SUPREME COURT OF QUEENSLAND

CITATION:	*Suncorp Metway Insurance Ltd v Ruckman* [2012] QSC 100
PARTIES:	**SUNCORP METWAY INSURANCE LIMITED** (plaintiff) **v** **JONATHAN OWEN RUCKMAN** (defendant)
FILE NO/S:	6745 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 and 31 January 2012
JUDGE:	Martin J
ORDER:	**Judgment for the plaintiff in the sum of $764,106.82.**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – OTHER MATTERS – where the plaintiff settled two claims arising out of a motor vehicle accident at a compulsory conference – where the plaintiff seeks to recover those amounts from the defendant under s 58 of the *Motor Accident Insurance Act* 1994 – whether the costs were reasonably attributable to the inability of the defendant to exercised effective control of the motor vehicle INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – OTHER MATTERS – where the plaintiff settled two claims arising out of a motor vehicle accident at a compulsory conference – where the plaintiff seeks to recover those amounts from the defendant under s 58 of the *Motor Accident Insurance Act* 1994 – whether the costs the subject of the claim were reasonably incurred *Motor Accident Insurance Act* 1994, s 58 *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 *Nominal Defendant (Qld) v Langman* [1988] 2 Qd R 569 *Nominal Defendant v Buchan* [2011] QSC 364

Nominal Defendant v Chaffey (2011) 58 MVR 1.
Suncorp Insurance and Finance v Ploner [1991] 1 Qd R 69
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603

COUNSEL: T Matthews for the plaintiff
P Mylne for the defendant

SOLICITORS: Quinlan Miller & Treston for the plaintiff
Sajen Lawyers for the defendant

[1] On 8 June 2005 Benat Larrasquet and Julien Brettes were travelling in a small panel van across the Healy Creek bridge near Townsville. Mr Larrasquet was driving. At the same time, a Toyota Landcruiser was being driven in the opposite direction by the defendant (Mr Ruckman). The vehicles collided and both Mr Larrasquet and Mr Brettes were injured.

[2] Each of the injured completed a Notice of Accident Claim Form. They were served on the plaintiff (Suncorp). After some negotiations, Suncorp settled the claims at a compulsory conference. It paid Mr Larrasquet the sum of $42,539.60 and Mr Brettes the sum of $1,221,567.22.

[3] Suncorp now seeks to recover those amounts from Mr Ruckman under s 58 of the *Motor Accident Insurance Act* 1994 (the Act). The defendant resists the claim on two bases. First, that the plaintiff could not demonstrate that the costs were reasonably attributable to the inability of the defendant to exercise effective control of the motor vehicle. Secondly, on the basis that the costs the subject of the claim were not reasonably incurred.

Motor Accident Insurance Act

[4] In determining the principles to be applied in a claim such as this, the first matter for consideration is the Act itself.

[5] The Act creates a regime for the making, settling and determining of claims arising out of motor vehicle accidents. So far as is relevant, the following may be noted:

(a) One of the objects of the Act is "to encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents" – s 3(e).
(b) A person who suffers personal injuries as a result of motor vehicle accident must, before bringing an action for damages, given written notice of the motor vehicle accident claim to the insurer – s 37.
(c) Such an insurer must, within six months of receiving notice, take certain steps and must attempt to resolve the claim – s 41.
(d) Both the claimant (s 45) and the insurer (s 47) must cooperate with each other with respect to the provision of relevant information.
(e) Unless there is a good reason for not doing so, there must be a compulsory conference of the parties before the claimant brings an action for damages – s 51A.
(f) If the claim is not settled at the compulsory conference then each party must exchange a mandatory final offer – s 51C.

