SUPREME COURT OF QUEENSLAND

CITATION:	*Jonsson & Ors v Tim Ferrier Pty Ltd & Anor* [2004] QSC 156
PARTIES:	**ANTHONY JAMES JONSSON and BRUCE PUTNEY MILNER** (first plaintiffs) **RIAPS PTY LTD (IN LIQUIDATION)** ACN 070 407 555 (second plaintiff) **v** **TIM FERRIER PTY LTD** ACN 007 766 038 (first defendant) **JENTIM (TRADING FUND) PTY LTD** ACN 007 844 895 (second defendant)
FILE NO:	SC No 139 of 2000
DIVISION:	Trial Division
PROCEEDING:	Costs Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	24 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	Written Submissions
JUDGE:	Mackenzie J
ORDERS	**1. The first defendant pay the first plaintiffs' costs of and incidental to the action against it including any reserved costs, to be assessed on the standard basis.** **2. The first and second plaintiffs pay one-half of the second defendant's costs of the action against it incurred after the order made on 15 July 2003 giving leave to amend the defence, to be assessed on the standard basis.** **3. The first plaintiffs may recover any costs paid by them pursuant to paragraph 2 hereof from the second plaintiff's assets.**
CATCHWORDS	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – OTHER CASES – where first plaintiffs successful against first defendant – where action against second defendant dismissed *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477, followed

COUNSEL: A R Philp for the plaintiff
C J Ryall for the respondent

SOLICITORS: MacDonnells for the plaintiffs
O'Reilly Stevens for the defendants

[1] **MACKENZIE J:** When judgment was delivered in this matter the first plaintiffs were successful against the first defendant and the second plaintiff substantially unsuccessful against the second defendant. The reasons for judgment are to be found at [2004] QSC 006. Written submissions as to costs were invited. These reasons are concerned with costs.

[2] The first plaintiffs' submission is that as they have been wholly successful against the first defendant they are entitled to their costs against it on a standard basis. The second plaintiff submits primarily that there should be no order as to costs as between it and the second defendant for reasons developed in the written submissions.

[3] The first defendant accepted that ordinarily the first plaintiffs would be entitled to their costs on the standard basis against it but submitted that the case was complicated by the fact that the first and second plaintiffs were jointly represented with the consequent difficulty in identifying items which related solely to the claim against the first defendant and those which related to the claim against the second defendant. An order that the first plaintiff recover a fixed percentage of the joint costs in the proceeding on the standard basis was proposed as an appropriate order. Seventy five per cent of the joint costs was suggested. Despite these submissions and principally because to do otherwise would involve speculation about the proportion attributable to each plaintiff's case, I am not persuaded that some other order than an order that the first defendant pay the first plaintiffs' costs should be made.

[4] The second defendant sought an order that the first and second plaintiffs pay the second defendants' costs on the standard basis. The second defendant sought a direction that the assessment proceed on the basis that the second defendant recover 50% of both defendants' defences on the standard basis. The second defendant, realising that something else might be thought more appropriate, advanced other proposals which will be referred to later.

[5] It is necessary to expand upon these basic submissions. On behalf of the second plaintiff it was submitted that, notwithstanding that it would ordinarily be liable to pay the second defendant's costs, another order was appropriate in the circumstances of the case. The first reason advanced was that, until amendment of the defence only a month before trial, the matter had proceeded on the basis that a written agreement between the second plaintiff and the first and second defendants dated 17 March 1998 was the agreement regulating the relationship between the parties. The effect of the amendment was to withdraw admissions to that effect and to substitute a new case that the agreement of 1 July 1998 had replaced the agreement of 17 March 1998 as the operative agreement.

[6] It was common ground that existence of the agreement was known to all parties well in advance of the amendment; it had been referred to in further and better particulars to the statement of claim and had been disclosed. However, the plaintiffs submitted that the possible significance of the agreement as a new regime governing the relationship between the second plaintiff and the defendants was not apparent until the amendment was made. It was only when the application for the amendment was made that the place of the agreement in the history of dealing between them became clear.

[7] The plaintiffs also submitted that there was nothing in the later agreement to suggest that it was intended to release the parties from rights and obligations under the earlier agreement. Nor did it suggest that it was intended to replace the earlier agreement. There were transactions and correspondence (summarised in [47] of the reasons for judgment in the action) that may reasonably have led the plaintiffs to believe that the March 1998 agreement was still operative.

