

# SUPREME COURT OF QUEENSLAND

CITATION: *Borg & Ors v Northern Rivers Finance & Ors* [2004] QSC  
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PARTIES: **ANDREW JAMES BORG**  
(first plaintiff)  
**JASON MARK BYRNE**  
(second plaintiff)  
**ROBERT STUART CHRISTENSEN**  
(third plaintiff)  
**GLEN ANGELLO COPPO**  
(fourth plaintiff)  
**LAURENCE ROY DIXON**  
(fifth plaintiff)  
**IAN ANTHONY GLAZEBROOK**  
(sixth plaintiff)  
**MICHAEL CHARLES GOTTKE**  
(seventh plaintiff)  
**BRIAN KENNETH HINCHEY**  
(eighth plaintiff)  
**ROBERT MICHAEL McCLOY**  
(ninth plaintiff)  
**NANCY MARY MONTGOMERY**  
(tenth plaintiff)  
**HENRY ALEXANDER MONTGOMERY**  
(eleventh plaintiff)  
**GORDON EDWARD PARISH**  
(twelfth plaintiff)  
**GORDON JOHN REID**  
(thirteenth plaintiff)  
**JAMES MICHAEL ROACH**  
(fourteenth plaintiff)  
**GLEN ALAN SCOTT**  
(fifteenth plaintiff)  
**GASPAR SICH**  
(sixteenth plaintiff)  
**NEIL GREGORY CAMERON**  
(seventeenth plaintiff)  
**COLIN SCOTT PURDIE**  
(eighteenth plaintiff)  
**GEOFFREY DAVID RAPSON**  
(nineteenth plaintiff)  
**DREW KINGSLEY WOODMAN**  
(twentieth plaintiff)  
**NIKO JOZINOVIC**  
(twenty-first plaintiff)  
v  
**NORTHERN RIVERS FINANCE PTY LTD**

(first defendant)  
**INVESTMENT LICENCING PTY LTD**  
(second defendant)  
**NORTHERN RIVERS PLANTATION MANAGEMENT LTD**  
(third defendant)  
**DARREN PAWSKI and RALPH MARCEL NUNIS trading as "SecurInvest Accounting Services"**  
(fourth defendant)  
**DREW GRAHAM FRANCIS**  
(fifth defendant)  
**BASE METALS EXPLORATION NL**  
(sixth defendant)  
**EXPLORERS AND PROSPECTORS FINANCE LIMITED**  
(seventh defendant)  
**DARREN CHARLES HORNER**  
(eighth defendant)  
**JOHN MEARES**  
(ninth defendant)  
**BANALASTA OIL PLANTATION**  
(tenth defendant)  
**SAFEINVEST PTY LTD**  
(eleventh defendant)  
**KAREN EVANS**  
(twelfth defendant)  
**PLANTATION EQUITY PTY LTD**  
(thirteenth defendant)

FILE NO/S: SC No 191 of 2000  
DIVISION: Trial Division  
PROCEEDING: Judgment & Costs Order  
ORIGINATING COURT: Supreme Court at Mackay  
DELIVERED ON: 28 May 2004  
DELIVERED AT: Brisbane  
HEARING DATE: 27 May 2004  
JUDGE: Mackenzie J  
ORDER: **Order as per draft**  
CATCHWORDS: PROCEDURE – COSTS - SCALES OF COSTS – SCALE APPLICABLE – whether costs on indemnity basis  
*Uniform Civil Procedure Rules, rr 360, 362*  
COUNSEL: P E Hack SC, for the first, fourth, seventh, twelfth, sixteen, seventeenth, eighteenth, nineteenth and twenty-first plaintiffs  
C Wilson, for the thirteenth defendant

**SOLICITORS:** Macrossan & Amiet for the first, fourth, seventh, twelfth, sixteenth, seventeenth, eighteen, nineteenth and twenty-first plaintiffs.  
Mullins and Mullins for the thirteenth defendants