[6] Section 58 of the Act allows an insurer a right of recourse against an insured person in certain circumstances. In this action Suncorp relies on s 58(3) which provides:

> "(3) If—
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> (a) personal injury arises out of a motor vehicle accident; and
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> (b) the insured person was, at the time of the accident, the driver of the motor vehicle; and
>
> (c) the insured person was, at the time of the accident, unable to exercise effective control of the motor vehicle because of the consumption of—
>
> (i) alcohol; or
>
> (ii) a non-medicinal drug or a combination of non-medicinal drugs; or
>
> (iii) a combination of alcohol and a non-medicinal drug or non-medicinal drugs;
>
> the insurer may recover, as a debt, from the insured person any costs reasonably incurred by the insurer on a claim for personal injury that are reasonably attributable to the insured person's inability to exercise effective control of the motor vehicle."

[7] The word "costs", as used in s 58(3), is defined in s 4 of the Act in the following way:

> "(a) when used in reference to legal costs, includes disbursements; and
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> (b) when used in reference to the costs of an insurer on a claim, includes—
>
> (i) the amount paid out by the insurer on the claim to the claimant or for the claimant's benefit, including—
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> (A) the cost to the insurer of providing rehabilitation services in connection with the claim; and
>
> (B) the cost to the insurer of paying private hospital, medical and pharmaceutical expenses in connection with the claim; and
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> (ii) the cost to the insurer of investigating the claim and of litigation related to the claim (but not the insurer's general administration costs)."

[8] The principles which are to be applied in a claim of this type have been considered in a number of authorities. A decision to which frequent reference is made is *Nominal Defendant (Qld) v Langman.*[1] In that case, Thomas J (as he then was) considered s 4G(1) of the *Motor Vehicles Insurance Act* 1936. That section provided a right of recourse to the Nominal Defendant in specified circumstances. It was entitled to recover "the amount of any costs and expenses properly incurred by it in relation to any such claim". The difference in the language is obvious. Section 58(3) of the Act refers to costs which have been "reasonably incurred". If there is a difference in the import of "properly" and "reasonably" in a claim of this type then

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1 [1988] 2 Qd R 569.

it is not so great as to prevent the use of the reasoning of Thomas J. The following propositions emerge from his Honour's reasons:[2]

(a) in reaching the particular settlement there was nothing wrong *per se* in adopting a 'broad brush approach' to negotiating and settling the claim;

(b) "the wise practitioner does not often pretend to be able to make accurate forecasts of factual findings, although he [or she] may make an astute assessment of the range of possible results, and perceive one of these to be more likely than the others";

(c) a court should not be "too astute to make microscopic examinations of compromise arrangements which save costs and which avoid the perils of litigation and which *prima facie* seem sensible"; and

(d) "there will come a time when slipshod, inadequate preparation leads to an unnecessary surrender of rights, where the settlement could not be described as 'proper'" and, in those cases, the Nominal Defendant would not be able to recover the money from the owner or driver of the uninsured vehicle.

[9] The reference in *Langman* to a "broad brush" approach was considered in *Suncorp Insurance and Finance v Ploner*.[3] In that case, the Full Court considered the extent to which it was necessary for a plaintiff to adduce evidence concerning the "reasonableness of the settlement". McPherson J (as he then was) referred to *Biggin & Co Ltd v Permanite Ltd*[4] and adopted the statement of principle that it is not necessary that the reasonableness of the settlement should be proved by adducing all or precisely the same evidence as would have been required if the action had been tried rather than settled.[5]

[10] Recent decisions in this court – *Nominal Defendant v Chaffey*[6] and *Nominal Defendant v Buchan*[7] – have referred with approval to what Thomas J said in *Langman* and, more particularly, to the consideration given to a similar problem in the High Court decision of *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd*.[8] It is that decision to which the parties gave most attention in their submissions.

[11] In *Unity Insurance Brokers* an insurance broker had arranged an industrial special risks policy but had negligently failed to disclose the insured's claims history fully to the insurer. The insured's premises were damaged by fire and the insurer refused to pay the full amount which would have been payable, for a number of reasons including the non disclosure. The insured sued both the insurer and the broker. As between the insured and the insurer, the claim was settled for an amount approximately half that which the insured would have received had the insurer admitted liability. The insured then continued against the broker claiming the balance of about $1,000,000.

