DISTRICT COURT OF QUEENSLAND

CITATION:	*Sentinel Springwood Retail Pty Ltd & Ors v Tomlinson & Ors* [2021] QDC 219
PARTIES:	**SENTINEL SPRINGWOOD RETAIL PTY LTD ACN 168 114 814 AS TRUSTEE FOR THE SENTINEL SPRINGWOOD RETAIL TRUST** (First Plaintiff) AND **BCC MACKAY INVESTMENT PTY LTD ACN 143 488 966 AS TRUSTEE FOR THE MACKAY RETAIL TRUST** (Second Plaintiff) AND **SENTINEL COUNTRYWIDE RETAIL LIMITED ACN 601 712 707 AS TRUSTEE FOR THE SENTINEL COUNTRYWIDE RETAIL TRUST** (Fourth Plaintiff) AND **SENTINEL REGIONAL OFFICE PTY LTD ACN 614 553 883 AS TRUSTEE FOR THE SENTINEL REGIONAL OFFICE TRUST** (Fifth Plaintiff) AND **SHIELD PROPERTY SERVICES PTY LTD ACN 149 144 016** (Eighth Plaintiff) **v** **NEIL DANE TOMLINSON** (First Defendant) AND **ARETE PARK PTY LTD ACN 626 064 453 IN ITS OWN RIGHT AND IN ITS CAPACITY AS TRUSTEE OF THE ARETE PARK TRUST** (Second Defendant) AND **CLAIRE LOUISE TOMLINSON** (Third Defendant) AND **VERUS CONSTRUCTION PTY LTD ACN 619 673 737** (Fifth Defendant)
FILE NO:	2456/19
DIVISION:	Civil
PROCEEDING:	Trial

ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 August 2021
DELIVERED AT:	Brisbane
HEARING DATE:	3, 4, 5 February, 19 March, 16 April 2021
JUDGE:	Porter QC DCJ

ORDER:

1. **The First Plaintiff (Sentinel Springwood) and the Second Plaintiff (BCC Mackay) pay the First Defendant's (Mr Tomlinson's) costs of the claims by those plaintiffs against Mr Tomlinson on the standard basis;**
2. **There be no order as to costs of the Fifth Plaintiff's (Sentinel Regional's) and the Fourth Plaintiffs' (Sentinel Countrywide's) claims against Mr Tomlinson relating to contracts with Bodel Projects Pty Ltd (Bodel);**
3. **Mr Tomlinson pay 80% of the costs of claims by Sentinel Regional against Mr Tomlinson relating to contracts with Growth Australia Pty Ltd on the standard basis;**
4. **Mr Tomlinson pay 80% of the costs of claims by Sentinel Countrywide against Mr Tomlinson relating the contract with the Fifth Defendant (Verus) on an indemnity basis;**
5. **Verus pay Sentinel Countrywide's costs of the claims by Sentinel Countrywide against Verus and of Verus' counterclaims on an indemnity basis;**
6. **There be no order as to costs in respect of the Eighth Plaintiff's claims;**
7. **Pursuant to Rule 697(2) UCPR, all costs orders be assessed as a proceeding in the District Court;**
8. **Mr Tomlinson pay interest up to judgment on the Sentinel Regional judgment sum in the amount of $9,785.41;**
9. **Mr Tomlinson and Verus pay interest up to judgment on the Sentinel Countrywide judgment sum in the amount of $9,895.73;**
10. **The orders made by Justice Dalton in the Supreme Court on 14 June 2018 and extended by the District Court on 3 February 2021 be discharged; and**
11. **Caveat Number 71887753 lodged on 19 June 2018 in respect of Lot 1 on RP 192335 be removed.**

CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – where plaintiffs contend it was inappropriate to apportion costs despite dismissal of some claims – where the relief granted in the proceedings could have been granted in the Magistrates Court – whether costs should be assessed on the basis of proceedings commenced in the District Court – where first defendant's first Calderbank offer was open for an unreasonable period of time, and second Calderbank offer held inefficacious as a single offer to all plaintiffs – whether fourth and fifth plaintiffs are entitled to costs of their failed claims – whether first defendant's conduct at trial merited an order for indemnity costs – where plaintiffs' Mareva orders were no longer sustainable as to the amount identified – where plaintiffs' caveat was in turn no longer sustainable – where plaintiffs had failed to seek orders adjusting the scope of the Mareva orders post trial
LEGISLATION:	*Magistrates Courts Act* 1921 (Qld), s. 4 *Uniform Civil Procedure Rules* 1999 (Qld), Rules 353, 360, 697
CASES:	*Calderbank v Calderbank* [1975] 3 All ER 333 *Commonwealth Bank of Australia v Saleh* [2005] NSWSC 843 *Oshlack v Richmond River Council* (1998) 193 CLR 72 *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439 *Sentinel Springwood Retail Pty Ltd & Ors v Tomlinson & Ors* [2021] QDC 159 *Wagners Cement Pty Ltd v Boral Resources (Qld) Pty Ltd (No. 2)* [2020] QSC 163
SECONDARY SOURCES:	P. Biscoe, *Freezing and Search Orders* (LexisNexis Butterworths, 2nd ed, 2008)
COUNSEL:	C. Johnstone for the Plaintiff
SOLICITORS:	Russells for the Plaintiff N. Tomlinson in person No appearance by the Fifth Defendant

SUMMARY

[1] On 5 August 2021, I handed down my reasons for judgment in this proceeding (the **Reasons**)[1] and made the following orders:

1. Judgment be entered against Mr Tomlinson and Verus in favour of Sentinel Countrywide for $41,838;
2. Judgment be entered against Mr Tomlinson in favour of Sentinel Regional for $40,613;
3. The claims of the plaintiffs are otherwise dismissed;
4. The counterclaims of Verus are dismissed; and
5. The Court will hear the parties on interest and costs and any residual matters not covered by the above orders.

[2] The parties have made submissions as contemplated by order 5. This judgment resolves those remaining issues. All defined terms in the Reasons have the same meaning in this judgment.

COSTS

Relevant aspects of the Reasons

[3] I will start by summarising some matters relevant to costs from the Reasons.

[4] The proceedings involved eight separate contracts which gave rise to distinct causes of action against Mr Tomlinson by different plaintiffs from the Sentinel Group, depending on which plaintiff was a party to the particular contract involved (though Shield advanced claims on all contracts).

[5] Those causes of action had been advanced variously against three different contractors who were parties to those contracts, as well as Mr Tomlinson, but the relevant Sentinel plaintiffs settled pre-trial against two of those contractors. This resolved the claims for damages against the two contractors. Those contractors were defendants in claims arising out of all but one of the eight contracts which were the subject of the various claims for damages.

[6] The Sentinel plaintiffs claimed the same loss against Mr Tomlinson in respect of their respective claims against him arising out of those seven contracts, as was claimed from the two contractors with whom settlement was reached. Although the causes of action were not identical, they had considerable overlap in issues and involved claims for the same loss in each case.

[7] The relevant Sentinel plaintiffs recovered sums from the contractors who settled the claims against them equal to, or exceeding, the loss sought in respect of the claims arising out of the contracts. Even though the same loss was sought in

[1] *Sentinel Springwood Retail Pty Ltd & Ors v Tomlinson & Ors* [2021] QDC 159.

respect of the separate claims against Mr Tomlinson, the Sentinel plaintiffs pressed their separate claims against Mr Tomlinson at the trial, on the basis that settlement funds from the contractors had been applied first to costs incurred in pursuing the contractors, rather than to the losses claimed against Mr Tomlinson, such that there remained a loss on those claims.

[8] I rejected that argument and concluded that the Sentinel plaintiffs had no loss remaining in relation to the causes of action against Mr Tomlinson arising out of the settled claims after the settlements were taken into account.

