SUPREME COURT OF QUEENSLAND

CITATION:	*Rathie v ING Life Ltd* [2003] QSC 429
PARTIES:	**DAVID STEWART RATHIE** **(plaintiff/respondent)** **v** **ING LIFE LIMITED ACN 009 657 176 (formerly known as Mercantile Mutual Life Insurance Company)** **(defendant/applicant)** **v** **NSP BUCK BROKING PTY LTD ACN 064 012 264** **(third party/respondent)**
FILE NO/S:	S10141 of 1999
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2003
JUDGE:	Mullins J
ORDER:	**1. The defendant pay the third party's costs of the third party proceeding to be assessed on a standard basis.** **2. As between the plaintiff and the defendant, the defendant bear its own costs of the third party proceeding**.
CATCHWORDS:	PROCEDURE - COSTS –where defendant granted leave to discontinue third party proceeding – where defendant sought order that plaintiff indemnify the defendant for the third party's costs of the third party proceeding and its costs of the third party proceeding on the standard basis – costs order in circumstances not solely determined by deciding whether reasonable for defendant to bring third party proceeding in light of plaintiff's claims - where defendant issued third party proceeding without leave of the court and before plaintiff had opportunity to indicate attitude to the proceeding – where plaintiff then amended statement of claim to abandon the allegations upon which the third party claim was based – where issue raised in third party proceeding not one agitated as between plaintiff and defendant — appropriate for the defendant to bear the costs of the third party proceeding *UCPR* r 194, r 304, r 307, r 683

R v Gold Coast City Council, ex parte Raysun Pty Ltd [1971] QWN 13
Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd [1992] 1 QdR 162
Leaver v Golsby [1964-5] NSWR 1833
Paron v Fry (No 2) [1990] 1 QdR 550
Petavrakis v Hirst & Co & Anor [2001] QSC 224
Thomas v Times Book Co Ltd [1966] 1 WLR 911

COUNSEL: B D O'Donnell QC for the plaintiff/respondent
H B Fraser QC and J B Sweeney for the defendant/ applicant
R F King-Scott for the third party/respondent

SOLICITORS: McCullough Robertson for the plaintiff/respondent
Hillhouse Burrough McKeown for the defendant/applicant
Biggs & Biggs as town agents for Colin Biggers & Paisley for the third party/respondent

[1] **MULLINS J**: By application filed on 18 September 2003 the defendant sought leave under r 304 of the *UCPR* to discontinue the proceeding against the third party. That order was not opposed by either the plaintiff or the third party and was made at the hearing of the application on 9 October 2003. The defendant also sought an order that the plaintiff indemnify the defendant for the third party's costs of the third party proceeding and an order that the plaintiff pay the defendant its costs of the third party proceeding, assessed on the standard basis. It was submitted on behalf of the plaintiff that the defendant should bear the costs of the third party proceeding or, alternatively, that the question of whether the defendant could recover from the plaintiff the costs which the defendant should be ordered to pay the third party should be reserved to the trial judge. The third party sought an order that the plaintiff pay the third party's costs on an indemnity basis. After hearing full submissions from the parties at the hearing of the application on 9 October 2003, I reserved my decision on the question of the costs in relation to the third party proceeding.

Background

[2] The plaintiff was a member of the firm of solicitors Minter Ellison ("ME") up to and including 30 June 1999. The third party was the insurance broker which acted on behalf of ME in its dealings with the defendant which carried on the business of an insurer and is sometimes referred to as "White & Lewis".

[3] A contract of insurance described as "Group Salary Continuance Policy" ("the contract of insurance") was entered into between ME and the defendant as from 1 July 1996 pursuant to which the defendant promised to pay benefits should a member of ME suffer a total disability after being admitted to the insurance. It is common ground that the plaintiff was admitted as a member under the contract of insurance at its inception. It is also common ground that immediately prior to 1 July 1996 ME's salary continuance policy was made with Australian Casualty & Life Limited ("AC&L") and that insurance cover for members of ME under the contract of insurance was negotiated by reference to existing levels of cover under the AC&L policy.