[12] Part of the argument concerned the manner in which the insured's damages should be calculated and, in turn, attention was given to whether or not the settlement was a

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2 Ibid at 572.
3 [1991] 1 Qd R 69.
4 [1951] 2 KB 314.
5 [1991] 1 Qd R 69, 76.
6 (2011) 58 MVR 1.
7 [2011] QSC 364.
8 (1998) 192 CLR 603.

reasonable one. Brennan CJ agreed with Hayne J on the principles which are to be applied in determining the reasonableness of a settlement in this type of circumstance. Their Honours were, of course, not concerned with a statutory cause of action but their consideration of the manner in which the reasonableness of a settlement might be established is not dependent upon anything which would render their reasoning irrelevant to the consideration in this case.

[13] The following emerges from the reasons of their Honours:

(a) The test of reasonableness is an objective one. (Brennan CJ at [6] and Hayne J at [29])

(b) Evidence of the advice which the insured received to induce it to enter into the settlement is not proof in itself of the reasonableness of the settlement advised. (Brennan CJ at [6])

(c) Evidence of the receipt of advice is relevant but what will usually be much more important is the reasoning that supported that advice because that will usually disclose why it was thought reasonable to compromise the claim. (Hayne J at [129])

(d) The reasonableness of a settlement depends on the circumstances existing at the time, provided the plaintiff has acted reasonably in discovering the circumstances material to the settlement at that time. (Brennan CJ at [7])

(e) Reasonableness is not to be judged according to whether material which was obtained later shows that a different result might have been obtained. (Hayne J at [130])

(f) Consideration will often be required of whether the party maintaining that the settlement was reasonable had made sufficient inquiries and had sufficient information available to it to warrant reaching the compromise. (Hayne J at [131])

(g) In making that inquiry attention may need to be given to whether the cost of seeking further information would outweigh the benefit that it was reasonable to expect may be obtained from doing so. (Hayne J at [131])

(h) What is a reasonable compromise of the claim will almost always require consideration of the chances of the parties succeeding in their respective claims or defences and that prediction of likely outcomes must always be imperfect and imprecise. (Hayne J at [132])

Liability of Mr Ruckman for the accident

[14] Suncorp pleads that the collision was caused by Mr Ruckman being unable to exercise effective control over the Landcruiser and that his inability was manifested by him:

(a) driving the Landcruiser while he was asleep or alternatively not fully alert and aware of the Landcruiser's position on the carriageway,

(b) driving the Landcruiser in such a manner that it veered from its correct side of the carriageway southbound onto the northbound side in the path of the panel van, and

(c) failing to take any or any proper or adequate steps to attempt to avoid the collision.

[15] It was argued on behalf of the defendant that there was no evidence to support the conclusion that the ingestion of the alcohol consumed by Mr Ruckman would have

had the effect of being likely to induce sleep. That is not correct. There was evidence from the medical experts from which an inference to that effect could be drawn. But there was ample evidence from Dr Griffin and Associate Professor Brown – neither of whom were cross-examined – to support the conclusion, which I have formed, that Mr Ruckman's level of intoxication meant that he was not fully alert or aware of his vehicle's position on the road.

[16] On 25 September 2006 Mr Ruckman pleaded guilty to one count of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by an intoxicating substance. The charge arose out of the collision referred to above. It follows that Mr Ruckman admitted that:

(a) he drove the Landcruiser dangerously;
(b) by reason of such driving he caused grievous bodily harm to Mr Brettes; and
(c) he drove when the concentration of alcohol in his blood exceeded 150mg of alcohol per 100ml of blood.

[17] Suncorp also relies upon some submissions made on Mr Ruckman's behalf at the sentencing hearing as admissions going to liability; in particular, that Mr Ruckman had **"**misjudged [his] own level of alcohol consumption, who on dusk for whatever reason, had drifted on to the wrong side of the ride at the worse position – worst possible position, and the consequences have been disastrous."[9] It was also admitted in that way that, at the time of the collision, Mr Ruckman's blood alcohol concentration was 0.259%.

