DISTRICT COURT OF QUEENSLAND

CITATION:	*Downing v Brassalls Jackpot PL & Anor* [2020] QDC 148
PARTIES:	**GRAHAM JAMES DOWNING** (plaintiff) **v** **BRASSALLS JACKPOT PTY LTD** (defendant) **and** **PETE'S TRANSPORT (QLD) PTY LTD** (third party)
FILE NO/S:	307/2019
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	21 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2020
JUDGE:	Reid DCJ
ORDER:	**1. The plaintiff pay the defendant's costs of the proceeding including costs of the third party proceedings to be assessed on the standard basis from the date of the defendant's mandatory final offer.** **2. The defendant's application for indemnity costs be refused.** **3. The third party pay 30% of defendant's cost of the third party proceedings to be assessed on the standard basis.**
CATCHWORDS:	CIVIL – PERSONAL INJURY – COSTS – where plaintiff alleged he suffered personal injury in the course of employment with the defendant– where plaintiff sought dismissal of his claim on the first day of the trial – where plaintiff sought no order as to costs – where the defendant sought an order that the plaintiff pay its costs of and incidental to the action on an indemnity basis – where the defendant further sought costs against the third party – where the third party sought an order that the plaintiff pay the defendant's costs of and incidental to the action, including the

costs of the third party proceedings and that the defendant pay the third party's costs of the third party proceeding – what costs should be ordered

Workers' Compensation and Rehabilitation Act 2003 (Qld) ss 316, 318B, 325

Uniform Civil Procedure Rules 1999 (Qld) rr 685, 703

Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors [2011] QCA 214

Sheridan v Warrina Community Co-operative Ltd & Anor [2004] QCA 308

Cooper Brookes (Wollongong) Proprietary Limited v Commissioner of Taxation (1981) 147 CLR 297

COUNSEL: R. Lynch for the plaintiff

W.D.P. Campbell for the defendant

J. McCloymont for the third party

SOLICITORS: Turner Freeman for the plaintiff

Jensen McConaghy for the defendant

Clyde & Co for the third party

[1] On Monday the 18th of May, the plaintiff's counsel informed me, on the first day of the scheduled trial of this matter, that I should dismiss the plaintiff's claim. He further submitted I should make no order as to costs of the action between his client and the defendant. Counsel for the defendant submitted I should order that the plaintiff pay the defendant's costs of and incidental to the action to be assessed on an indemnity basis. He also sought costs against the third party. Counsel for the third party submitted I should make what might be considered the usual order for costs, that is, that the plaintiff pay the defendant's costs of and incidental to the action, including the costs of the third party proceedings, and that the defendant should pay the third party's costs of the third party proceedings.

Plaintiff's Submissions

[2] The plaintiff's counsel submission that there should be no order as to costs in the action between the plaintiff and the defendant appears to me to be based on a

misapprehension about the factual basis for his submission. He submitted that until 15 May 2020, the eve of the trial, the plaintiff "believed on reasonable grounds that the fracture to the base of his fifth metatarsal occurred in the subject incident on 19 February 2014". It was that injury, and that incident, which was the subject of the litigation. That submission was largely reliant on the fact that, based on the history the plaintiff provided to examining doctors and to WorkCover, that organisation had made statutory payments to him on account of the injury then suffered, had made a lump sum offer, and had obtained medical reports which, on their face, appeared to support the view that the alleged incident of 19 February had resulted in the fracture, which was, however, not detected on X-ray until after he suffered a further injury on 23 July 2014. That subsequent injury was the subject of a re-opening of the claim to WorkCover, but not of a common law claim.

[3] In order to understand what I consider to be the fallacy in the plaintiff's counsel's submissions, it is necessary to briefly consider the medical history of the plaintiff's initial injury, and the notes of conferences between two orthopaedic surgeons and the third party's legal advisors. Those consultations occurred only after I had given the third party leave to defend the proceedings about a month prior to trial. The details of those consultations are exhibited to an affidavit of the third party's solicitors, Sarah Yau, filed by leave on 18th May. Following the February incident, the plaintiff complained of symptoms which resulted in a diagnosis by his GP of right ankle strain. The defendant and third party contend the plaintiff's version of how that injury occurred is false. They also denied the plaintiff's version of how he was injured. For present purposes, it is unnecessary to resolve that issue.