History of the proceeding

[4] By the claim and statement of claim filed in this proceeding on 12 November 1999, the plaintiff alleged that he suffered a total disability within the meaning of the contract of insurance, the onset of which occurred in September 1997. The plaintiff alleged that on or about 13 August 1998 ME made a claim on the defendant in respect of the total disability suffered by the plaintiff which was accepted by the defendant, on the basis that the level of benefit applicable to the plaintiff under the policy was $20,000 per month. The relief sought by the plaintiff when initiating the proceeding was a declaration that the disability benefit payable under the contract of insurance in respect of the total disability of the plaintiff is $25,000 per month.

[5] It was alleged by the plaintiff in paragraph 8 of the statement of claim:

> "In the course of the first annual review of the contract of insurance, Minter Ellison asked and the defendant agreed to vary the level of benefit with respect to the plaintiff to $400,000 per annum, or $25,000 per month."

Particulars were provided that the variation was partly in writing and partly by conduct and was made in or is to be inferred from the correspondence and conduct which are identified in the particulars of paragraph 8 of the statement of claim:

> "(a) A fax from the defendant to White and Lewis on 16 June 1997;
> (b) A fax from White and Lewis to the defendant on 4th July 1997;
> (c) Memo White and Lewis to Mercantile Mutual dated 3 July 1997;
> (d) A letter from the defendant to White and Lewis dated 11 July 1997;
> (e) A memo from White and Lewis to the defendant dated 29th August 1997, enclosing a schedule listing the plaintiff at an "insured salary" for 1997/1998 of $400,000 per annum;
> (f) A fax from White and Lewis to the defendant on 22 October 1997;
> (g) A letter defendant to White and Lewis of 30th October 1997 and enclosure;
> (h) The defendant's acceptance of the premium offered by the plaintiff of $179,103.75 which was calculated (inter alia) on a $400,000 level of benefit in respect of the plaintiff for the period commencing on 1st July 1997."

[6] There is an alternative allegation made in paragraph 9 of the statement of claim that on or about 20 April 1998 it was orally agreed between Ms G Paton on behalf of the third party acting for ME and Mr P Ismay on behalf of the defendant that the level of benefit in respect of the plaintiff was $25,000 per month.

[7] The defendant filed its notice of intention to defend on 10 January 2000. It admitted that the plaintiff suffered a partial disability from 6 March 1998 to 7 August 1998 and total disability on and from 8 August 1998, but contended that the level of

benefit applicable to the plaintiff under the policy was $20,000 per month for the total disability.

[8] The defendant responded to the allegations in paragraphs 8 and 9 of the statement of claim by admitting that the third party on behalf of ME asked the defendant to vary an Accepted Benefit Level ("ABL") with respect to the plaintiff to $25,000 per month, but denying that the defendant agreed to vary the ABL, because the plaintiff did not comply with standard underwriting requirements. It was alleged in paragraph 23 of the defence that the standard underwriting requirements for a partner in the position of the plaintiff were completion of a personal statement, requiring disclosure of health condition, and a personal medical attendant's report, with further inquiries and possible medical examination following from the assessment of the details provided in the personal statement and report. The defendant also denied that there was the oral agreement for variation that was alleged in paragraph 9 in the statement of claim.

[9] On 25 February 2000 the Defendant filed an amended defence incorporating some minor amendments and including an allegation that the contract of insurance also included the insurance proposal form signed by ME.

[10] On 3 May 2000 the plaintiff filed an amended statement of claim which was served at the same time as the reply to the amended defence. Apart from some minor amendments, changes were made to the documents that were included in the particulars to paragraph 8 of the amended statement of claim. What were originally particulars (a), (b), (d) and (f) were omitted, the remaining particulars were re-lettered as paragraphs (a) to (d) and the following additional particulars were inserted:

> "(e) A fax from White & Lewis to the Defendant dated 26 November 1997;
> (f) A fax from the Defendant to White & Lewis dated 27 November 1997;
> (g) A document headed 'schedule of outstanding underwriting matters' communicated by the Defendant to White & Lewis prior to 9 December 1997;
> (h) A fax from the Defendant to White and Lewis dated 4 February 1998;
> (i) A memo from White and Lewis to the Defendant dated 4 February 1998;
> (j) A fax from the Defendant to White and Lewis dated 1 April 1998;"

[11] One of the documents which remained in these particulars was the memo from the third party to the defendant dated 29 August 1997. That memo refers to the 1 July 1997 review for the contract of insurance and enclosed a schedule of all insured members under the contract of insurance. In relation to the plaintiff, the schedule showed in respect of salary continuance insurance that his actual salary was $450,000 and the insured salary was $400,000 and in the column entitled "Notes" there was the statement "1/05/96 Accepted".