[18] The defendant raised a number of matters in his defence to the effect that the collision was caused or contributed to by the fault of Mr Larrasquet. None of these matters was pursued with any vigour and no submissions were made on them. Mr Barsby was called to give evidence. He was, at the relevant time, the Suncorp employee who decided that liability should be admitted and that no claim of contributory negligence should be made. He was not cross-examined.

[19] Suncorp was justified in concluding that its insured was entirely at fault. Mr Ruckman was not able to control his vehicle because of his consumption of alcohol.

Claim by Mr Larrasquet

[20] The amount paid by Suncorp to Mr Larrasquet was admitted by the defendant to be within the range that could have been achieved had the matter gone to trial. This amount was not the subject of dispute at this trial and, so, there will be judgment for the plaintiff in the sum of $42,539.60 on this part of the claim.

Claim by Mr Brettes

[21] Mr Mylne submitted that there were three areas in which Suncorp had not demonstrated that it had reasonable incurred costs in the settlement sum:

(a) future impairment of earning capacity;
(b) future out of pocket expenses; and
(c) future care.

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9 Ex 5, 1-28.

[22] He then argued that the failure by Suncorp to make appropriate inquiries with respect to those matters infected the entire settlement and, thus, Suncorp could not recover anything.

[23] On a settlement of a claim the breakdown of the total amount paid cannot be confirmed as readily as it can when the case has gone to trial and judgment, but the allocation made by Mr Smith in his letter[10] to Suncorp after the compulsory conference was used by the parties as the most reliable account. According to Mr Smith the constituent parts of the sum paid were:

"General Damages	136,100
Personally paid Past Out of Pocket Expenses	30,000
Future Out of Pocket Expenses	175,000
Past Economic Loss	115,000
Interest on Past Economic Loss	12,900
Future Economic Loss	500,000
Past Care	14,000
Interest on Past Care	2,000
Future Care	115,000
TOTAL	1,100,000"[11]

Future Impairment of Earning Capacity

[24] Prior to the accident Mr Brettes was employed as a waiter in France and was earning about $450 net per week. For most of the time during the assessment of his claim Suncorp proceeded on the basis that he would, apart from the accident, have been promoted to a supervisory capacity and would have had higher earnings. The medical assessment, and the claim by Mr Brettes, was that he would not be able to engage in that type of work again and that he would have to consider retraining for an office job.

[25] In January 2008 Mr Brettes was examined by Dr Emery. In March 2008 Dr Emery supplied his opinion based upon that examination. He noted that Mr Brettes had been able to go back to professional activity as a restaurant supervisor. This was notwithstanding that he still suffered significant pain in his left elbow and problems with his left leg. Dr Emery said: "The effect of his injury has been 100% to our client's ability to obtain remunerative employment as he had to retrain to specific non physical jobs." He also said that Mr Brettes would not have the ability to continue in his usual employment and would have to "give up completely his usual employment which became impossible to do. Furthermore I think that Julian will not ever be able to again work within a physical job."

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10 Ex 4, 526.

11 The total amount paid included legal costs and refunds.

[26] That opinion would justify a very pessimistic view of the capacity of Mr Brettes to obtain further work of the type he had previously undertaken.

[27] Dr Emery was later asked to provide a further opinion and he did so in September 2009. It appears that this opinion was provided without having undertaken a further examination and without any further information. Dr Emery gave the following opinions:

a. Mr Brettes has a severe disability in relation to his inability to work and do his activities of daily living. I believe that a lot of his disability is related to the pain and stiffness that he is getting. At this stage in view of his left arm and leg injury, it is my belief that he will not return to manual work.

b. Mr Brettes does not have any other choices than considering retraining for a pure office job. The risk of recurrent flaring is significant and Mr Brettes is likely to be debilitated with pain for the rest of his life. I also believe that his condition will deteriorate with time, forcing him to a restricted and limited sedentary job.

c. the whole person impairment was assessed at 58%.

