

# SUPREME COURT OF QUEENSLAND

CITATION: *Little Images Pty Ltd v Fresh View Venture Pty Ltd & Ors*  
(No 2) [2012] QSC 95

PARTIES: **LITTLE IMAGES PTY LTD**  
**ACN 099 485 113**  
(Plaintiff)

v

**FRESH VIEW VENTURE PTY LTD**  
**ACN 112 323 654**  
(First Defendant)

and

**GARY TEIK LOON YOU**  
(Second Defendant)

and

**SHIRLEY CHENG SIM OH**  
(Third Defendant)

and

**INFOLINK HOLDINGS PTY LTD**  
**ACN 081 802 922**  
(Fourth Defendant)

FILE NO/S: BS 11800 of 2007

DIVISION: Trial Division

PROCEEDING: Costs determination

ORIGINATING  
COURT: Supreme Court

DELIVERED ON: 17 April 2012

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: McMurdo J

ORDER: **1. The second and third defendants pay to the plaintiff 95 per cent of the plaintiff's costs of the proceeding, including reserved costs and its costs of defending the counterclaim, to be assessed upon the standard basis.**  
**2. There be no order for costs as between the plaintiff and the fourth defendant.**

CATCHWORDS: *Uniform Civil Procedure Rules, r360.*

*District Court of Queensland Act 1967 (Qld), s68(2)(c).*

- [1] On 20 December 2011, I gave judgment for the plaintiff against the second and third defendants and dismissed their counterclaim. I dismissed the plaintiff's claim against the fourth defendant. This judgment concerns the costs of the proceedings.
- [2] The first defendant was not an active participant, having been deregistered well prior to the trial. The present issues are between the plaintiff and the second, third and fourth defendants. The plaintiff substantially succeeded against the second and third defendants and there should be some order for costs in its favour. But there is a contest as to what that order should be. As between the plaintiff and the fourth defendant, the plaintiff submits that there should be no order as to costs whilst the fourth defendant submits that 50 per cent of the costs of all of the defendants should be attributed to its costs of defending the case against it.
- [3] On 17 June 2010, the plaintiff made an offer to settle which was open for acceptance by the second, third and fourth defendants jointly. It offered to accept \$180,000 plus interest and \$70,000 for costs to settle the case against those three defendants. The result between the plaintiff and the second and third defendants was more favourable to the plaintiff than that offer. The amount of its judgment, not including interest, was \$218,276.10.
- [4] The plaintiff submits that r 360 of the *Uniform Civil Procedure Rules* thereby applies. But that overlooks the position of the fourth defendant. The second and third defendants were unable to accept that offer without the concurrence of the fourth defendant. Of course it was a company controlled by them. But the consequence of its accepting the offer would have been that it incurred a substantial liability when there was no corresponding cause of action against it. The plaintiff

could have sought to protect its position on costs by addressing this offer to the second and third defendants. By making the offer to all three defendants, it overlooked the marked differences between its respective claims. It seems to me that r 360 does not apply but if it did, the defendants have shown that in the circumstances some other order for costs is appropriate, as the plaintiff concedes.

[5] The plaintiff seeks its costs of the entire proceeding (including the counterclaim) on the standard basis until 1 July 2010 and thereafter on the indemnity basis. Alternatively, it seeks 90 per cent of its costs of the entire proceeding (throughout the case) upon the indemnity basis.

[6] The defendants were represented by the same counsel and solicitors. As I have said, the fourth defendant was controlled by the second and third defendants. It would be impractical for any assessor to endeavour to distinguish the costs incurred by the fourth defendant from those of the other defendants. And the plaintiff's costs could not be readily divided between its successful and unsuccessful claims. However, it can be said that nearly all of the issues were those affecting the claim and counterclaim between the plaintiff and the second and third defendants, as the principal judgment demonstrates.

[7] Clearly, the orders for costs should make some allowance for the circumstances that the plaintiff unnecessarily incurred costs pursuing the fourth defendant and that upon the defendants' side of the record, some costs were incurred in defending a distinct and unmeritorious claim. The present question is how to fairly allow for those circumstances. As the respective submissions suggest, the order should fix some apportionment of the overall costs of one or other side of the record. The

defendants' proposal is not at all commensurate with the extent to which the case against the fourth defendant contributed to the cost of the litigation. In my view, apportionment of five per cent of the entire costs to the claim against the fourth defendant would be realistic. That might result in the plaintiff recovering 95 per cent of its costs overall from the second and third defendants and paying the fourth defendant its costs, quantified at five per cent of the defendants' overall costs. But that would have the practical disadvantage of requiring an assessment of the entire costs of each side. The likely amount to be awarded to the fourth defendant upon that basis would hardly justify the exercise.

[8] A further relevant matter is that although the claim against the fourth defendant was dismissed, I found that it had used information which was confidential to the plaintiff.<sup>1</sup> The small amount of profit thereby derived by the fourth defendant was not awarded to the plaintiff because instead, it was compensated by an amount of \$5,000 being awarded against the second and third defendants.<sup>2</sup> But the fact that the fourth defendant did misuse the plaintiff's information is of some relevance here in considering whether it should have any order for costs.

[9] A further matter raised by the plaintiff is that an order in favour of the fourth defendant could lead to an injustice if the second and third defendants are unable to pay the judgment and costs ordered against them. In that regard, on 27 January this year, the plaintiff's solicitors were notified by the solicitors for the second and third defendants that they had presented petitions in bankruptcy. I accept this submission as providing one of the circumstances which is presently relevant.

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<sup>1</sup> [2011] QSC 402 at [82].

<sup>2</sup> Ibid.

- [10] In all the circumstances, I am persuaded that there should be no order for costs in favour of the fourth defendant. There was, after all, a cause of action against it and it escaped judgment, albeit for a small sum, only because an alternative remedy was given to the plaintiff.
- [11] That leaves the question of the costs to be paid by the second and third defendants. This proceeding should have been brought in the District Court, because according to the principal judgment, the various claims in total were less than the “monetary limit” within s 68 of the *District Court of Queensland Act 1967* (Qld), even as that was when these proceedings were commenced in 2007.<sup>3</sup> However, no submission is made that the plaintiff should recover costs only on the District Court scale.
- [12] As the principal judgment should indicate, the second and third defendants pleaded and conducted a case at the trial which raised every conceivable point. In saying that I am not critical of their counsel. The criticism is of them for making a large number of factual assertions which they were unable to prove. Overall however, their conduct of the case was not so serious as to warrant indemnity costs and I do not understand the plaintiff to submit otherwise. Its case for indemnity costs was put upon the basis of the offer to settle.
- [13] I have concluded that the second and third defendants should be ordered to pay to the plaintiff 95 per cent of the plaintiff’s costs of the entire proceeding, including any reserved costs and costs of defending the counterclaim, to be assessed upon the standard basis.

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<sup>3</sup> The monetary limit not including an amount of interest: s 68(3)(c).