[12] On 30 July 2001 the defendant's solicitors sent a letter to the plaintiff's solicitors which relevantly stated:

> "Your client has pleaded in paragraph 8 that Minter Ellison asked and that Mercantile Mutual Limited ("MML") agreed to vary the level of benefit for Rathie to $25,000 per month, such agreement relying in the main on correspondence between White & Lewis ("W&L") and MML in July 1997 to early 1998.
>
> Our client invites you to withdraw any allegations that W&L's conduct gave rise to or assisted in the formation of any such agreement or entitlement.
>
> If you do not withdraw these allegations forthwith, MML intends to join W&L to the action on the basis that, if such an allegation is vindicated at trial, MML is entitled to claim over against W&L. If the allegation is not vindicated at trial and Rathie fails in his claim, we put you on notice that MML will be seeking that Rathie pay any costs associated with MML jointing W&L."

[13] The plaintiff's solicitors responded by facsimile dated 7 August 2001 in which they advised that paragraph 8 had been in existence since the plaintiff instituted the proceeding. (Even though the particulars to paragraph 8 were amended by the amended statement of claim, the reference to the memo of 29 August 1997 and the enclosed schedule was one of the particulars that was consistently relied on by the plaintiff.) The plaintiff's solicitors foreshadowed that it was highly likely that the plaintiff would oppose the application for leave to join the third party and requested a copy of the proposed claim and statement of claim against the third party, in order to obtain instructions.

[14] On 10 August 2001 the defendant's solicitors delivered to the plaintiff's solicitors a draft of the proposed further amended defence and counterclaim. The counterclaim was against the third party. By facsimile sent on 13 August 2001 the plaintiff's solicitors advised that they were obtaining instructions from the plaintiff and would revert to the defendant's solicitors "shortly".

[15] The defendant's solicitor, Mr Whitton, set out in his affidavit filed on 23 September 2003 why the allegation in paragraph 8 of the amended statement of claim led the defendant to consider bringing the third party proceeding. One of the instructions of the defendant was that the significance of the statement "1/05/96 Accepted" was that it suggested that AC&L had on 1 May 1996 accepted that the plaintiff was forward underwritten to a benefit level of $21,000 per month. It was the defendant's instructions that that statement was incorrect.

[16] Notwithstanding that the defendant had not received the response foreshadowed by the plaintiff, the defendant filed its third party notice and third party statement of claim on 24 August 2001 (which largely reflected the allegations against the third party in the proposed further amended defence and counterclaim) which were then served on the plaintiff on 28 August 2001, together with the further amended defence which had also been filed on 24 August 2001.

[17] The third party statement of claim referred to the allegations made by the plaintiff in paragraphs 8 and 9 of the amended statement of claim. It was pleaded in the third party statement of claim that the defendant denied those allegations, but if it were

found to have agreed to the variation pleaded in paragraphs 8 and 9 of the amended statement of claim, it claimed against the third party on the basis set out in the third party statement of claim. It was alleged in paragraph 5 of the third party statement of claim that by memo dated 29 August 1997 from the third party to the defendant, it was represented by the third party to the defendant that AC&L had on 1 May 1996 accepted that the plaintiff was forward underwritten to a benefit level of $21,000 per month. It was pleaded in paragraph 6 of the third party statement of claim that, in fact, AC&L had not on 1 May 1996 or at all accepted that the plaintiff was forward underwritten to a benefit level of $21,000 per month. It was therefore alleged that the representation was false and misleading or made negligently. It was alleged in paragraph 12 of the third party statement of claim that if the defendant agreed to the alleged variation to the contract of insurance that was pleaded by the plaintiff in paragraphs 8 and 9 of the statement of claim, then it made that agreement in reliance upon and as a consequence of the representation by the third party.

[18] The further amended defence made substantial changes to the defence. One of the documents pleaded in this version of the defence as being a document of contractual effect or a document from which the contract of insurance could be inferred is the facsimile from the defendant to the third party dated 2 May 1996 which stated:

> "As discussed we are happy to offer transfer of acceptance terms to $25,000 per month to the members who were recently underwritten and accepted to $21,000 per month by AC&L."