[9] In respect of the two contracts involving Growth Australia, I concluded that the funds paid by Growth Australia were sufficient to cover the costs incurred in pursuing Growth Australia up to that settlement plus the loss claimed arising from the Growth Australia contracts. That meant that there was no loss, even on the approach adopted by Sentinel to show residual loss, arising from the two Growth Australia contracts which were the subject of causes of action against Mr Tomlinson.

[10] Of course, Sentinel Countrywide did recover the secret profit paid to Mr Tomlinson by Growth Australia as specified in order 2 above of $40,613. However, that was not a claim for compensable loss arising out of entry into the Growth Australia contract, but rather a claim to strip Mr Tomlinson of a benefit.

[11] In respect of the five contracts involving Bodel, the settlement sum did not cover the whole of the loss claimed in relation to those five contracts against Mr Tomlinson plus the costs incurred on an indemnity basis in proceedings against Bodel and Mr McIntyre up to the time of settlement.

[12] However, I concluded for the reasons set out at paragraphs [388] to [394] of the Reasons that, on the facts of that settlement, Mr Tomlinson could not be bound by the application of the settlement sum unilaterally adopted by the respective Sentinel plaintiffs and could not be bound by the adoption of costs on an indemnity basis.

[13] In those circumstances, I held:

> [396] How then should the settlement sum be dealt with? It seems to me that it must be allocated to the damages sought against Mr Tomlinson for deceit. I reach that view because:
>
> (a) The settlement sum was paid at least in part on account of the same loss as is claimed in the deceit causes of action against Mr Tomlinson; and
>
> (b) That is the only loss which has been established against Mr Tomlinson in respect of the Bodel projects.
>
> [397] I suspect that there is much more to this subject than has been explored in this judgment. However, on the submissions put to me, I find that the plaintiffs have recovered the whole of the loss claim against Mr Tomlinson in respect of the Bodel projects, and accordingly, the claim in deceit must be dismissed. Further, I can see no basis why equitable compensation would produce a different result in these circumstances. That claim must also be dismissed.

[14] The consequence of that finding was that the first and second plaintiffs failed against Mr Tomlinson at trial because they failed to establish any loss in respect of

the claims advanced against him (all of which were compensatory in nature). They did, however, otherwise establish that Mr Tomlinson had engaged in deceit and had breached his fiduciary duties.

[15] Sentinel Regional, the fifth plaintiff, succeeded against both Mr Tomlinson and Verus in respect of the Dubbo contract, recovering a judgment for the loss on that contract arising out of Mr Tomlinson's deceit, conspiracy and breach of fiduciary duty, and out of Verus' conspiracy and knowing assistance in the amount of $40,613. Verus' counterclaims were also dismissed.

The plaintiffs' submissions

[16] The plaintiffs seek an order for costs against both Mr Tomlinson and Verus on the indemnity basis, seemingly in respect of the whole of the costs of the proceedings (despite failing on a number of causes of action).

[17] The foundation for that order is encapsulated in this submission, made after reviewing authorities:[2]

> These authorities suggest a growing acceptance in superior courts that where plaintiffs are victims of fraudulent conduct and are forced to litigate in the face of defendants who, despite their fraudulent conduct, instead choose to "roll the dice" such a defence will inevitably be maintained in wilful disregard of known facts, and thus it is appropriate that the plaintiff be indemnified for its costs.

[18] The plaintiffs contend that that principle applies to the trial of these proceedings and relied on:

(a) My findings which rejected Mr Tomlinson as a credible witness on all matters;

(b) Mr Tomlinson's admissions to much of the conduct said to be deceitful arising out of his fabrication of quotations; and

(c) My rejection of Mr Johnson's evidence and findings of the conspiracy between him and Mr Tomlinson.

[19] Sentinel Countrywide advances a separate basis for an indemnity costs order against Verus. It relies on an offer to settle, made to Verus under Rule 353 *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), by which Sentinel Countrywide offered to settle all claims against Verus for $40,000 plus costs assessed on the Magistrates Court scale, with interest abandoned.