[8] The plaintiffs submitted that departure from the ordinary rule was justified by a variety of factors including the lateness and nature of the amendment, lack of candour as to the second agreement (referred to in [32] and [33] of the reasons in the action) and the ambivalent nature of the evidence on the issue. Others were that the claim against the second defendant was ancillary to the claim against the first defendant, which was wholly successful, that the defendants were not separately represented and that the likelihood of any additional costs being attributed to the unsuccessful claim against the second defendant was marginal. The proposition was that the claim against the second defendant turned, essentially, on little more than documentary evidence. Finally, the status of the first plaintiffs as external controllers performing functions for the benefit of creditors, not persons pursuing their own interests, and a submission that in performing their role they heavily depended on information from others, especially Mr Ferrier, about the affairs of the second plaintiff, were relied on.

[9] With regard to the performance of the functions by the liquidator, the submission on behalf of the first plaintiffs is correct in saying that they initially had little choice but to pursue both the first and second defendants if they were to discharge their obligations as liquidators to get in the assets of the plaintiff. On the state of the evidence there was a risk, which in the end did not eventuate, that proceeding only against the first defendant may have been unsuccessful in obtaining judgment for the whole amount eventually held to be recoverable from the first defendant.

[10] The plaintiffs' submission was that the most appropriate order would be that there be no order as to costs in favour of the second defendant. Alternatively, if an order for costs was to be made, it should be confined to the second plaintiff.

[11] The first defendant, in support of its argument for an order that it be liable only for a proportion of the first and second plaintiffs' joint costs, submitted that there were separate issues with respect to the second defendant. Those identified were whether the second defendant had carried out work as a real estate agent, the application of

the *Auctioneers & Agents Act* if it did and whether there was any payment made to the second defendant which was recoverable by the second plaintiff.

[12] By far the major focus of the case was what had occurred in the period surrounding the transfer of money from the first defendant's trust account, what Mr Ferrier's state of knowledge was or what grounds for suspicion there were about the solvency of the first plaintiff and what his intention was when he took no steps to restore the money to the trust account. These issues were fundamental to determining whether there was a basis for recovering moneys, whether they had been paid solely to the first defendant or partly to it and partly to the second defendant. The issue of which agreement was operative was, in a sense, secondary to this. It is, in my view, accurate to describe that issue as one where the evidence founding the respective claims was largely documentary. However, a not insignificant part of the trial was concerned with examining the reasons why the earlier agreement should be treated as operative, including allegations of lack of frankness concerning the second agreement and the apparent allocation of payments, in records of the first defendant, as if the earlier agreement were still operative.

[13] One other important function of the evidence concerning Mr Ferrier's ambivalent evidence about the second agreement was that it threw his credit sharply into focus. His credibility was a critical element in determining the principal issue in the case. Determination of his state of knowledge or suspicion about the solvency of the first plaintiff was critical to the plaintiffs' right to recover moneys, whether from the first defendant alone, or the first and second defendants according to the distribution under the March 1998 agreement if it applied. The questions whether the second defendant was acting as a real estate agent and the consequences of doing so only became decisive if the March 1998 agreement was held to be operative but the allegation concerning Mr Ferrier's knowledge or suspicion with regard to the second plaintiff's insolvency had not been made out. It became unnecessary to decide the issue for two reasons, one favouring the plaintiffs and one favouring the second defendant. The first was that the requisite state of knowledge or suspicion to establish liability to disgorge moneys was made out. The second was that the March 1998 agreement was held not to be applicable.

[14] There are three strands to the case. The first is whether Mr Ferrier had the requisite knowledge or reason to suspect that the first plaintiff was insolvent at relevant times. The second is whether the March 1998 or the July 1998 agreement applied. The third is whether the second defendant acted as a real estate agent without a licence and the associated issue of whether the money might be recovered as moneys had and received.