- [1] **MACKENZIE J:** On 27 February 2004 reasons, favourable to the thirteenth defendant were given on its counterclaim. Reasons why certain costs orders were to be made were also delivered on the same day.
- [2] In relation to the counterclaim certain orders were formulated. The relevant parties consent to the orders being set aside and orders pronounced which comprehensively finalise the proceedings. A draft was provided. The only substantial remaining dispute is whether costs should be ordered in favour of the thirteenth defendant in respect of the successful counterclaim on the indemnity basis or the standard basis. The basis for claiming indemnity costs is that offers to settle the counterclaim were made on 24 October 2003, to remain open for a period which expired on the Friday before the hearing of the counterclaim. The counterclaim had been adjourned when the primary proceedings were heard. More will be said about this shortly.
- [3] Under rule 360 the issue is whether the judgment obtained was no less favourable than the offer to settle. If that is the case, the onus is on the defendant to show that another order for costs is appropriate. If the defendant fails to discharge this onus, an order for indemnity costs must be made.
- [4] Rule 362, which is concerned with judgment for a debt which includes interest or damages in the nature of interest, says that such interest or damages relating to the period after the day of service of the offer must be disregarded. Each offer (made on behalf of the tenth and thirteenth defendants) consisted of a monetary sum, which, if paid, was to be full and final satisfaction of the counterclaim, the claim for interest and costs for the entire proceedings, including costs relating to the counterclaim.
- [5] The total sum which each unsuccessful party would be obliged to pay in the absence of any unusual order otherwise, would comprise the tenth and thirteenth defendants' costs of the plaintiffs' unsuccessful action against them, the judgment sum comprising the amount due under the agreement together with interest, and the costs of the thirteenth defendant's counterclaim.
- [6] The offer to settle in each case encompassed each of these sums. One issue raised by counsel for the plaintiffs was that there was no evidence as to the quantum of costs. Evidence in relation to the plaintiffs' claim, which was heard in Mackay, extended over ten days. Addresses occupied part of another day in Brisbane; the counterclaim was heard separately, occupying another day. Even though there were a number of plaintiffs involved in the trial before me, the absence of evidence about quantum of costs is, in the particular factual context, not of critical importance. There may be cases where it is necessary for evidence of this kind to be produced. However, this is not one of them, since it is inconceivable that the share to be paid by individual plaintiffs would be less than any relevant difference between the offer and the outcome in relation to the counterclaim.
- [7] I am satisfied that in each individual case judgments obtained by the thirteenth defendant were no less favourable than what was offered. The onus therefore shifts

to the plaintiffs to prove that some order other than an order for indemnity costs is appropriate.

- [8] Counsel for the plaintiffs raised two other matters. One was the manner of prosecution of the counterclaim. The other was lateness of the offer. With regard to the prosecution of the counterclaim, there was a measure of agreement at trial that it was convenient to adjourn the counterclaim until after the decision on the plaintiffs' case. One matter that arose was that there had been failure to give complete disclosure but the transcript indicates there was a measure of agreement that it was convenient to adjourn the counterclaim until after the decision on the plaintiffs' case, since the counterclaim might have become otiose if the result in that phase had been in favour of all plaintiffs. However the catalyst for discussion of the adjournment seems to have been the failure to give complete disclosure.
- [9] I am not persuaded that such a circumstance is of itself sufficient to allow another order to be made. While the failure to give adequate disclosure at a convenient time may in some circumstances count against a person seeking a favourable costs order, this is not one of those cases. There were sensible practical reasons in addition to the deficiency in disclosure which led to the adjournment.
- [10] With respect to the lateness of the offer to settle, the rules clearly provide for a settlement at a relatively late stage of proceedings. By the time the offer was made, reasons had been given in relation to the plaintiffs' claims. The counterclaim by the thirteenth defendant remained a live issue. There is nothing incongruous about an offer to settle the proceedings on the counterclaim a short time before trial. The plaintiffs in the original action were, at the time the offer was made, faced with the decision whether to accept the offer or not accept it. The philosophy behind the rules requires a party to make a decision to accept an offer, or reject it and face the risk that the party may be less successful than the offer would have left them. In the present case the amounts offered were relatively close in monetary terms to the judgment sum. However, the inclusion in that sum of costs of the action and of the counterclaim had to be factored in. The inclusion of them made the offer more financially beneficial than it would otherwise have been.
- [11] I am of the opinion that in a situation where the differences between the judgment sum and the monetary amount of the offer are quite small and the action is a relatively lengthy and expensive one to run (partly because it was substantially heard in a circuit centre) it is safe, despite the absence of specific evidence on the quantum of costs, to draw a conclusion that the benefit to be derived from including the two aspects of costs in the offer to settle meant that the amount of the offer was sufficient in quantum to remove the possibility that the judgment was not more favourable than the offer.
- [12] For those reasons I am of the opinion that the basis of payment of costs of the counterclaim should be the indemnity basis. Accordingly the draft provided to me by the solicitors for the tenth and thirteenth defendants will be initialled and placed with the papers, subject to the amendment to paragraph 1 by substituting (2)(e) in lieu of (1)(c). The formal order is that an order is made in terms of the draft order provided to me by the tenth and thirteenth defendants, initialled by me and placed with the papers.