[19] In relation to paragraph 8 of the statement of claim, the defendant now denied that ME asked the defendant to vary the level of benefit with respect to the plaintiff to $300,000 per annum or $25,000 per month, in addition to maintaining the denial that the defendant had agreed to vary the level of benefit with respect to the plaintiff to $25,000 per month. The defendant pleaded that the plaintiff did not at any time provide the defendant with any of the information to enable the plaintiff to be covered under the contract of insurance at a level of benefit greater than that level applying to the plaintiff under the AC&L policy and did not provide the medical evidence acceptable to the defendant's underwriters to enable it to decide whether to accept an application that the plaintiff be covered at a greater level of benefit than had applied under the AC&L policy. The defendant also continued with its denial that there was any oral agreement to vary the level of benefit in respect of the plaintiff, as alleged in paragraph 9 of the amended statement of claim.

[20] In relation to the service of the third party proceedings, the solicitors for the plaintiff sent a facsimile to the defendant's solicitors on 29 August 2001 which relevantly stated:

> "We assume, as we are required to be served with such an application under the Rules, that your client has not obtained leave from the Court to issue the Third Party Notice and Third Party Statement of Claim against NSP Buck Broking Pty Limited.
>
> Before our client can properly determine whether he proposes to oppose your client's Application for Leave to issue the Third Party Notice and Third Party Statement of Claim, we need to know the basis upon which your client will seek leave. In particular, it would

> be helpful if you could explain the reason for the delay in instituting the Third Party Proceedings against NSP Buck Broking Pty Limited.
>
> Unless and until this information is provided, to allow our client an opportunity to consider whether he will consent or oppose leave, we will require your client to properly make an application to the Court for leave to issue the Third Party Notice."

[21] The defendant's solicitors now concede that the view they took at the time of issuing the third party proceedings that they were regularly commenced under r 194 of the *UCPR* was incorrect, but that view was conveyed by them to the plaintiff's solicitors on 30 August 2001, when they asserted that it was only necessary for the defendant to make application for leave to issue the third party proceedings, if the plaintiff required it.

[22] The plaintiff's solicitors waited for counsel's advice, before responding to the defendant's solicitors' letter of 30 August 2001. As a result, the plaintiff's solicitors did not respond until 7 January 2002. The plaintiff's solicitors then pointed out that the cause of action that was pleaded by the defendant against the third party was a claim of misleading or deceptive conduct or misrepresentation, by reason of the specific representations alleged to have been made by the third party in the memo of 29 August 1997 that the third party represented to the defendant that the previous insurer AC&L had on 1 May 1996 accepted cover in respect of the plaintiff at a benefit level of $21,000 per month, but that was not the allegation made by the plaintiff in the statement of claim. The plaintiff's solicitors put forward three reasons why they considered the allegation against the third party would be unlikely to succeed:

> "1. The letter and enclosure of 29 August 1997 does not support that such a representation was made. It does support that a representation was made that cover for Mr. Rathie had been accepted on 1st May 1996, and therefore must have been accepted by AC&L. But it does not represent that he was forward underwritten to a benefit level of $21,000 per month by AC&L;
>
> 2. Correspondence between the broker and MML prior to 29 August 1997 plainly indicated that Mr. Rathie was not one of those who had been forward underwritten by AC&L to $21,000 per month. See the course of correspondence commencing with the fax from White & Lewis of 4 June 1997, the fax of MML of 16 June 1997, the fax of White & Lewis of 4 July 1997, the fax of MML of 11 July 1997 (and subsequent faxes dealing with the same topic), read in light of the correspondence at the time of the changeover from AC&L to MML, particularly the letter from MML dated 2nd May 1996. That course of correspondence clearly enough revealed to MML those who have been forward underwritten by AC&L to $21,000 per month, and Mr. Rathie was not named as one of them.

> 3. The plea of inducement in para. 12 of your pleading against the broker seems doomed to fail. It is plain from your client's Defence to Mr. Rathie's claim that MML denies ever having intended to vary the cover in respect of Mr. Rathie. If at no time the officers of MML turned their minds to varying the cover for Mr. Rathie, they could hardly have been induced to do so by the representation you allege against the Broker, even if their conduct viewed objectively is held to have amounted to a variation. Consequently, MML cannot establish reliance on the alleged representation."

