquidator the latter is indemnified against any personal liability for costs he is ordered to pay the defendants in the action. It is said that GRL has confirmed that it will honour the indemnity so that it 'is fully exposed to meeting whatever costs are awarded to the defendants.'

[49] I do not understand why the existence of the indemnity should be thought to make it inappropriate that an order for costs be made directly against GRL. If it accepts that it will have to pay those costs by way of indemnifying Mr Macks there seems no real point in its opposing an order that it pay them directly to the first defendants. Such an order will obviate the need for a circularity of actions and remove the risk that GRL might in the future change its mind and find some reason for refusing indemnity.

[50] It is pointed out that its company secretary deposes to a resolution by the board of GRL to 'confirm indemnity under the policy … in respect of Macks' personal liability for costs in full ordered in favour of the defendants in respect of the judgment dated 17 July 2003 …' This is less than an unconditional and irrevocable commitment enforceable by the defendants against GRL for the recovery of their costs.

[51] On 13 December 2000 the first defendants' solicitors wrote to GRL's solicitors to advise them that in the event that the plaintiffs were unsuccessful costs would be sought against GRL should the plaintiffs not promptly satisfy any order for costs against them. On 5 February 2002 the first defendants' solicitors again wrote to GRL's solicitors to repeat its intimation that the first defendants intended to seek an order for costs against GRL in the event of a successful defence.

[52] The first defendants did not make an application for security for costs but GRL makes no point about this. What happened was that the defendants' solicitors in July 2002, at the unsuccessful conclusion of the challenge to the funding arrangements, wrote to GRL to advise that it would not apply for security for costs but that it should understand that an order for non-party costs would be sought against it should the action fail. There is nothing in the material filed in connection with the application for costs orders to give rise to a suggestion that had an application for security for costs been made GRL would not have provided whatever security was ordered and the action would not have proceeded with a resulting saving in costs. The action instead proceeded on the basis that GRL would indemnify Mr Macks for any costs order made against him. The failure to apply for security for costs is therefore irrelevant to the exercise of the discretion to order costs against GRL.

[53] Not only do the first defendants seek an order for costs against GRL they seek costs on the indemnity basis. The basis for seeking this order is that:

(a) GRl required the liquidator to engage its solicitor and conduct the litigation in accordance with his advice.

(b) GRL received regular reports about the conduct of the litigation and had the right at any time to call for independent legal advice in accordance with which the liquidator would have to act.

(c) GRL had to approve the retainer of counsel and the commencement of the action.

(d) GRL took an active interest in the conduct of the trial.

(e) The first defendants' solicitors wrote to GRL pointing out in clear terms the lack of evidence to make out their case and the likelihood that an order for costs on the indemnity basis would be made.

[54] GRL did not reply to the first defendants' correspondence and the plaintiffs persisted with their allegations including serious ones of impropriety which had no basis in fact. GRL, given its rights to be informed, the interest it took in the action and the role of its solicitor must be taken to have approved of the manner in which the trial was conducted by the plaintiffs.

[55] During the course of the plaintiffs' opening, some time in September of 2002, I raised with counsel for the plaintiffs the fact that the documents relied upon by them did not appear to make out their case of conspiracy or dishonesty. On 22 October 2002 at the conclusion of the opening the first defendants' solicitors wrote to the solicitors for GRL to note that:

> '"The case as opened singularly failed to disclose a basis for any of the allegations of fraud, dishonesty or conspiracy …"
>
> (a) … the plaintiffs' case was infected at critical points by distorted (sometimes plainly erroneous) interpretation of documents …
>
> (c) It has become apparent that the plaintiffs do not propose to call any witness of fact who will … support the claims made …
>
> (d) Several witnesses have been called none of whom gave evidence adverse to the defendants …
>
> (e) Evidence adduced … has removed all possibility of any recovery by the plaintiffs in respect of the Mango Hill … development.'

[56] There is a reason why, in principle, GRL should pay costs on the indemnity basis. It invested in the litigation as a speculation. It hoped to recover a large profit on its outlay. The case it funded involved serious allegations of misconduct against persons of some prominence. There was a degree of recklessness in the conduct of the litigation in the sense that these allegations were made and persisted in without a proper evidentiary basis and in the face of warnings that there was no such basis. GRL was in a position to control the conduct of the litigation and was in possession of all relevant facts. To the extent that it may not have known the facts it was put on notice that it should ascertain them.