[4] The plaintiff saw his GP at a medical centre called "Primary Beenleigh" on 21 and 24 February 2014. On 27 February, he again saw his general practitioner and told him he was much better. The GP notes that he then walked with a normal gait. The records of those consultations are at pages 172/3 of the trial bundle. Following the initial injury, the plaintiff returned to work on about the 3rd of March, only two weeks after the injury. Thereafter, he had other consultations with GPs about unrelated medical issues on 8 May, 13 May, 1 June and 22nd of June 2014 (see PPS 231/3 of the trial bundle). The plaintiff made no complaint to any of those doctors about right foot pain,

or of any difficulty walking or working, at the time of those consultations. The records are entirely silent about such matters.

[5] On 23rd of July he says he suffered immediate onset of pain when he was again injured in the course of his employment.

[6] The third party lawyers conferred with Dr Donnelly on 7 and 8th of May, and Dr Saxby on the 11th of May, 2020. When the third party's lawyers disclosed notes of those consultations to the plaintiff's solicitors, the plaintiff's solicitors discussed them with the orthopaedic surgeon on whom they relied, Dr Gamboa. He indicated to the solicitors that he agreed with the views of both Dr Donnelly and Dr Saxby that the fractured metatarsal, on balance, occurred in July and not February 2014, contrary to his earlier expressed opinion. Importantly, Dr Donnelly had told the third party's lawyers that a fracture at the base of the fifth metatarsal would cause localised pain and tenderness approximately halfway along the length of the foot, with extreme difficulty weight bearing and mobilising for at least three to four weeks.

[7] This view is inconsistent with the plaintiff's description of symptoms to, and observations of, his general practitioner in the days following the February incident. It is also inconsistent with his return to work on 3 March. Dr Saxby too said the plaintiff would, if the toe had been fractured, have experienced pain localised on the side of his foot. The swelling and tenderness the GP observed in February 2014 was, Dr Saxby said, not to the same anatomical area as one would get symptoms from a fracture at the base of the fifth metatarsal. While the opinions of those doctors also significantly relied on observations of X-rays taken in July 2014, that is not of present importance.

[8] What is, in my view, critical and destructive of the plaintiff's counsel's submission, is that the symptoms he suffered in February 2014 were both transitory and, more importantly, different in nature and location than those he must necessarily have suffered when he suffered the fractured metatarsal. In that circumstance, he must have known he suffered not only different symptoms in and after the July incident than he had in February, but as a consequence, would have known, and should have pointed out to examining doctors and in his declarations to WorkCover and medical practitioners, that he had suffered a new and different injury. He does not appear to have done so. Instead, he told Dr Donnelly the pain he suffered in July 2014 and that

five months earlier was "pain in a similar region". This must, I infer from the conference notes, have been incorrect.

[9] Dr Gamboa, in his report, says the plaintiff complained of sharp lateral sided right foot pain after his initial injury, and of excruciating lateral right-sided foot pain after the July incident. This description of his symptomology in February 2014 is not consistent with the contemporaneous general practitioner's records of what he told them and what they observed.

[10] In such circumstance, and putting aside for the moment the defendant's counsel's submission that the plaintiff's allegations of how the February incident occurred are wholly false and fraudulent, I do not accept the plaintiff's counsel's submission that at all times prior to 15 May 2020, the plaintiff "believed on reasonable grounds that the fracture to the base of his fifth metatarsal occurred in the subject incident on 19 February 2014".

[11] Such a view is inconsistent with the medical evidence as to the consequences of such an injury, and this would have been readily apparent to the plaintiff. He must have known his July symptoms and February symptoms were unalike. I do not accept the submission made on behalf of the plaintiff that until May 2020, the medical evidence "always supported the plaintiff's claim that the principal injury occurred on 19 February 2014". In making that submission, counsel relied, inter alia, on the report of Dr Gamboa to which I have already briefly referred. In that report, Dr Gamboa concludes that the fracture occurred in the February incident. But as I pointed out to counsel on the morning of the hearing of this matter, that conclusion was effectively made in a vacuum. The doctor made no attempt to explain why or how he concluded that the fracture occurred then, rather than in July. He merely expressed a preference for the view that it had occurred at the time of the earlier incident, without explaining why.

[12] In my view, his opinion about that issue was inadmissible opinion evidence, and certainly not evidence that I, as the trial judge, would or could have relied on. In such circumstance, it was, in my view, incumbent on the plaintiff's legal advisors to have raised this shortcoming in his report with Dr Gamboa, and with the plaintiff. If that had been done, I infer Dr Gamboa would have found it necessary to refer to

contemporaneous GP records and to X-rays taken both in February and in July 2014. This would thus have caused him to then come to the conclusion that he ultimately did when asked about such matters on the 14th of May 2020. The failure of the plaintiff's lawyers to have done this also undermines the submission that there should be no order as to costs.