[20] Sentinel Countrywide beat that offer because it obtained judgment against Verus for $41,838, and assuming it is entitled to at least an order for standard costs (which it is) and interest, it will have beaten that offer at trial by a reasonable margin.

[21] The plaintiffs' submissions grapple with the fact that the first, second and eighth plaintiffs failed in their claims against Mr Tomlinson at trial. Two points are made.

---

[2] Written Outline of the Plaintiffs as to Costs and Interest at paragraph [2.19] (**Plaintiffs' Outlines**).

[22] **First**, they submit that evidence led in respect of the failed claims was necessary to claims brought against Mr Tomlinson and Verus which succeeded. It is submitted that:[3]

> Regardless of the success or otherwise of those claims, Shield Services would still have been entitled to lead that evidence in furtherance of its successful claims against the defendants.

[23] Shield Services' claims were dismissed. I infer this was a slip and the submission meant to refer to Sentinel Countrywide.

[24] **Second**, the plaintiffs referred to Justice Bond's judgment in *Wagners Cement Pty Ltd v Boral Resources (Qld) Pty Ltd (No 2)* [2020] QSC 163, where his Honour, relevantly:

(a) Stated an uncontroversial list of factors which might lead to costs being awarded other than by reference to individual 'events'; and

(b) Restated the principle in *Oshlack v Richmond River Council* (1998) 193 CLR 72.

[25] It is convenient to set out the passage:

> [9] I summarised applicable general principles in *Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors (No 2)* [2017] QSC 266 in the following passage:
>
> > [4] The following summary of general principle derives from *Thiess v TCN Channel 9 Pty Limited (No 5)* [1994] 1 Qd R 156 at 208-209, *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at [84], *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)* [2009] QCA 239 at [3]-[7], and *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd* [2015] QCA 168 at [1]:
> >
> > (a) Costs of an application in a proceeding are in the discretion of the Court but follow the event unless the court orders otherwise: UCPR r 681.
> >
> > (b) The word "event" is to be approached distributively with the consequence that it refers to the event of an issue or of each separate issue, if there is more than one, in the proceeding.
> >
> > (c) The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the Court considers that some other order is more appropriate.
> >
> > (d) The circumstances which a Court might consider in determining whether some other order is more appropriate, and, if so, its form include:
> >
> > > (i) the preference to avoid the complicated form of assessment that would follow if different issues are determined in different directions as between the parties and costs were to be awarded in respect of issues in the technical sense;
> > >
> > > (ii) the possibility of taking the approach of identifying heads of controversy or "units of litigation" (rather than what might technically be regarded as issues on the pleadings) as the criterion for awarding costs;

[3] Plaintiffs' Outlines at paragraph [4.2].

> (iii) where a party has succeeded on one of two ways to the same outcome in a particular unit of litigation, a court might regard the costs of the second way on which that party failed as not so distinct conceptually or practically as to warrant making a costs order which reflected that party's failure on the second avenue of success; and
>
> (iv) on the other hand, where, in a particular unit of litigation, there are multiple issues which are determined in different directions as between the parties, a court might form an overall impression having regard to the significance of the issues, the way they were determined, and the amount of time and cost spent on them, and order one party to pay a proportion of another party's costs as a way to reflect fairly the parties' comparative success or failure in the outcome which was obtained.
>
> [5] None of the parties supported the notion of an order of costs on an issue by issue basis in relation to the applications. I agree with that choice. The complexity which would be involved in the costs assessment which such a form of order would necessitate makes that a most unattractive outcome. …
>
> [10] In hindsight, that summary of general principle would have been improved by recording that the fundamental principle which underlies the policy choice that costs should follow the event, and which also informs the Court's assessment as to what is appropriate within the calculus I identified, is that which McHugh J explained in *Oshlack v Richmond River Council*, namely:
>
> > [67] … the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is granted in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.
> >
> > [68] As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.
> >
> > [citations omitted]

[26] The plaintiffs contended that these principles meant it was not a case where it would be appropriate to apportion costs despite dismissal of some claims, based presumably on the points made in their substantive submissions.