[57] The answer advanced by GRL is, essentially, that though the case was lost it should not properly have been seen as 'hopeless' when commenced. It was said that it failed because the court preferred the evidence of the defendants' witnesses but this was not necessarily to be foreseen when the action was commenced and run. I accept that not every case in which a plaintiff loses resoundingly will result in an order for indemnity costs to the defendants. However this is not a case in which the court in the end took a view of the evidence different to the expectations of the

plaintiffs' lawyers. For reasons which I have identified and will not repeat it was a case in which the essential requirements for victory were missing and were never adduced.

[58] It is also pointed out that the first defendants made late disclosure of a number of documents. Particularly there was a late waiver of privilege with the result that a substantial number of solicitors' memoranda, file notes and correspondence were provided to the plaintiffs some months into the trial. These documents were corroborative of the first defendants' case. It is said that had the documents been provided earlier the plaintiffs would have had a chance to re-evaluate their decision to prosecute the action. Reliance is also placed on the fact that the witness statements for the defendants' witnesses were provided relatively late in the trial. The same consequence is said to follow.

[59] The difficulty with the argument is that having received the statements and the additional documents the plaintiffs approach to the case did not change. There is no reason to think that had the documents been given earlier they would have had a different effect.

[60] Accordingly I am satisfied that it is proper to make an order that Gordian Runoff pay the first defendants' costs of the action to be assessed on the indemnity basis.

Submissions by Second Defendants

[61] The second defendants seek an order that the costs incurred in defending the claims against the thirteenth defendant, Mr Cuming, should be assessed on the indemnity basis. This is on the ground that the plaintiffs, properly advised, should have known that their case against him was hopeless, or had no chance of success. It is submitted the claims were persisted in when the plaintiffs were given 'clear warnings that they were fundamentally misconceived.'

[62] There were two claims against Mr Cuming. The first was that he should have recovered loans due to the companies in respect of which he was appointed liquidator from Emanuel Management. The amount involved was just under $9,000,000. The second claim was that Mr Cuming took no steps to recover monies on behalf of one of those companies, Elizabeth House, which were recorded as having been deposited with EFG in what was called the 'Elizabeth House Deposit Account'. A full discussion of both claims can be found in the reasons for judgment.

[63] The first claim failed because the plaintiffs did not show, and did not attempt to show, that it suffered any loss by reason of the dereliction of duty by Mr Cuming. I found that he was dilatory in attending to the recovery of the inter-company loans but that there was no prospect of any recovery no matter how quickly after his appointment Mr Cuming might have moved to demand payment. This aspect of the claim against Mr Cuming was contrary to the whole thrust of the plaintiffs' claims against the first defendants (and indeed the second defendants) that at all relevant times the plaintiff companies were insolvent.

[64] I think it is fair to categorise this claim as hopeless. The most significant feature is the plaintiffs complete lack of attempt to show any loss resulting from Mr Cuming's tardiness.

[65] The second claim is even clearer. It is enough only to mention the uncontroversial evidence accepted on all sides that there was no record in any of the documents given to Mr Cuming in his capacity as liquidator of Elizabeth House that there was a deposit account which had once held a credit balance to which Elizabeth House might have mounted an arguable claim.

[66] There were reasons, which I accepted, for thinking that the monies standing to the credit of the deposit account could never have been recovered by Elizabeth House. It is not necessary to consider whether the plaintiffs should have formed the view that the monies were irrecoverable so as to characterise their pursuit of them as hopeless or ill-advised or with no chance of success. For present purposes the real point is that, on the evidence, no-one ever suggested that Mr Cuming should have or could have known of the existence of the deposit account so that he cannot be criticised for not having claimed the money.

[67] Mr Cuming is entitled to his costs for defending the action on the indemnity basis.

[68] The second defendants ask for the balance of their costs of defending the action from the plaintiffs on the standard basis until 18 January 2003 and thereafter on the indemnity basis. The date mentioned is that on which the second defendants offered to compromise the action by the payment of $1,500,000 to the plaintiffs. The offer was rejected.

[69] By letter dated 2 January 2003 marked ‘without prejudice save as to costs’ the second defendants’ solicitors wrote to the plaintiffs’ solicitors to point out, at some length, the reasons why the plaintiffs’ case against the second defendants could not succeed. The letter concluded with an offer that the second defendants pay the plaintiffs $1,500,000 and that judgment be entered in favour of the second defendants with no order as to costs. The offer was open for acceptance until 4.00 pm on 17 January 2003. The letter informed the plaintiffs that if they failed against the second defendants the letter would be relied upon ‘to seek indemnity costs from the date of its service’.