[13] I also note, however, that the same failure can be attributed to the defendant's legal advisors. They too might well have raised the matter with Dr Saxby, from whom they obtained a report, or from Dr Donnelly, who provided one to WorkCover. It was only after I gave the third party leave to defend the matter that such inquiries were made by the third party lawyers. And the third party only obtained such leave shortly before trial, so they, too, might be considered not entirely blameless. But, of course, it is trite to say the plaintiff must prove his case, and in my view, the report of Dr Gamboa would not have enabled the plaintiff to prove what the plaintiff alleged. This is, of course, unsurprising since, as I have said, the symptoms the plaintiff suffered in February were not consistent with a fractured fifth metatarsal.

[14] The plaintiff's counsel also seeks to attribute to WorkCover responsibility for the plaintiff having instituted proceedings, by reason of WorkCover's decision to treat the July 2014 incident as an aggravation of the February incident, and to assess him as having suffered an impairment in function due to the first incident. But that decision was made in circumstances where the plaintiff asserted he had ongoing pain after February 2014. In addition to what I have said, a further example of that is that he told Mount Warren Park Medical on 6th of October 2015 that, after the February incident, "three months later, he still had pain and damaged again" (see page 506 of the trial bundle).

[15] That history is again not consistent with the actual history of the initial injury - namely, full recovery from it and then suffering a different injury and different symptoms in July. The assertion that the plaintiff "merely reported each injury and relied on the medical advice he received" is disingenuous, since the medical advice itself depended on the history that the plaintiff gave. In such circumstances, I do not think that the plaintiff's submission is supported by consideration of contemporaneous records.

[16] The plaintiff's counsel also made submissions concerning the provisions of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('WCRA'). Section 316 of that Act relevantly provides:

> 316. Principles about orders as to costs
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> 1. No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceedings.
>
> 2. If…an insurer makes a written final offer of settlement that is refused, the court must, in the following circumstances, make the order about costs provided for –
>
> (a) …..
>
> (b) if the court later dismisses the worker's claim, makes no award of damages…..– an order that the worker pay the insurer's costs on the standard basis from the day of the final offer.

[17] The plaintiff's counsel concedes that, prima facie, this section would entitle the defendant to an order for costs. He points, however, to section 318B(4) which provides that factors that become apparent only after the parties completed the exchange of written final offers can be taken into account if the section otherwise applies. Section 318B(3), however, provides that the section only applies:

> "…if an award of damages is affected by factors that were not reasonably foreseeable by a party at the time of making or failing to accept a written final offer."

[18] Putting aside the question whether an order to dismiss the plaintiff's claim can be characterised as an award of damages, within the meaning of that term as used in subsection (3), it is my view that the section has no application in this case. In my view, it was reasonably foreseeable by the plaintiff that he may be confronted with the fact that medical opinion was that he suffered the fractured injury in July and not February, for the reasons I have already set out.

[19] Consequently, it is my view that section 318B has no relevance to the plaintiff's application.

[20] In circumstances where I do not accept the aetiology of the plaintiff's medical condition came to his knowledge only on the eve of trial, and where, if he had acted appropriately, the aetiology would have become apparent to his legal advisors very much earlier, the plaintiff's application that there be no order as to costs should be dismissed.

[21] It is appropriate that the plaintiff be ordered to pay the defendant's costs of the action. Indeed, the provisions of section 316 set out above appear to mandate such an order in circumstances where, as here, the insurer has made a written final offer of settlement that is refused and the Court later dismisses the plaintiff's claim.

Defendant' Application for Indemnity Costs

[22] Despite the provisions of section 316(2)(b) set out above, counsel for the defendant seeks an order that the plaintiff pay such costs on an indemnity basis. In his written submissions, counsel submits that the provisions of 316(2)(b) "compels" the Court to make a costs order in favour of the defendant in accordance with the section, but "does not preclude the making of an order for costs to be assessed on an indemnity basis". In support of that submission, counsel refers to the provisions of the *Uniform Civil Procedure Rules 1999* (Qld), and in particular to rules 685 and 703 in relation to indemnity costs. He relies also on the decision of *Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors*,[1] especially at paragraphs 24 to 27, 38 to 41, and 46 to 49.

