SUPREME COURT OF QUEENSLAND

CITATION:	*Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 3)* [2015] QSC 164
PARTIES:	**VISION EYE INSTITUTE LTD** (first plaintiff) and **ICON LASER (AUSTRALIA) PTY LTD** (second plaintiff) **v** **DR DAVID KITCHEN and MICHELLE KITCHEN (in their personal capacity and in their capacity as Trustees of the MDK Trust)** (defendants)
FILE NO/S:	10366 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions 1, 10 and 11 June 2015
JUDGE:	Applegarth J
ORDER:	**1. The defendants pay 95 per cent of the plaintiffs' costs of the principal proceeding and of the counterclaim, including reserved costs, to be assessed on the indemnity basis.** **2. The liability of the second-named defendant, Michelle Kitchen, for such costs is limited to the property of the MDK Trust, including (without limitation) the Restricted Securities held by the defendants in the first-named plaintiff, Vision Eye Institute Ltd.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where the plaintiffs were substantially successful in their claim against the defendants – where the defendants were largely unsuccessful on their counterclaims – whether the costs order in the plaintiffs' favour should be discounted to reflect the defendants' partial success

PROCEDURE – COSTS DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the defendants failed to accept the plaintiffs' formal offer to settle made under the *UCPR* – where the plaintiffs offered to accept $2 million and bear their own costs – where three years later one of the plaintiffs is awarded a judgment of more than $10 million and a cost order is made in the plaintiffs' favour – where the terms of the offer included that the proceedings would be discontinued in their entirety – where the defendants submit that settlement of the proceedings on the terms of the offer would have permitted the plaintiffs to bring fresh proceedings without leave – whether judgment and orders more favourable to plaintiffs than terms of their offer

Uniform Civil Procedure Rules 1999 (Qld) rr 360(1), 681(1), 684

BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, followed
Harvey v Attorney-General for the State of Queensland (2011) 220 A Crim R 186; [2011] QCA 256, cited
Mobile Innovations Ltd v Vodafone Pacific Ltd [2003] NSWSC 423, cited
Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156, cited
Todrell Pty Ltd v Finch & Ors [2008] 2 Qd R 95; [2007] QSC 386, cited
Vision Eye Institute Ltd & Anor v Kitchen & Anor [2014] QSC 260, cited
Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 2) [2015] QSC 66, cited

COUNSEL: S R Cooper for the plaintiffs
S C Russell (solicitor) for the defendants

SOLICITORS: Clayton Utz for the plaintiffs
Russells for the defendants

[1] On 23 October 2014 I delivered reasons as to why there should be judgment for Icon against Dr Kitchen for damages for breach of the Service Agreement, in an amount to be assessed.[1] I made directions for the parties to file and serve further submissions on the assessment and calculation of Icon's loss and damage, the form of declaratory or other relief that was appropriate in respect of the shares held in escrow and the form of judgment and orders in the light of my findings and reasons. My reasons also indicated that the defendants' counterclaims for breach of contract and for misleading and deceptive conduct should be dismissed, but that the defendants were entitled to declarations that some of the restraints in the Service Agreement and in the Share Purchase Agreement were void as an unreasonable restraint of trade.

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1 *Vision Eye Institute Ltd & Anor v Kitchen & Anor* [2014] QSC 260.

[2] On 21 April 2015 I delivered reasons in which I assessed Icon's damages, and gave judgment for Icon against Dr Kitchen in the amount of $10,845,476 (comprising losses discounted to 13 January 2009 in the sum of $7,266,545 and interest from 13 September 2009 to the date of judgment in the amount of $3,578,931).[2] I made directions for the parties to file and serve written submissions in relation to costs. These submissions have now been received.

[3] The plaintiffs submit that, given the extent of their success both on their own claim and in resisting the defendants' counterclaims, the defendants should be ordered to pay their costs of the entire proceeding. This is said to reflect the general rule that the costs of the proceeding are in the discretion of the court but follow the event, unless the court orders otherwise.[3]

[4] The defendants accept that costs should follow the event and that this means that the plaintiffs should have an order for costs of the proceedings on the claim and the counterclaim. However, they submit that the power of the court to make an order for costs in relation to a particular question in, or a particular part of, a proceeding under r 684 permits the court to decide what portion of costs should follow the "event". Because only two of the numerous sub-clauses in the restraint provisions were upheld, the defendants submit that an appropriate discount would be perhaps 10 per cent to 15 per cent of the total costs so that, subject to a matter in relation to the position of the second-named defendant, the appropriate order would be that the defendants pay 85 per cent of the plaintiffs' costs of the proceeding and of the counterclaim.