[70] The making and rejection of an offer which was substantially more favourable to the plaintiffs than the outcome of the trial is a sufficient reason for an award of indemnity costs from the expiration of the offer. The letter correctly identified the flaws in the plaintiffs’ case against the second defendants. To summarise them briefly: the claims were barred by the *Limitation of Actions Act*; and the plaintiffs could not prove any loss consequent upon the second defendants’ breach of retainer. This summary oversimplifies things but makes the essential point.

[71] The offer was made at a time when the plaintiffs’ case had been closed and no further evidence (assuming any was available) could have been adduced to overcome the deficiency in the case against the second defendants. Those deficiencies were clearly pointed out in the correspondence. Indeed they had been expressly articulated during the opening when, at my invitation, counsel for the defendants responded to the plaintiffs’ opening to provide an overall appreciation of the action.

[72] The plaintiffs were unreasonable in rejecting the offer. It was made at a time when the trial had some months to run and a considerable cost could have been saved by compromising the action.

Costs Against GRL

[73] The second defendants too claim an order that GRL pay their costs of defending the action.

[74] I see no reason to distinguish between the position of the two sets of defendants. Without an order for costs against GRL in favour of the second defendants there is a risk, the magnitude of which cannot be evaluated, that an order for costs against the plaintiffs would be unsatisfied. It could only be satisfied if GRL indemnified the plaintiffs or some of them in respect to the order. It is preferable, for the reasons given earlier, that there be an order directly against GRL.

[75] It is true that the second defendants did not give early notice to GRL that it would seek an order for costs against it should the plaintiffs' claims fail. 14 February 2003 appears to be the first occasion on which such a notice was given. However the first defendants had given earlier notice and there is no reason to think that those advising GRL would not have anticipated that the second defendants would make a similar application to that adumbrated by the first defendants. In any event Manfield J was persuaded, in part, to approve the funding arrangements proposed by the plaintiffs on the basis that they protected the defendants should the plaintiffs' claims fail. His Honour was told that GRL would be liable for the costs of the defendants should an order for costs be made against the plaintiffs. There was no stated difference between the position of first and second defendants. Lack of earlier notice of this particular application by the second defendants cannot have caused GRL any prejudice.

[76] The second defendants seek an order against GRL that it pay costs on the same basis as the order it seeks against the plaintiffs i.e. that it pay Mr Cuming's costs on the indemnity basis and costs after January 2003 on the indemnity basis.

[77] In October 2002 and March 2003 Mr McDonnell of the second defendants' solicitors spoke to the solicitors for GRL in an endeavour to achieve a compromise of the claims between the plaintiffs and the second defendants. During those meetings Mr McDonnell pointed out the difficulties that lay in the plaintiffs' path. The warnings must have gone unheeded. GRL had ample contractual powers to acquaint itself with the state of the litigation and to review its prospects. It is clear that its solicitors were actively monitoring the proceedings of the trial.

[78] In all the circumstances the appropriate order is that which the second defendants seek.

Interest

[79] Both sets of defendants seek an order that they recover interest on the costs ordered in their favour. Section 48 of the *Supreme Court Act* 1995 confers the right to such interest unless the court otherwise orders. There is no reason for a different order. The amount of costs is very large and the defendants have had to fund the litigation over several years. They are out of pocket and will be until costs are assessed and paid. The liability to pay interest is likely to lead to an earlier assessment. There will be an incentive not to delay the assessment process.

[80] Section 48 raises a question about the date from which interest should run. The amount on which it should run and therefore the amount of interest will not be

known until costs are assessed. That will take some time even with the operation of the incentive I mentioned. Accordingly the appropriate order is that the plaintiffs and GRL should pay interest at the rate of 10 per cent on costs when assessed as from 17 July 2003.

Contribution Proceedings

[81] There were claims for contribution between the defendants. Those claims were dismissed because it was unnecessary to deal with them. I indicate that the costs incurred by both first and second defendants in prosecuting claims of contribution against each other should be part of their respective costs in defending the plaintiffs' claims against them.

[82] The defendants seek directions in relation to the assessment of costs for the assistance of the taxing officer. Subject to the requirement in *UCPR* 704(3) that costs will only be allowed if they were reasonably incurred and were of a reasonable amount I think it appropriate to make the directions sought. It should lessen the scope for further argument.

Claim for Costs by Plaintiffs

[83] The plaintiffs seek an order that the defendants should pay their costs 'of the insolvency issue.' It will be recalled that there was a debate at the trial, dealt with in the reasons, about the date from which the plaintiff companies were insolvent. The plaintiffs contended for a date earlier than the defendants and succeeded in their contention.