[23] The similarity between that case, (at least in the Planning and Environment Court as opposed to the Court of Appeal) and this was that neither case proceeded to a hearing on the merits. But there was, in that case, no section similar to section 316 which mandated a particular order as to costs. In his submission, counsel for the defendant identified no authority to support his submission that an order for indemnity costs could be made. No submission was made as to how this Court could circumvent the apparent mandatory effect of section 316(1) which provides that no order about costs, other than an order allowed under the section is to be made in the claimant's proceedings.

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1 [2011] QCA 214.

[24] These matters were emphasised by the plaintiff's counsel in his written submissions in reply. In those submissions, counsel referred to *Sheridan v Warrina Community Co-operative Proprietary Limited & Anor*.[2] In that case, the plaintiff's claim for damages for personal injury against her employer was dismissed. Section 325 of the WorkCover Act was in virtually identical terms to the provisions of section 316 of the WCRA. In his judgment, Williams JA, with whom Helman J agreed, observed that the wording of subsection (1) was clear and unambiguous. His Honour found the section was "an all embracing provision as to costs", and said it was significant there was no section giving the Court a general power to make an order about costs "as it considers appropriate".

[25] Interestingly, in view of the defendant's counsel overall submission in this case that the plaintiff's claim was a fraudulent one, his Honour said, at paragraph 8 of his judgment:

"Counsel for the appellant drew the court's attention to the obvious unfortunate consequences of placing such a construction on the section. It would mean, for example, that even where a claim was dismissed as being fraudulent an order for costs could not be made in favour of WorkCover. It was therefore submitted that the court should find some way of construing s 325 so as to empower the court to make an order for costs in favour of WorkCover where the proceeding was dismissed."

[26] Such a contention was dismissed because it was inconsistent with the wording of the section. Importantly, Williams JA, in Sheridan's case, then referred to the submission of counsel in that case that the literal meaning of the words in the case – almost identical, as I have said, to the words of subsection (1) of section 316 in this case – were:

"…so obviously absurd that it could not have been intended by the legislature, and that this court should, in consequence, place a construction on the section, however strained and by adding words if necessary, which would more accurately reflect what a legislature, acting reasonably, must be presumed to have intended."

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2 [2004] QCA 308. ('*Sheridan*')

[27] His Honour, in rejecting that submission, noted that it could not be said that the literal construction of subsection (1) of section 325 of the WorkCover Act was not inconsistent with the object and intention of the statute.

[28] So too in this case, I do not discern that a provision which precludes WorkCover from ever recovering indemnity costs from a plaintiff who fails in his action, even if it be fraudulent (and I, at the moment, make no finding in this case about that) is necessarily inconsistent with the object and intention of the WCRA.

[29] His Honour in Sheridan's case considered the judgments of the High Court in *Cooper Brookes (Wollongong) Proprietary Limited v Commissioner of Taxation*,[3] dealing with issues of statutory construction, and said, at paragraph 19:

> "I can find nothing in the reasoning of the Judges quoted, which constituted the majority, which would justify this Court in the present circumstances construing s 325 in such a way as to recognise that on dismissing the respondent's proceeding the court had power to order the respondent pay costs to WorkCover. Reading the relevant statutory provisions in the way proposed by the majority was not contrary to an express provision of the statute."

[30] In his separate judgment, a very similar approach was adopted by Dutney J, with whom Helman J also agreed. At paragraph 36 of the judgment, his Honour noted that the effect of the provision there under consideration "seems odd". No doubt, the defendant would similarly submit in the circumstances of this case. But as his Honour pointed out, WorkCover is a statutory organisation set up to administer a compensation scheme for injured workers, a scheme to ensure workers are treated fairly, and, in this case, the legislature might have "baulked at making an injured worker" indebted to WorkCover for indemnity costs. In that case, Dutney J found that section 325(1) of the WorkCover Act, the equivalent of subsection (1) of section 316 of the WCRA, removes any power to award costs except in the specific and limited circumstances set out in the section.

[31] Consequently, I similarly conclude there is no power to award indemnity costs.

[32] I will, however, order that the plaintiff pay the defendant's costs, including costs of the third party proceedings, on the standard basis. Counsel for the plaintiff submitted such

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[3] (1981) 147 CLR 297.

an order would not be made in circumstances where the plaintiff did not pursue a claim against the third party, but pursued a claim only against the defendant on the basis of default of that party in its obligations as an employer to provide a safe system of work. He submitted that the third party proceedings were motivated by the defendant's own forensic considerations.