Mr Tomlinson's submissions

[27] Mr Tomlinson made the following submissions.

[28] **First**, he referred to Rule 697 UCPR which relevantly provides:

> (1) Subrule (2) applies if the relief obtained by a plaintiff in a proceeding in the Supreme Court or District Court is a judgment that, when the proceeding began, could have been given in a Magistrates Court.

> (2) The costs the plaintiff may recover must be assessed as if the proceeding had been started in the Magistrates Court, unless the court orders otherwise.

[29] Mr Tomlinson correctly contended that the relief granted in the proceedings could have been given in a Magistrates Court. The claims which succeeded were all personal actions which fell within the civil jurisdiction of that Court under s. 4 *Magistrates Courts Act* 1921 (Qld). That applies to the equitable,[4] as well as the common law, personal actions. Mr Tomlinson submitted that in those circumstances, costs should be assessed on the relevant Magistrates Court scale.

[30] I reject that submission. I order that the costs orders in these proceedings be assessed as a proceeding started in this Court. I make that order because:

(a) The proceedings were complex, factually and legally;

(b) When the proceedings commenced, they reasonably included relief which could not have been given in the Magistrates Court; and

(c) The trial was of a scale which would not have comfortably been accommodated in the civil jurisdiction of the Magistrates Court.

[31] In my view, the plaintiffs were correct to prosecute the proceedings in this Court.

[32] **Second**, Mr Tomlinson relied on two offers which he attached to his submissions.

[33] The first of those offers, marked Exhibit A to the submissions, was objected to by the plaintiffs on the basis that it was related to the mediation between the parties and that the plaintiffs had not consented to the disclosure of that document (Exhibit C to the submissions was objected to on the same basis, as to which see below). Mr Tomlinson contended in response that the documents had been tendered in his tender bundle. The plaintiffs' solicitors submitted that the documents had not been able to be located in that bundle (which was Exhibit 9 in the proceedings). That submission was not disputed by Mr Tomlinson.

[34] Ultimately, that issue is moot in relation to Exhibit A. That document contains what purports to be a *Calderbank* offer made on 11 September 2019. So far as I could tell, that offer was open only for acceptance for 2 hours and 29 minutes. That was not a reasonable time for its consideration, notwithstanding the prompt response from the plaintiffs' solicitors (likely provoked by the short timeframe on the offer). For that reason, I am not persuaded that it was unreasonable for the plaintiffs to reject that offer.

[35] In any event, another *Calderbank* offer was made less than two weeks later by a solicitor on behalf of Mr Tomlinson and Mrs Tomlinson, with more details and open for acceptance for a reasonable period. That offer was made on 1 October 2019. That letter provided:[5]

> **Without Prejudice Save As To Costs**

---

[4] *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439.

[5] Written Outline of the First Defendant Neil Tomlinson as to Costs and Interest at Exhibit B (**First Defendant's Outlines**).

Dear Colleagues

We refer to the above matter.

Our clients have limited funds available to them to defend this matter. The purpose of this correspondence is to make an offer on the basis those funds be applied towards settlement of this proceeding rather than continued litigation.

On 22 June 2018 affidavits were filed by Mr & Mrs Tomlinson setting out their financial position. Those affidavits (excluding annexures) are **enclosed** for your convenience.

Our clients' financial position since the swearing of those affidavits has deteriorated as a result of the legal fees incurred in this proceeding. As your client would know, the only asset of any value is the property jointly owned by Mr & Mrs Tomlinson, being 327 Rowley Road, Burpengary (**the Property**). The Property has little (if any) equity in it and is unlikely to assist your client in enforcement of any judgment or bankruptcy should your client participate as a creditor.