[84] *UCPR* 682 provides that:

> '(1) The court may make an order for costs in relation to a particular question, or a particular part of, a proceeding.
>
> (2) For subrule (1) the court made it clear what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates.'

The new wording is no doubt meant to broaden the discretion of the court and to avoid the necessity to have recourse to old authorities which discussed what amounted to an issue or event or a 'unit of litigation'. Now there is a widely expressed discretion to make separate orders for costs in relation to questions or parts of proceedings.

[85] The rule is, I suspect, more likely to find application where a plaintiff has been partially successful. The defendant who has restricted the plaintiff's success may have an argument, the strength of which will depend on the circumstances, that it should pay only part of the costs or indeed be paid part of the costs. Where, however, a defendant has been completely successful it would be unusual to require it to pay any part of the plaintiff's costs. There may be exceptional cases where the defendant by its conduct has made it appropriate that it should be deprived of its costs or even pay its opponent's costs, but cases in which a successful defendant has not recovered costs are rare. The general rule is that a successful litigant is entitled to its costs the primary purpose of which is to indemnify the successful party because 'fairness dictates that the unsuccessful party typically bears the liability for

the costs of unsuccessful litigation.' Per McHugh J is *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97. The cases collected by Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd* (2003) NSWSC 423 para 4 show that the power to order a successful party to pay costs 'is a course to be taken in unusual cases and with a degree of hesitancy.'

[86] I was referred to a passage in a judgment of Burchett J in *Australian Conservation Foundation v Forestry Commissioner Tasmania* 81 ALR 166 at 169. The case was one in which the applicant failed but one of the respondents took some points by way of defence which were unsuccessful. The argument on those points added to the duration and therefore costs of the trial. The unsuccessful applicant sought an apportionment of the costs. It was refused. The judge said (169):

> 'A party against whom an unsustainable claim is prosecuted is not to be forced, at his peril in respect of costs, to abandon every defence he is not sure of maintaining, and oppose to his adversary only the barrier of one hopeful argument: he is entitled to raise his earthworks at every reasonable point along the path of assault.'

[87] I did not regard the debate on when the plaintiff companies became insolvent as being a separate 'question' or 'issue' or 'event' let alone a separate 'unit of litigation.' It was dealt with separately as a topic for convenience. The ambit of the action was so immense that to be comprehensible it had to be divided into parts which were separately treated in argument and judgment. The fact of insolvency was a relevant ingredient in a number of the plaintiffs' causes of action. The plaintiffs made out that ingredient but no cause of action succeeded because other essential parts were not made out. Proving that 'ingredient' gave the plaintiffs no success.

[88] I do not apprehend that a judicial exercise of discretion as to costs calls for an order in favour of a plaintiff who proves an identifiable part of his pleaded cause of action but does not make out the whole.

Adjournment

[89] GRL sought an adjournment of the defendants' application for costs on the basis that late on the last working day before the application it gave notice to senior counsel who appeared for the plaintiffs that it might seek contribution from him in respect of any costs it was ordered to pay the defendants. The basis for such a claim was not explained, but it argued that Mr Meagher QC might prefer to have the matter adjourned. GRL itself would prefer to have the application put off until it was in a position to prosecute its claim for contribution against Mr Meagher.

[90] I refused the adjournment which would have been productive of much inconvenience and wasted costs.

[91] The application for costs was dealt with in a day on written submissions supplemented by oral argument. The claim for contribution will presumably rest upon claims of negligence or breach of retainer against senior counsel. It will involve a trial which will take days if not weeks and could not be prepared for months, or even years. The defendants have succeeded in the litigation and are entitled to an order for costs. They should not have to wait while GRL seeks to lay off its losses.

[92] The main reason advanced for the adjournment was that the matters should be heard together lest the two applications, the defendants for costs and GRL's for contribution from the plaintiffs' counsel lead to different results which might occur if they are heard at separate times on differing materials.

[93] Even if the risk be real, which I doubt, the applications must necessarily involve different considerations. The question whether the defendants were entitled to indemnity costs could be decided, as it has been, without any reference to the manner in which plaintiffs' counsel performed his retainer. That question can be decided in separate proceedings.

[94] Counsel for GRL argued that the best chance of avoiding inconsistent findings of fact would be for the same judge to hear both applications but if they were heard separately and the defendants' application for costs were heard first Mr Meagher might object to my hearing GRL's application on the ground of apprehended bias, should I be critical of his conduct.