[33] While I might accept that to be factually so, in my view that does not mean it is not appropriate to order the plaintiff to pay the defendant's costs of the third party proceedings. There may often be reasons a plaintiff does not wish to sue other than his employer. Issues of multiplicity of costs may be one. But a plaintiff in the circumstances of this case could readily foresee that a defendant, acting reasonably, might join the truck owner or operator as a third party. Indeed, it could well anticipate that might occur. Its decision not to join the truck driver cannot determine that the defendant, if it did so, did so entirely at its own risk.

[34] The inclusionary order I propose relating to the third party proceedings is not inconsistent with the provisions of subsection (2) of section 316, since it is part of the "insurer's costs" within the meaning of the term used in subsection (b). This is so because of the circumstance that the defendant's decision to join the third party was, in my view, reasonable and plainly a foreseeable consequence of the plaintiff instituting proceedings, and in those proceedings allege that the cause of the plaintiff jumping from the truck was to protect a load from breaking free of the packaging when the lift device of the truck operated by an employee of the third party operated in a jerky fashion.

Third Party Costs

The remaining question concerns the issue of costs as between the plaintiff and the third party. The defendant's submission that the third party should pay the defendant's costs of the third party proceedings is based on the contention that the third party, personally and through its solicitors, has been uncooperative and in breach of its obligations under the WCRA, and in particular, that it has failed to provide statements of the truck driver, Mr Hughes, and of the director of the company, Mr Grey and a loss assessor's report obtained by the third party. It was submitted that if the third party had complied with its ongoing obligation of disclosure, the defendant would have caused

the plaintiff to be prosecuted and not paid him statutory benefits in excess of $128,000 from the 27th of February 2014 to the 27th of May 2016, as it did, and would not have commenced the third party proceedings, with resultant savings in costs.

[35] It should be noted that the defendant's contribution claim against the third party was only served on the 8th of December 2016. It seems clear from the material that the relevant statements were obtained by loss assessors in preparation of the report in 2017, and provided then to the third party's insurer. They were not provided to the third party's solicitors until the 21st of April 2020, and were then immediately disclosed (see paras 4 and 5 of the further affidavit of Sarah Yau sworn the 19th of May 2020).

[36] In considering the question, it is relevant to note that on the 23rd of February 2018, the defendant's solicitors wrote to the third party's solicitors advising that they did not then intend to commence third party proceedings, but a relevant factor in that determination was whether there was cooperation by Mr Hughes, and, if he did not cooperate, the defendant might be forced to issue third party proceedings. On the 29th of May 2018, the defendant's solicitors advised the third party's solicitors that they intended to speak to the owners of the third party and ask them to arrange a conference between them, their solicitors and Mr Hughes. The defendant's solicitors asked if they wished a legal representative to be present. The third party's solicitors, on that same day, asked the defendant's solicitors not to contact the third party directly, or to contact its employees.

[37] On the 8th of June the defendant's solicitors again wrote to the third party's solicitors saying that issuing third party proceedings would be "a last resort to compel Hughes and other witnesses" of the third party to give their accounts. On the 11th of June, the third party's solicitors advised that, as the defendant had not assured the third party that proceedings would not be instituted, the third party would not agree to the defendant's solicitors' request. Despite these matters, the defendant's solicitors wrote directly to the directors of the third party seeking to meet them and to interview Mr Hughes. The directors indicated they were happy to do so if their legal representatives were present.

[38] On the 28th of June, the third party's solicitors advised the defendant's solicitors that they would seek further instructions if the defendant would confirm third party proceedings would not be instituted. That position was again adopted in

correspondence of the 16th of July, when the solicitors stated the third party would not meet the defendant's solicitors "unless assured that proceedings would not be instituted".

[39] Only then, on the 6th of September 2018, did the defendants obtain leave to join the third party to the action. There were then offers and counter-offers to resolve the third party proceedings. The third party submits that a factor in favour of the Court making the order it seeks, namely, that the defendant pay the third party's costs, is that the defendants unreasonably refused their offer to settle the third party proceedings. I will refer to that issue shortly.

[40] I should say, however, that in the course of those negotiations, the defendant's solicitors, on the 18th of July 2019, requested that in order to consider the third party's offer, that copies of witness statements be provided and arrangements be made for the defendant's solicitors to interview relevant witnesses. This led to a further round of offers as to the arrangements for convening a meeting to allow the defendant's solicitors to speak to those witnesses. Reading the correspondence is like reading Catch-22.