[23] The plaintiff's solicitors therefore emphasised in that letter of 7 January 2002 that the plaintiff accepted no responsibility in respect of the claim that the defendant made against the third party and stated:

> "If your client wishes to pursue this unpromising claim against the broker, based on an allegation of misrepresentation not made or supported by Mr Rathie, it does so at its own risk as to costs."

[24] The plaintiff had filed another amended statement of claim on 7 January 2002 that was served on that date. This pleading put forward a different basis for claiming the benefit of $25,000 per month as the benefit in respect of the plaintiff's total disability. This different basis relied on the definition of "salary" in the contract of insurance and that the defendant had agreed, in the event of the total disability of a member, to pay benefits of 75% of salary payable in monthly instalments, up to the dollar maximum benefit. It was alleged that the plaintiff's budgeted share of the profits of ME and its associated entities for the financial year in which he became totally disabled, namely the financial year commencing 1 July 1997, was $450,000. The plaintiff therefore claimed that the benefit payable in respect of his total disability was $25,000 per month up to 30 June 1998 and thereafter $27,083 per month which was the amount to which the dollar maximum benefit had been increased. What had been claimed in paragraph 8 of the statement of claim was now pleaded as an alternative basis for claiming the benefit of $25,000 per month in paragraph 13 of this amended statement of claim filed on 7 January 2002.

[25] The defendant's solicitors in their letter of 8 February 2002 foreshadowed the intention of the defendant to pursue ADR. Negotiations about mediation took place between the solicitors for the plaintiff and the defendant in March and April 2002. A consent order for ADR signed by the plaintiff and the defendant was filed on 18 April 2002. The plaintiff's solicitors made it clear to the defendant's solicitors that, although the plaintiff was prepared to mediate and not object to the third party attending the mediation, the plaintiff maintained his position that the defendant required leave to join the third party.

[26] The defendant filed the amended further amended defence on 1 May 2002 which was responsive to the amended statement of claim filed on 7 January 2002.

[27] The third party's notice of intention to defend which could be described as merely a holding defence was filed on 6 December 2002. An amended defence of the third party was filed on 3 April 2003.

[28] In its amended defence, the third party claimed that the schedule enclosed with the memo of 29 August 1997 was prepared by ME for submission to the defendant and not by the third party and was merely passed onto the defendant by the third party. The third party alleged that the note "1/05/96 Accepted" was not inserted by the third party and it was not part of the third party's responsibility to check the accuracy of the information contained in the schedule. The third party alleged that the defendant had in its possession the previous year's schedule which contained information to the effect that the plaintiff had an Automatic Acceptance Level of salary of $20,000 per month and that there had been no further underwriting information in relation to the plaintiff provided to the defendant during the 1996 year to affect that amount. The third party therefore alleged that the defendant had no reason to rely upon the note in the schedule in respect of the plaintiff.

[29] A mediation took place at which all parties attended but no settlement was achieved.

[30] On 18 August 2003 an amended statement of claim was filed by the plaintiff which omitted the allegations that had been made in paragraph 13 of the previous amended statement of claim. This meant that the plaintiff was no longer relying on the correspondence passing between the defendant and the third party in respect of the review under the contract of insurance as of 1 July 1997, including the memo from the third party to the defendant dated 29 August 1997, in order to establish that there was an agreed variation to the contract of insurance to increase the benefit payable in respect of the plaintiff to $25,000 per month.

[31] The defendant therefore made the application filed on 18 September 2003 for leave to discontinue the third party proceeding, on the basis that the third party proceeding had been rendered futile by the amendments to the statement of claim reflected in the amended statement of claim filed on 18 August 2003.

[32] The solicitors for the defendant estimate that the defendant's costs of the third party proceeding are approximately $20,000 on a standard basis and they have been informed that the third party's costs of the third party proceeding are approximately $55,000 on an indemnity basis.