[95] I have expressed no such opinion. Even in cases where reasons for judgment do criticise someone not a party against whom an order for costs is subsequently sought the trial judge is not disqualified from hearing the application. Indeed the trial judge is required to deal with the application notwithstanding such criticism. This was decided by the Court of Appeal in *Bahai v Rashidian* [1985] 1 WLR 1337 which held that only in the most exceptional case should an application for payment of costs by a non-party be tried by anyone other than the trial judge. Balcombe LJ was part of the court. His Lordship of course wrote the judgment of the court in *Symphony Group PLC v Hodgson* [1994] QB 179 which at 193 considered that:

> '(4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v Rashidian* …
>
> (5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias or the appearance of bias …'

[96] All this having been said it appears to me that a proceeding of the kind which GRL insinuates that it will bring is not a claim for an order that a non-party pay the costs of an action but will be a claim for damages for negligence against a barrister. I am not presently convinced that the principle of *Bahai* is applicable.

[97] It appeared to me that the defendants were entitled to have their costs applications dealt with on the day allotted to it.

Orders

[98] I order that:

> 1. The plaintiffs pay the first group of defendants' costs of and incidental to the proceedings (including the costs of and incidental to the third party claims brought by and against the second defendants in these proceedings, the costs of this application and all reserved costs) to be assessed on the indemnity basis, subject to paragraph 3 of this order.

2. Gordian Runoff Limited (ACN 052 179 647) pay the first defendants' costs of and incidental to the proceedings (including the costs of and incidental to the third party claims brought by and against the second defendants, the costs of this application and all reserved costs) to be assessed on the indemnity basis, subject to paragraph 3 of this order.

3. The said costs are to be assessed on the basis that:

   (a) all costs are to be allowed, except so far as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, each of the first defendants will be completely indemnified for their costs.

   (b) it was necessary and proper for the attainment of justice and for enforcing the first defendants' rights for the first defendants to have retained the counsel whose appearance was announced (being Mr Keane QC, Mr Sheahan SC, Mr Bond SC, Mr McKenna, Mr Pomerenke and Mr Fox) for the conduct of these proceedings.

   (c) it was necessary and proper for the attainment of justice and for enforcing the First Group of Defendants' right for the First Group of Defendants to have engaged the expert witnesses called by them to given evidenced at the trial (being Professor Boymal, Mr Kendall, Mr Southwell and Mr Dover).

   (d) it was necessary and proper for the attainment of justice and for enforcing the first defendants' rights for the first defendants to have caused the documents relevant to these proceedings to be converted to an electronic format.

   (e) it was necessary and proper for the attainment of justice and for enforcing the first defendants' rights for the first defendants to have paid their share of the costs to e.Law as required by the court order dated 16 August 2002.

4. The plaintiffs and Gordian Runoff Limited pay interest, pursuant to the *Supreme Court Act* 1995 (Qld), on the costs that they have been ordered to pay, with interest at 10 per cent per annum to run from 17 July 2003.

5. The plaintiffs pay the second defendants' costs:

   (a) of defending the claim against the thirteenth defendant on an indemnity basis, and

(b) other than those referred to in paragraph 5(a), on a standard basis until 18 January 2003 and, thereafter, on an indemnity basis.

6. The plaintiffs pay the second defendants' costs of the claim made by them for contribution against the first defendants and their costs of defending the cross-claim brought against them by the first defendants.

7. Gordian Runoff Limited (ABN 11 052 179 647) pay to the second defendants the costs ordered to be paid to them by the plaintiffs, being the second group of defendants' costs:

(a) of defending the claim against the thirteenth defendant on an indemnity basis, and

(b) other than those referred to in paragraph 7(a), on a standard basis until 18 January 2003 and, thereafter, on an indemnity basis.

8. The assessment of the second defendants' costs be made on the basis that except so far as they are of an unreasonable amount or were unreasonably incurred the following items are to be regarded as costs necessary and proper for the attainment of justice and for enforcing the second defendants' rights:

(a) The fees of Mr B C Oslington QC

(b) The fees of Mr G A Thompson SC

(c) The fees of Mr L F Kelly

(d) The costs of the expert reports of Mr G Leppinus

(e) The costs of the expert report of Mr D Van Homrigh

(f) The costs of the expert report of Mr D Lombe

(g) The second defendants' share of the costs paid to e.Law as required by the Court order dated 16 August 2002.

9. The plaintiffs and Gordian Runoff Limited pay interest, pursuant to the *Supreme Court Act* 1995, on the costs that they have been ordered to pay, with interest to run from 17 July 2003 at the rate of 10 per cent per annum.