[41] Eventually, on the 21st of April, I gave the third parties leave to defend the plaintiff's claim, and this resulted in the third party's lawyers speaking to Dr Donnelly and Dr Saxby. I conclude, this was a significant contribution to the resolution of the claim. It is, as I have said, inexplicable that neither the plaintiff, in particular, nor, the defendant's legal advisors had adopted such approach.

[42] Before turning to the third party's counsel's submission, it is necessary to refer to the most recent affidavit of the third party's solicitor, Ms Yau. She attests to having been informed by the claim's handler of the third party's insurer that signed statements of Mr Hughes and Mr Grey, a director of the third party, were provided to the insurer by the investigators on the 16th of February 2017. Subsequently, in about August 2017, some six months later, there was a change of claim's handler and the statements were not provided to the third party's solicitors until the 21st of April this year, and then, as I have said, disclosed to the defendant's solicitor on the following day. The solicitor's affidavit says that because the statement of Mr Hughes refers to the plaintiff requesting that he, Mr Hughes, lie about the circumstances of the accident, that would have

justified the solicitors in concluding the statements contained reasonable grounds for suspicion of fraud, and so would have justified the third party in withholding disclosure pursuant to section 284 of the WCRA.

[43] That contention is with all due respect, utterly without foundation. The entitlement to withhold relevant documents from disclosure under section 284 arises if an insurer or contributor has reasonable grounds to suspect a claimant of fraud, but provides that it may do so if to disclose it would alert the claimant to that suspicion or help further the fraud. The solicitor, understandably, does not attest to any belief that disclosing the documents to the defendant's solicitors would do either of those things.

[44] In my view, the failure of the third party to disclose the documents to the defendant's solicitor is inexcusable. The solicitors' obligation is not only to ensure that documents in its possession are disclosed in accordance with the provisions of the WCRA, but that it makes sure its client, and any insurer, are aware of the full extent of that obligation. That was, I infer, either not done or the insurer did not act in accordance with that advice, and as a result, the matter became unnecessarily complicated.

[45] It seems clear from the nature of the defendant's solicitors' letter that if such statements had been provided that, with even reasonable cooperation, the third party proceedings might have been avoided. But there are other issues also to be considered. I have referred already to the role of the third party's legal advisors in obtaining necessary and relevant information from Dr Donnelly and Dr Saxby, and of that effect on the subsequent information obtained by the plaintiff's advisors from Dr Gamboa that contributed significantly to the ultimate resolution of the trial. The defendant's counsel submits, in paragraph 29 of his written submissions, that such a factor is "commendable", but "of no relevance" to the issue of whether the third party proceedings should have been brought. But in my view, the proper characterisation of that issue is not whether it is relevant to the issue of whether or not proceedings ought have been brought, but whether it is relevant to the issue of costs in those proceedings. In my view it is, since it has saved all parties significant cost and time.

[46] The affidavit refers to the alleged failures of the defendant's solicitor itself with disclosure, but that is addressed by Mr Balaam in his most recent affidavit and appears to be explained in that affidavit. The third party's counsel also submits that the non-

provision of the statements was not relevant to the defendant's decision to join the third party to the action. She submits that the real motive for the defendant doing so was the defendant's concern that not to do so might expose him to a charge of negligence. But that assertion in the defendant's solicitor's affidavit was made in the circumstances I earlier described, which might have caused his concern that the third party would not cooperate with the defendant to defeat, if they could, the plaintiff's claim.

[47] The defendant's solicitor's statement, in contemporaneous correspondence, that he hoped to approach the matter cooperatively, and that in that circumstance, joinder would be unlikely, were a true expression of the defendant's solicitor's then belief. It is at least likely that, but for the third party's insurer's failure to disclose the statements, that the third party proceedings might have been avoided. In circumstances where the failure to have provided the relevant statements materially contributed to the decision to join the third party, but where the third party's appropriate involvement in the preparation of the matter has led to a significantly earlier determination of the matter and saving for costs, it is, in my view, appropriate than an order other than the usual order ought be made.

[48] Ultimately, I gave consideration to making no order to costs, but have finally determined that I ought order that the third party pay 30 per cent of the defendant's costs of the third party proceedings to reflect the significant breach of its statutory obligation, a breach, I might say, that was of third party's insurer's making, not of the third party's solicitors themselves.

Conclusion

[49] In the circumstance, the orders I make are the plaintiff pay the defendant's costs of the proceeding including costs of the third party proceedings to be assessed on the standard basis from the date of the defendant's mandatory final offer. The defendant's application for indemnity costs be refused. The third party pay 30% of defendant's cost of the third party proceedings to be assessed on the standard basis.