What was not made clear by our clients when making their offer to your clients on 11 September 2019 was that the funds for that settlement would be advanced by family members on our clients' behalf, as our clients do not have that money available.

Our clients' family members are prepared to advance funds for the purpose of a settlement. If this matter proceeds to trial and your client is ultimately successful, the money our clients' family members would have contributed towards a settlement will not be available.

Should your clients be successful at trial, our clients will inevitably face bankruptcy. Given our clients' financial positions, bankruptcy will not result in a better financial outcome.

Given the above, our clients make the following offer in full and final satisfaction of your clients' proceeding S2456/2019 (**Proceeding**):

1. Our clients shall pay your clients the sum of $100,000 (**Settlement Sum**);
2. Payment of the Settlement Sum shall be made as follows:
    a. $70,000 within 21 days of acceptance of this offer (**First Tranche**);
    b. The balance of $30,000 by way of monthly instalments of $5,000, payable by the last business day of each month, commencing 31 October 2019 (**Second Tranche**);
3. The first and third defendants will secure their obligations to pay the Second Tranche by granting a mortgage in registrable form over the Property;
4. The mortgage shall be held in escrow by the plaintiffs' solicitors and upon payment in full of the Second Tranche the mortgage will be returned to Redchip Lawyers;
5. Payment of the Settlement Sum is in full and final satisfaction of all claims the plaintiffs have against the first, second and third defendants, including any order for costs in the Proceeding;
6. Upon payment of the First Tranche, the parties will do all things necessary to discontinue the Proceeding against our clients;
7. The parties shall bear their own costs of the Proceeding; and
8. The parties shall enter into a Deed of Settlement reflecting the above terms.

In making then above offer, we ask your client to consider the following matters:

1. Mrs Tomlinson is an innocent party in this litigation. It is clear from the material filed in this proceeding that Mrs Tomlinson had no knowledge of the actions of Mr

Tomlinson. Notwithstanding, Mrs Tomlinson is now faced with the prospect of bankruptcy and an uncertain future through no fault of her own;

2. Our clients have already paid your clients the sum of $49,356.85 being:

    a. $22,000 being the Verus Payment; and

    b. $27,356.85 on 8 May 2019 in satisfaction of the costs order; and

3. Our clients have already incurred significant financial cost in this litigation.

Our clients offer remains open for 7 days at which time it shall lapse. Should you wish to discuss this matter please do not hesitate to contact the writer on (07) 3223 6100.

[36] Mr Tomlinson's submissions referred to the list of factors regularly cited as informing whether it was imprudent for a party to reject a *Calderbank* offer, and submitted that costs should be assessed on a standard basis up to the offer, and that "the plaintiff pay the defendants costs of the proceedings…on an indemnity basis thereafter",[6] though no reasoning was advanced applying those factors to the circumstances of this case.

[37] **Third**, Mr Tomlinson submitted that regard should be had to the failure of the plaintiffs on some of the claims against him. He submits that not only should the plaintiffs not recover any costs in respect of those claims, but that the unsuccessful plaintiffs should pay his costs of those claims.

[38] He alternatively submits that the mixed success of the plaintiffs could be reflected in an order made under Rule 687 UCPR, which provides:

(1) If, under these rules or an order of the court, a party is entitled to costs, the costs are to be assessed costs.

(2) However, instead of assessed costs, the court may order a party to pay to another party—

    (a) a specified part or percentage of assessed costs; or

    (b) assessed costs to or from a specified stage of the proceeding; or

    (c) an amount for costs fixed by the court; or

    (d) an amount for costs to be decided in the way the court directs.

[39] He proposes a rather complex order in the following terms:[7]

4.6 Given this, any costs recoverable by the plaintiffs from the First Defendant should be based on a percentage of overall assessed costs up to the time of which each defendant settled their claims:

1/7th up until 29 March 2019 – Growth settlement
1/6th up until 11 July 2019 -Bodel/McIntrye settlement
1/4th up until 7 September 2020 Liquidation of Arete Park
1/3rd up until 29 September 2020 – Claire Tomlinson settlement
½ thereafter

[6] First Defendant's Outlines at paragraph [3.13].
[7] First Defendant's Outlines at paragraphs [4.6]-[4.7].