[15] The two defendants had a common cause in defending themselves against the allegation in the first strand. They were unsuccessful in doing so. They presented a common defence to the second strand. The outcome was favourable to them. The third strand was only of legal significance to the second defendant. Since it is a discrete issue, costs relating to it should be identified with reasonable ease. It should also be recorded that costs thrown away by the amendment of the defence were ordered to be paid by the defendants to the plaintiffs by Jones J on 15 July

2003. Those costs are already disposed of and are not affected by the orders now under consideration.

[16] The second defendant submitted that the amendment was made in sufficient time before trial for the plaintiffs to discontinue against the second defendant if they wished. Because of this, the decision to proceed against the second defendant must have been taken with knowledge of the risks and of the fact that the second defendant would incur expense in defending itself. It would be an inequitable result if an order was made that there be no order as to costs. Had the order reserving costs thrown away not been made, the plaintiffs' case for such an order would have been stronger.

[17] It was, however, conceded that the second defendant could not expect to recover the entirety of its costs. It was conceded that it had raised and argued issues at trial in common with the first defendant. They were represented by the same counsel and solicitors. The first plaintiff succeeded on those issues against the first defendant. The issue of Mr Ferrier's knowledge or suspicion was common to both defendants' cases. It was submitted that the second defendants' costs should not be reduced because it had contributed to the first defendants' costs in conjunction with that aspect of the defence.

[18] Three possible approaches to the orders were suggested on behalf of the second defendant. The first was that the second defendant should have an order for 50% of the joint defence to avoid the complexities of assessment. The second recognised the possibility that costs of the unsuccessful defence with respect to Mr Ferrier's state of knowledge or suspicion might not be awarded. On this basis, it was submitted that the second defendant should recover 25% of the entire costs of the defence of both defendants. It was submitted that this would avoid complexities in identifying issues upon which the second defendant was successful and those upon which it failed. The third was that if it was found that the second defendant's receipt of costs should be substantially restricted, the second defendant should have half of the costs of trial only.

[19] The amendment of the defence was a watershed in the proceedings and in my view is an appropriate point from which to fix the second defendant's entitlement to costs. From the early stages of the action until the trial, the second defendant had a common cause with the first defendant to defeat the claim that the liquidators were entitled to recover moneys pursuant to the *Corporations Act*. The defence was unsuccessful. While it is difficult to make an estimate in this regard precisely, the transcript reveals that a substantial proportion of the trial was taken up by examination of that issue. By contrast, the issues of which agreement was applicable and the somewhat consequential one of whether the second defendant was acting as a real estate agent did not occupy a large part of trial time. However, they were issues upon which the second defendant was successful.

[20] In my view an order that there be no order as to costs would not give adequate recognition to the success of the second defendant on the issues mentioned. These were issues which were determinative of its liability; the unsuccessful support of the

first defendant on the *Corporations Act* issue should nevertheless reduce the second defendant's entitlement to costs.

[21] Where an order for costs is fashioned rather than made in usual form, it is impossible to be mathematically precise. Where an estimate must be made as to what proportion of a trial was taken up with particular issues the matter is largely one of impression. In this particular matter there is also the issue that while the question of contravention of the *Auctioneers & Agents Act* was in issue from the beginning of proceedings, the costs incurred with regard to it should have been small in proportion to the costs relating to other issues. The order that I am of opinion should be made represents a pragmatic decision reflecting factors of this kind.

[22] In my view an appropriate order is that costs to which the second defendant is entitled will be one-half of its assessed costs incurred after the amendment of the defence. The remaining question is whether, as the first plaintiffs submit, the costs order should be made against the second plaintiff only or whether, as the second defendant submits, it should be made against all plaintiffs.

[23] *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477 at 491 states, as the usual principle, the following:

> "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 and in some cases a virtual certainty 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. It is usual in such cases to permit the liquidator to recover costs so far as this is feasible, from company assets, provided there has not been misconduct or other unusual circumstances. The exercise of such a discretion by the courts along the above lines is consonant with the principles under which orders for costs may be made against non-parties."

[24] There is no evidence of misconduct by the liquidators in the present case. Having regard to the general principle referred to above, it is in my view appropriate to order costs against the first plaintiffs and the second plaintiff and to give to the first plaintiffs the right to recover such costs from the second plaintiff's assets.

Orders

1. The first defendant pay the first plaintiffs' costs of and incidental to the action against it including any reserved costs, to be assessed on the standard basis.
2. The first and second plaintiffs pay one-half of the second defendant's costs of the action against it incurred after the order made on 15 July 2003 giving leave to amend the defence, to be assessed on the standard basis.
3. The first plaintiffs may recover any costs paid by them pursuant to paragraph 2 hereof from the second plaintiff's assets.