[28] Contrary to the opinion expressed by Dr Emery, Mr Brettes had obtained employment as early as March 2007 on a part time basis as a waiter in a restaurant in England. When he returned to Paris he worked for three months at Hotel Concorde Lafayette and from March 2009 until, at least, the compulsory conference he was employed full time as a waiter at the Hotel Lutetia. In that position he worked 39 hours a week. It is reported that he suffered pain in his left arm and leg but was able to traverse the stairs from the kitchen to the dining room, lift and carry plates, bottles of wine and wine buckets, as well as reaching above shoulder height to retrieve glasses or bottles of wine. Notwithstanding the pain he was suffering, he was working double shifts. Suncorp became aware of this no later than the compulsory conference.

[29] It was accepted by Mr White, who at the relevant time was the claims officer with responsibility for the claim by Mr Brettes, that the assessment he provided for Suncorp's internal purposes proceeded upon a false basis and that he would have reduced his assessment of future economic loss had he been aware of the work being performed by Mr Brettes.

[30] Mr Brettes did not take part in the compulsory conference. That was the responsibility of Mr Smith, the solicitor retained by Suncorp for that purposes. The person who was ultimately responsible for approving the settlement was Ms O'Connor. She did not take part in the compulsory conference (which was conducted by telephone). Mr Brettes was taking part by telephone from France with Ms O'Connor was available at all times to deal with any need for instructions during the conference. Ms O'Connor accepted that about 10 months after Mr Brettes was examined by Dr Emery he was working as a waiter on a full time basis. She accepted that the type of work being undertaken by Mr Brettes was entirely inconsistent with the prognosis expressed by Dr Emery and that the knowledge of the work being undertaken by Mr Brettes was to the effect that prior to the accident he was earning about $450 net per week and, at the date of the compulsory conference, he was doing similar work earning a little over $500 net per week.

[31] On the basis of that knowledge it was put to Ms O'Connor that it would have been in accordance with an ordinary prudential approach to the assessment of the claim to reduce the quantum of damages being offered by Suncorp. Ms O'Connor accepted that.

[32] As was said by Hayne J in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd*:

> "…the question whether the settlement was reasonable must be judged by reference to the material the parties had available to them at the time the compromise was reached."[12]

[33] The situation with respect to settlement, especially settlements which have occurred since the enactment of legislation requiring the making of mandatory final offers, must be taken into account. But, in circumstances where the entire basis for the assessment of future economic loss has been either removed or radically changed it is not going to be a cost reasonably incurred by the insurer if the claim is paid upon a basis which has been demonstrated to be incorrect. This will apply even in circumstances where the information only becomes apparent at the compulsory conference. Suncorp should have, on becoming aware of this radical difference in the factual basis for the settlement negotiations, sought further information and made further inquiries. This was not a case where any adjustment to the offer might have been small or, when weighed against the difficulties of dealing with a plaintiff in another country, the logistical problems favoured maintaining the offer.[13] The cost incurred by Suncorp in making that part of the payment which relates to future economic loss was, in these circumstances, not reasonably incurred.

Future out of pocket expenses

[34] In his outline of damages Mr Brettes claimed future out of pocket expenses in the sum of $317,419.28. That included an amount of $160,000 for aids in accordance with the suggestions of a French general practitioner, Dr Lamazouade, and an occupational therapist.

[35] Mr Mylne submitted that there was no basis upon which that amount could be supported and that the original assessment by Dr Lamazouade of €20,000 a year was similarly unsupported. This was the subject of criticism by Mr Mylne on the basis that there was no logical link between the claim and the underlying evidence. That may well be the case but it is not relevant. In Mr Smith's opinion provided to Suncorp on 24 November 2009 he sets out Mr Brettes' claim in this area and then puts forward his own assessment under the following headings in the following ranges:

"Allowance for use of automatic vehicles	$8,000.00	$10,000.00
Cost of physiotherapy, associated therapies and aids @ $100.00 to $120.00 per week for 40 years (917.5 multiplier)	$91,750.00	$110,100.00
Surgical procedures noted by Dr Emery	$25,000.00	$30,000.00
Pain relief medication and medical treatment	$10,000.00	$15,000.00
Home modifications	$5,000.00	$10,000.00"

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12 (1998) 192 CLR 603, 653.