Plaintiff's explanation for abandoning variation claim

[33] In an affidavit sworn on 9 October 2003 and filed by leave, Ms Chapple, the plaintiff's solicitor explained that the plaintiff was suffering from a drug resistant clinical depression for which he was being treated by a psychiatrist and that the plaintiff had instructed his solicitors not to proceed with the allegation of variation in respect of the benefit payable to him under the contract of insurance, as pleaded in paragraph 13 of the amended statement of claim filed on 7 January 2002, for the following reasons:

(a) the addition of the third party in the proceeding has the prospect of prolonging the litigation and the trial and enlarging the costs, the stress of which was restraining the plaintiff's recovery, according to his psychiatrist;

(b) as the proceeding had progressed and more information had been obtained through disclosure, the prospects of the different claims made in the statement of claim had been reviewed and the primary claim based on the construction of the contract of insurance was now considered to have better prospects than the claim based on the variation of the contract of insurance.

[34] The plaintiff also swore an affidavit on 9 October 2003 which was filed by leave on that day which confirmed his health condition, the advice he had received from his treating psychiatrist and that during the course of the litigation, he had experienced ill-health and difficulty in understanding the issues which are the subject of the proceeding.

Defendant's submissions

[35] The defendant relies on the jurisdiction given to the court in either rules 307 or 683 of the *UCPR*. It is not in issue that, although the power to award costs is expressed in different terms in each of these rules, there is no appreciable difference in effect between the rules. Under r 307(2), if a party discontinues or withdraws with the court's leave, the court may make the order for costs it considers appropriate. If, for any reason, it becomes unnecessary to continue a proceeding other than for deciding who is to pay the costs of the proceeding, r 683(1) permits any party to the proceeding to apply to the court for an order for the costs. Under r 683(2), the court may make the order the court considers to be just. It follows from the terms of these rules, that it is not necessary for there to be a determination of the merits of the matter, as a condition precedent to the award of costs: *R v Gold Coast City Council, ex parte Raysun Pty Ltd* [1971] QWN 13.

[36] It was submitted by the defendant that the test to be applied in determining how to order costs in respect of the third party proceeding which is now futile is whether it was reasonable of the defendant to bring the third party proceeding in the light of the plaintiff's claims: *Petavrakis v Hirst & Co & Anor* [2001] QSC 224 at para [9].

[37] It was argued on behalf of the defendant that there was no basis for the allegation of consensual variation of the contract of insurance which provoked the third party proceeding. The contention was advanced in the defendant's written submissions that there was no explanation as to why the plaintiff abandoned the allegation of consensual variation. That complaint, however, was met by the further material filed on behalf of the plaintiff at the hearing. On the basis that before commencing the third party proceeding, the defendant asked the plaintiff to withdraw the allegation in circumstances where the plaintiff was on notice that the allegation was disputed and that it would provoke the third party proceeding, and that the failure of the plaintiff to abandon the allegation at that time resulted in the third party proceeding being issued, it was submitted that there was conduct which justified an order for costs against the plaintiff in favour of both the defendant and the third party in respect of the third party proceeding.

Plaintiff's submissions

[38] The plaintiff's submissions reflected the reasons put forward by the plaintiff's solicitors in their letter dated 7 January 2002 to the defendant's solicitors, as to why the allegation made by the defendant against the third party would be unlikely to succeed.

[39] The plaintiff accepted that it was his allegation that the contract of insurance was varied at its renewal in mid 1997 which caused the defendant to bring the third party proceeding. The plaintiff's submission, however, was that the fact that an unsuccessful plaintiff's claim against a defendant led to the institution of third party proceedings was insufficient, in itself, to justify ordering the plaintiff to pay the costs of the third party proceedings and that some closer relationship is required

between the third party proceedings and the conduct of the plaintiff before it would be "appropriate" to order the plaintiff to bear the costs of the third party proceedings. Amongst the authorities relied on by the plaintiff are *Paron v Fry (No 2)* [1990] 1 QdR 550, 551 and *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 QdR 162, 175.

[40] The plaintiff submitted that the defendant's claim against the third party was for misrepresentation, but no such allegation of misrepresentation by the third party was made in the plaintiff's statement of claim. The plaintiff was not relying on any suggestion that he had been forward underwritten to $21,000 per month by AC&L, in order to establish his claim against the defendant, but was relying on the allegation of consensual variation. It was therefore submitted by the plaintiff that the nature of the defendant's claim against the third party was one of the defendant's own making, so that the issues between the defendant and the third party could be described as "private issues in the third party proceedings" in which the plaintiff had no interest.