[5] The plaintiffs also submit that costs should be assessed on an indemnity basis pursuant to r 360(1) of the *UCPR*. This is because the plaintiffs made a formal offer under Chapter 9, Part 5 of the *UCPR* on 22 December 2011 to settle the proceedings on terms that:

(a) the defendants pay the sum of $2 million to the plaintiffs within 28 days of the acceptance of the offer;

(b) each party would bear its own costs; and

(c) the proceedings be discontinued in their entirety.

The orders made are said to be "no less favourable" than the offer which the defendants did not accept.

[6] In response the defendants submit that acceptance of the offer would have left open the possibility of the plaintiffs' seeking injunctions and declarations designed to stop Dr Kitchen from practising his profession through the initiation of fresh proceedings immediately after the discontinuance. They submit that this risk should be taken into account in deciding whether the orders obtained were "no less favourable than the offer". The plaintiffs reply that there is nothing to suggest that there was any likelihood of fresh proceedings being commenced and that, on any view, the orders made following the trial are no less favourable than the offer.

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2 *Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 2)* [2015] QSC 66.
3 *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*"), r 681.

[7] A matter which is not contentious relates to the position of Mrs Kitchen. Although the proceedings against Dr Kitchen and Mrs Kitchen named them as defendants "in their own capacity and in their capacity as trustees for the MDK Trust", Mrs Kitchen was not sued in her personal capacity. The defendants submit, and the plaintiffs accept, that her liability to pay costs should be limited to the property of the MDK Trust.

[8] Therefore, the two live issues in relation to costs are:

- Should there be a reduction in the costs order made in the plaintiffs' favour to reflect the defendants' success in relation to the enforceability of a number of the restraints in the Service Agreement and the Share Purchase Agreement?
- Should the order for costs in the plaintiff's favour be assessed on the indemnity basis?

Should the defendants be ordered to pay the whole or only part of the plaintiffs' costs?

[9] Rule 681(1) provides that the costs of a proceeding are in the discretion of the court but follow the event, unless the court orders otherwise. That sub-rules applies unless the rules provide otherwise.

[10] Rule 684(1) authorises the court to make an order for costs "in relation to a particular question in, or a particular part of, a proceeding". For the purpose of that sub-rule, the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates.[4]

[11] The plaintiffs submit that the power to make an order for costs under r 684 constitutes an exception to the general rule under r 681 and that the circumstances that engage that power are "exceptional circumstances". Reliance is placed upon the decision of McMurdo J in *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)*.[5] The defendants contest the proposition that "exceptional circumstances" are required to engage r 684. They point out that r 684, unlike many other rules, does not expressly provide for special or exceptional circumstances. They also submit that McMurdo J did not decide in *BHP Coal* that "exceptional circumstances" were required. In reply, the plaintiffs point to the following statement by McMurdo J in *BHP Coal*:

> "The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule?"

This passage supports the plaintiffs' submissions that exceptional circumstances are required to engage r 684. It is unnecessary to survey the meaning of "exceptional circumstances" in other contexts[6] and the defendants are correct to point out that the rule does not require expressly "exceptional circumstances". However, it is unusual, and in

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4 *UCPR*, r 684(2).
5 [2009] QSC 64 at [8] ("*BHP Coal"*).
6 For a judicial definition see *Harvey v Attorney-General for the State of Queensland* (2011) 220 A Crim R 186 at 197 [42].

that sense exceptional, to deprive a successful party of its costs. This is so whether an order is made as a matter of discretion under r 681 or by making an order under r 684.

[12] McMurdo J in *BHP Coal* followed earlier authority that:

> "Notwithstanding that the court has power to deprive a successful party of costs, or even order a successful party to pay costs, that is a course to be taken in unusual cases and with a degree of hesitancy."[7]

His Honour reiterated the view that:

> "…ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and severable and has occupied a significant part of the trial."[8]

I respectfully follow that approach.

[13] The parties accept that in exercising its discretion in relation to costs, the court is entitled to take an impressionistic and pragmatic view as to what were the real heads of controversy in the litigation and will strive to avoid assessments of costs in a complicated form, according to issues in the technical sense. However, this does not detract from the general rule that costs follow the event, or relieve a party which seeks to invoke the discretion under r 684 from the requirement to identify the "particular question" in a proceeding, or the "particular part" of a proceeding, in respect of which the court is asked to make an order for costs.