13 See *Unity Insurance Brokers* at [131]

[36] Mr Smith then advised that his range of damages (rounded off) for this area was $140,000 to $175,000.

[37] There is nothing in the material that I have been referred to which suggests that the aids suggested either by Dr Lamazouade, or in the occupational therapist's report, were taken into account in Mr Smith's assessment, which is consistent with the amount the subject of the settlement.

[38] I am satisfied that the amount assigned to future out of pocket expenses was supported by the evidence and was not otherwise disturbed by the evidence relating to Mr Brettes' occupation. In fact, it is noted in one of the reports that one of the reasons for Mr Brettes' being able to continue in the employment in which he had been engaged prior to the accident was the substantial physiotherapy and associated treatments he had been receiving. To challenge the claim for future loss of earnings without acknowledging that the diminution in that claim is due to this type of care and its continuation will have an effect on future impairment of earning capacity.

Future care

[39] Mr Mylne argued that the "new" evidence relating to the capacity of Mr Brettes to work also affects the issue of future care. Mr Smith, in his report of 24 November 2009, considers the opinions which were expressed by the occupational therapist and was of the view that they were "not … much overstated". It was argued on behalf of the defendant that there should have been a review of this aspect of the claim because of the "new" evidence relating to the work able to be done by Mr Brettes.

[40] In his analysis of the claim for future care, Mr Smith takes care to demonstrate that he has taken into account comments made by Dr Emery and the occupational therapist about "increased care needs with the progression of time". In light of the injuries suffered by Mr Brettes, that would seem to be an entirely unobjectionable approach to take. Further, it would not be an approach that was inconsistent with the "new" evidence about earning capacity. There was still no material which suggested that Mr Brettes would not suffer from problems caused by the accident and which would require him to be provided with care. Notwithstanding Dr Emery's opinion that Mr Brettes would need assistance in the order of some ten hours a week, Mr Smith's opinion was that an offer should be made on the basis of two to three hours a week for five years, then three to four hours a week for the next 20 years, and then six to eight hours a week for the 20 years after that. That approach, even with the pessimistic views expressed by Mr White about the opinions of both Dr Emery and the occupational therapist is still within a logical and justifiable range for this claim.

Other matters

[41] It was submitted by Mr Mylne that the categorisation by Suncorp of this claim as being a "catastrophic claim" had, in some way, coloured the view taken by those at Suncorp responsible for dealing with the matter. The evidence of the witnesses does not support that. The reasons for categorising claims are obvious and include, among other things, that they assist with the assessment of amounts to be set aside as provision and also allow for internal organisation of staff in accordance with their experience with handling claims.

[42] It was also submitted by Mr Mylne that if one part of the amount paid was demonstrated not to have been "reasonably incurred" then none of the amount paid was able to be recovered. Section 58 allows for an insurer, in the circumstances provided for, to recover the "costs reasonably incurred" by it. The word "costs" is defined to include separate categories of cost including, for example, the provision of rehabilitation services. It follows, then, that the term "costs" should not be viewed as a global amount within which there can be no subdivision of amounts. This must be the case in personal injuries matters where it has been the practice for a very long time to assess a claim and to make an offer in accordance with accepted heads of damage. It is possible for a payment made by an insurer to an injured person to be reasonably incurred as to one part and unreasonably incurred as to another. That is the circumstance which I have found to exist in this case.

Conclusion

[43] I give judgment for the plaintiff in the sum of $764,106.82 being made up as follows:

Larrasquet Claim	$42,539.60	
Brettes Claim	$721,567.22	($1,221,567.22 – 500,000)
	$764,106.82	

[44] I will hear the parties on costs.