[41] The plaintiff sought to rely on a submission that the claim against the third party by the defendant was weak. In addition, the plaintiff submitted that, as the third party was the agent for the insured ME, if such a representation had been made by the third party, the defendant could have obtained the same relief against ME.

[42] The fact that the defendant issued the third party proceeding without the leave required pursuant to r 194(1)(b) of the *UCPR*, when it knew that the plaintiff required the leave to be obtained, was described as conduct on the defendant's part that was relevant to the exercise of the court's discretion on costs. The submission was made on behalf of the plaintiff in these terms:

> "There is something unjust in MML instituting and proceeding with the third party proceedings, in defiance of the requirement that leave of the Court be obtained, and denying to Mr. Rathie the opportunity to oppose the third party proceedings and then subsequently for MML to submit that it is appropriate that Mr. Rathie, should bear the costs of the third party proceedings."

It was also submitted that the plaintiff was not without prospects in opposing any application for leave for the defendant to issue the third party proceeding, in that the matters in the plaintiff's pleading that were relied on to make the third party claim were in the first statement of claim filed on 12 November 1999, and no explanation was ever given by the defendant, as requested by the plaintiff, for the delay in seeking to join the third party.

Third party's submissions

[43] Rather than seeking an order for costs against the defendant as the party which issued the third party proceeding which was then not to be pursued, the third party sought an order for costs against the plaintiff in its favour on an indemnity basis. The third party also relied on the fact that the plaintiff's solicitors were put on notice to withdraw the allegations in the amended statement of claim that were then relied on by the defendant to issue the third party proceeding. It was submitted that the inference should be drawn from the abandonment of the variation claim that it was unmeritorious and that, in the absence of any reasonable explanation, it must

also be inferred that the claim was unmeritorious from the commencement of the proceeding. This submission was also prepared, before the explanation given by the plaintiff at the hearing.

Decision

[44] The Full Court in *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 QdR 162, 173-174 summarised the principles derived from *Leaver v Golsby* [1964-5] NSWR 1833 as follows:

> "(a) that although a plaintiff has no interest in proceedings for contribution between the defendant and the third party (Barclays Bank v. Tom [1923] 1 K.B.221 at 223-224), the third party still has an interest in the trial between the plaintiff and the defendant and its result;
>
> (b) that it is logical that where a defendant has added a third party and a verdict has been found in favour of the defendant against the plaintiff, in the ordinary course of events the defendant should have his costs against the plaintiff but should pay and bear the third party's costs himself; and
>
> (c) that although the plaintiff has no interest in the private claims by the defendant against a third party, if the plaintiff or a third party in the course of litigating the plaintiff's claim against the defendant in the third party procedure, in which each has an interest, is guilty of some misconduct such as aborting the trial and causing costs to be thrown away, then the court may in its discretion visit an order for costs upon the offending party."

[45] After analysing this and other authorities, the Full Court concluded that the award of costs on an appeal as between the first respondent which had joined the first third party and the first third party were entirely within the discretion of the court and various results may follow, depending on the circumstances. In that case the appellant had entered into a contract with the first respondent for the supply and installation of an oven. The oven exploded. The appellant sued the first respondent which joined its insurer as the first third party which denied that it was liable to indemnify the first respondent. The appellant was unsuccessful in suing the first respondent and unsuccessful on the appeal. The first respondent had maintained the involvement of the first third party in the appeal. Ultimately it was concluded that the first third party should bear its own costs of the appeal, even though it was successful, because the first respondent was also successful against the appellant. The court concluded that the first third party should not have its costs against the appellant "because that party had no interest in the private issues in the third party proceedings; nor had the first respondent necessarily joined the first third party because of the nature of the plaintiff's claim".

[46] Reference to these authorities and those referred to in them makes it clear that the costs order in respect of a third party proceeding which has been abandoned is not determined solely by deciding whether it was reasonable of the defendant to bring the third party proceeding in the light of the plaintiff's claims. That is one of the relevant considerations, but must be considered with other relevant considerations.