[14] I apprehend that the defendants submit that the particular question relates to the validity of restraint provisions, and the particular part of the proceeding relates to the part of the proceeding which concerned their enforceability.

[15] Although the plaintiffs initially sought to rely upon the restraints and pursued injunctive relief, their solicitors wrote to the defendants' solicitors on 22 March 2012, more than two years before the trial, and advised them that the plaintiffs would not be pursuing that relief. Instead, at the trial, the plaintiffs relied upon the enforceability of their restraints as being relevant to the determination of the claim for damages for breach of the Service Agreement. The defendants, by way of counterclaim, sought declarations in relation to the invalidity of all of those restraints. The defendants failed to establish that all of the restraints were invalid. I concluded that a few of them were enforceable.

[16] Neither party enjoyed complete success concerning the enforceability or otherwise of the restraints. The issues between the parties concerning the enforceability of the restraints required attention to principles governing restraints in different contexts. The principles themselves were not in issue and did not occupy a substantial part of oral submissions. I

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[7] *BHP Coal* at [8] following *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 423, at [4] and *Todrell Pty Ltd v Finch & Ors* [2008] 2 Qd R 95 at [21].

[8] *BHP Coal* at [8].

have had regard to the extent to which the issue featured in the parties' written submissions. The parties' submissions adopted an "all or nothing" approach to the question of enforceability whereas, for the reasons which I gave, I found only some of them to be enforceable. Not much evidence related to the issue of enforceability. Still, there were affidavits and other evidence touching upon those issues. To the extent that it is possible to define or even estimate the proportion of the proceeding which was attributable to the question of the enforceability of the restraints, I would consider it to be substantially less than 10 per cent.

[17] It would, in theory, be possible to identify an event in terms of the defendants' success in obtaining part of the declaratory relief sought by them on the question of invalidity. A starting point would be to conclude that the defendants should have the costs that followed that event. But this is an unattractive course, and contrary to the long-established principle that courts should avoid complicated forms of taxation or assessment.[9] I am disinclined to make an order under r 684(1) concerning the costs in relation to the question of enforceability or the particular part of the proceeding which was concerned with that question. Instead, I consider that I should exercise my discretion in relation to costs so as to avoid complicated forms of assessment, such as an assessment which would require the plaintiffs to pay a small percentage of the defendants' costs so as to reflect the defendants' success in obtaining the declarations which they did concerning the enforceability of certain restraints.

[18] Viewed in one light, the plaintiffs might be described as having been successful, but failed on particular issues, namely the enforceability of certain restraints, so that in accordance with the principles which I have discussed they should not be deprived of part of their costs. However, the defendants have enjoyed some limited success upon their counterclaim and in that regard they have a reasonable claim to an order for costs in their favour. Although a successful party in the plaintiffs' position should not usually be deprived of some of its costs in circumstances in which its success has been less than total, I consider that this is a case in which the plaintiffs should not be entitled to the whole of the costs of the proceeding and the counterclaim. This is because the defendants were successful on a significant part of their counterclaim and their success in that regard had significant implications for the quantum of the plaintiffs' claims for damages, including claims for damages based upon alleged breaches of the restraints.

[19] Having regard to the extent of the plaintiffs' success on their claim, and their success in resisting the defendants' very substantial counterclaims for misleading and deceptive conduct and breach of contract, I consider that an appropriate order is that:

(a) the defendants pay 95 per cent of the plaintiffs' costs of the principal proceeding and of the counterclaim, including reserved costs;

(b) the liability of the second-named defendant, Michelle Kitchen, for such costs is limited to the property of the MDK Trust, including (without limitation) the Restricted Securities held by the defendants in the first-named plaintiff, Vision Eye Institute Ltd.

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9 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 at 208.

Should costs be assessed on the indemnity basis?

[20] Rule 360(1) relevantly provides that if the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order "no less favourable than the offer", and the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer, the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

[21] Clearly, the judgment for damages which exceeded $10 million, when discounted for interest which accrued between December 2011 (when the offer was made) and the date of judgment, substantially exceeds the plaintiffs' offer to accept $2 million and to bear their own costs. The defendants seek to characterise the offer as being one in which the plaintiffs would accept $2 million "for the damages claim". However, the offer was to settle the proceedings, not simply the plaintiffs' damages claim. As for costs, the offer dated 22 December 2011 noted that at the date of that letter, the plaintiffs' costs of the proceedings, on a time cost basis, totalled $1,382,945.90.