[47] Although it is conceded that the allegations of consensual variation to the contract of insurance in respect of the amount of the benefit payable to the plaintiff was one of the reasons for the defendant's issuing the third party proceeding, it is still relevant to consider the connection between the allegations made by the plaintiff and the claim framed by the defendant based on those allegations. There is a distinct difference between the manner in which the plaintiff sought to use the memo of 29 August 1997 and enclosed schedule and the characterisation of the information in those documents by the defendant in the third party statement of claim as a misrepresentation on which it relied to enter into the consensual variation (if that were established by the plaintiff). Mr Fraser of Queen's Counsel who appeared with Mr Sweeney of Counsel for the defendant sought to argue that reliance was not a necessary element of the cause of action for misleading and deceptive conduct. The problem for the defendant, however, was that the defendant pleaded reliance on the misrepresentation made by the third party as part of its cause of action. This is not a case where the real issue raised in the third party proceeding was one that was also being agitated as between the plaintiff and the third party: *Thomas v Times Book Co Ltd* [1966] 1 WLR 911, 919.

[48] It is a relevant consideration that the defendant issued the third party proceeding, without leave, and before the plaintiff had an opportunity to indicate to the defendant what his attitude would be to the issuing of the third party proceedings. After the third party proceeding had been issued, the plaintiff's solicitors immediately requested the explanation for the delay in instituting the third party proceeding, so the plaintiff could consider whether he would oppose leave being sought by the defendant in respect of the third party proceeding. That information has never been provided by the defendant. It is also relevant that the matters relied on by the plaintiff on this hearing to oppose the costs orders sought against him were conveyed by his solicitors to the defendant's solicitor in the letter of 7 January 2002 in which the plaintiff warned the defendant that it would pursue the third party proceeding at its own risk as to costs.

[49] Whereas the defendant and the third party argued that there was no basis for the plaintiff's allegation of consensual variation of the contract of insurance, the plaintiff sought to argue that the claim for misrepresentation made by the defendant in the third party proceeding was weak. On an application of this nature, it is neither appropriate nor possible to assess the prospects of success of causes of action which are now not to be pursued by the relevant party, unless it is patent that there were no prospects of success. Both the plaintiff and the defendant relied on aspects of the extensive material filed in connection with this application to support their submissions in relation to prospects, but that material does not give a complete evidentiary picture, in the absence of relevant evidence from the representatives of the parties involved in the negotiations. It is not possible to conclude that there were no prospects of success for the respective allegations.

[50] It is not necessary to determine whether the defendant should have relied on ME's liability for the conduct of the third party as its agents, as the question of costs of the third party proceeding has to be determined in the context that the defendant did bring the claim against the third party.

[51] Although the third party proceeding would not have been issued on 24 August 2001, but for the allegations contained in paragraphs 8 and 9 of the amended statement of claim, the defendant was not bound to issue that third party proceeding and elected

to do so and pursue a cause of action against the third party which was not one in which the plaintiff had an interest in the outcome. The plaintiff's amendment of the statement of claim to abandon the allegation of consensual variation to the contract of insurance at the stage of the proceeding when such an amendment did not require the leave of the court falls far short of being "misconduct" in the sense described in *Gold Coast Bakeries (Qld) Pty Ltd v Heat & Control Pty Ltd* [1992] 1 QdR 162, 174.

[52] Even though it is the abandonment by the plaintiff of the relevant allegations on which the third party proceeding was then based which now makes the third party proceeding futile, taking into account all relevant considerations, it is appropriate that the respondent bear the costs of the third party proceeding. The question of indemnity costs does not arise.

Order

[53] It follows that the orders which should be made are:

1. The defendant pay the third party's costs of the third party proceeding to be assessed on a standard basis.
2. As between the plaintiff and the defendant, the defendant bear its own costs of the third party proceeding.

[54] It is necessary to hear submissions on the question of the costs of the application. As the leave to discontinue the third party proceeding was ordered by consent of the parties, the issue that resulted in the hearing on 9 October 2003 and the substantial submissions which that entailed was that of the costs orders that should be made as a result of the granting of the leave. As the plaintiff has been successful in resisting the orders sought against it by both the defendant and the third party, I am inclined to make an order for costs which is in favour of the plaintiff. It will be necessary, however, to hear submissions from all parties on what form of costs orders in respect of the application are appropriate.