[22] The defendants' submissions note that the terms of the offer did not say anything about the plaintiffs providing any releases or discharges to the defendants, nor *vice versa*. Because the offer envisaged the proceedings being discontinued in their entirety, the defendants submit that, if accepted, the parties would have been at liberty to bring the same proceedings without leave. I do not consider that acceptance of the offer would have involved simply a resolution of the parties' damages claims. It sought a resolution of all of the claims and counterclaims, including claims for costs. If the defendants had been in any doubt about the nature of the compromise which was proposed, then they might have raised the question in correspondence and sought the provision of mutual releases and discharges. There is no evidence that they did. In any case, I do not consider that there was a significant risk of the plaintiffs commencing fresh proceedings to restrain Dr Kitchen. Any fresh proceedings probably would have been met by a response that the plaintiffs' claim to injunctive relief was the subject of a compromise, that a fresh claim constituted an abuse of process and that declaratory or injunctive relief should be declined because of delay as a matter of discretion. The plaintiffs had offered to compromise the proceedings, which would be taken to involve a compromise of the plaintiffs' claims for injunctive and declaratory relief.

[23] For the reasons which the plaintiffs have given in their submissions in reply, if the offer had been accepted and no further proceeding had been commenced, then they would have been in a position of having received $2 million from the defendants and been required to bear their own costs of the proceedings. Dr Kitchen would have remained free to practise in Rockhampton and Gladstone and the question of validity or invalidity of the restraints would not have been determined. On this scenario, the damages judgment and the plaintiffs' entitlement to costs are significantly more favourable to the plaintiffs than their position would have been if the offer had been accepted.

[24] On the unlikely scenario that a fresh proceeding had been instituted, the position would only have been different in relation to questions concerning the validity of the restraints. For the reasons developed in the plaintiffs' written submissions, whichever hypothetical scenario is submitted, the orders made following the trial are no less favourable to the

plaintiffs than the offer. If the defendants had accepted the offer, then Dr Kitchen would have been able to practise in Rockhampton and Gladstone, as he in fact did, subject to the unlikely scenario of the plaintiffs commencing fresh proceedings. The defendants would not have been exposed to an order for costs in respect of the plaintiffs' costs prior to the offer because the plaintiffs were prepared to bear their own costs. In addition to paying their own costs, the defendants would have been required to pay $2 million to the plaintiffs. They would have been required to forego the claims made by counterclaim (assuming the offer was interpreted as settling both the claims and counterclaims and precluding the parties from re-litigating them). However, the defendants would not have been exposed to the plaintiffs' very substantial claims for damages which resulted in a judgment of more than $10 million.

[25] The orders which the plaintiffs obtained, including orders for substantial damages in their favour, the dismissal of substantial damages claims against them and orders for costs in their favour, are more favourable than the offer which the plaintiffs made, making appropriate adjustments for interest and costs. There is no reason to think that the plaintiffs were not willing or able to carry out the terms of the offer. The defendants have not shown that another order for costs is appropriate in the circumstances than the order provided for in r 360(1).

[26] The defendants' submissions on the issue of indemnity costs do not seek to make distinctions between plaintiffs or distinctions between costs of the proceeding and costs of the counterclaim. This is understandable given the manner in which the litigation was conducted. Each plaintiff was jointly represented, and there is no submission by the defendants that there should be an attempt to differentiate between the position of the first plaintiff and the second plaintiff. No point is taken by the defendants that costs of the proceeding should be on an indemnity basis whereas costs of the counterclaim should be on the standard basis. Any attempt to dissect the plaintiffs' costs of the principal proceeding and their costs of the counterclaim would be a complicated and costly one. The offer to settle was an offer to settle the whole of the proceedings. The plaintiffs are entitled to invoke r 360 as a basis to seek an order that their costs be calculated on the indemnity basis. The offer was a reasonable one which involved a substantial element of compromise, both in respect of the plaintiffs' claims for damages and in foregoing their costs to the date of the offer. Rule 360(1) is engaged because the orders which were obtained are no less favourable than the offer which was not accepted by the defendants. The defendants have not shown that another order for costs is appropriate in the circumstances. The appropriate order is that the costs order which I have decided to make be assessed on the indemnity basis.

Orders

[27] I order:

1. The defendants pay 95 per cent of the plaintiffs' costs of the principal proceeding and of the counterclaim, including reserved costs, to be assessed on the indemnity basis.

2. The liability of the second-named defendant, Michelle Kitchen, for such costs is limited to the property of the MDK Trust, including (without limitation) the Restricted Securities held by the defendants in the first-named plaintiff, Vision Eye Institute Ltd.