> 4.7 In addition, the Plaintiffs should only be able to claim costs based on a division of the eight Plaintiffs, with judgements against the First Defendant found in favour of the Fourth and Fifth Plaintiff only:
>
> First Plaintiff - Sentinel Springwood Retail Pty Ltd
> Second Plaintiff - BCC Mackay Investments Pty Ltd
> Third Plaintiff - Sentinel Office NO.1 Pty Ltd
> Fourth Plaintiff - Sentinel Countrywide Retail Limited
> Fifth Plaintiff - Sentinel Regional Office Pty Ltd
> Sixth Plaintiff - Sentinel Industrial 5 Pty Ltd
> Seventh Plaintiff - Sentinel Robina Office Pty Ltd
> Eighth Plaintiff - Shield Property Services

[40] **Fourth**, Mr Tomlinson relies on Exhibit C to his submissions which is a Mediation Position Paper. The plaintiffs objected to the tender of that document on the costs. They claim it is, and remains, without prejudice. Mr Tomlinson's response is that:

(a) He had already included the information in his opening; and

(b) The Court would be misled if the document was not put before it.

[41] Not surprisingly given its heading, he does not dispute that the document was used in a mediation.

[42] I reject his arguments that either of the matters he identifies are sufficient to answer the without prejudice privilege attaching to the document. The fact he included information from the without prejudice document in his opening (if that be correct) does not constitute an implied waiver of without prejudice privilege in the document. Further, I can see no reason why this document is necessary to avoid the Court being misled. The basis for that submission seems to be that as the dispute is over, the Court is entitled to know everything, even without prejudice communications, on costs. That is wrong in law. However, the information in Exhibit C does not, so far as I can tell, play a part in any substantive submission anyway.

[43] **Finally**, Mr Tomlinson advances a calculation based on amounts already recovered and costs sworn to by the plaintiffs which results in "an expected maximum figure" for costs per plaintiff on the standard basis of $63,760.24. There are so many assumptions in this figure as to make it of little use in practically resolving the costs issue. Further, it involves matters which are really matters for assessment, not for determining what costs orders to make. I will not refer further to this submission.

Analysis

Preliminary observations

[44] I make the following observations.

[45] **First**, both parties put submissions to me, which did not distinguish between the individual claims by the several plaintiffs. I do not consider that costs can properly be determined on that basis. Each of the Sentinel plaintiffs advanced distinct

claims against Mr Tomlinson at trial. Further, there were quite distinct outcomes and quite distinct considerations relevant to costs depending on the contractor involved. While I am conscious of the importance of making efficient costs orders, I do not think the individual outcomes can be ignored.

[46] **Second**, the consequence of the first point is that Mr Tomlinson's offer of 1 October 2021 is inefficacious as a *Calderbank* offer, because it makes a single offer to all the Sentinel plaintiffs jointly. While the ultimate outcome indicates that the total offered was in the interests of the plaintiffs as a whole, I do not consider that it can be inferred it was unreasonable for any individual plaintiff to have rejected that rolled-up offer in respect of its individual claim. As I have already observed, there were quite distinct considerations for each claim and each plaintiff. Further, each plaintiff was a separate legal entity. In those circumstances, it is not possible meaningfully to compare the outcome at trial to the 1 October 2021 offer. The same holds true of his earlier informal offer.

[47] **Third**, while the position of each plaintiff must be considered separately, it is possible, in my view, to deal with costs issues by reference to three categories of claims:

(a) The Bodel claims;

(b) The Growth Australia claims; and

(c) The Verus claims.

The Bodel claims

[48] I reject the plaintiffs' contention that I ought to order indemnity costs for the Bodel claims against Mr Tomlinson:

(a) **First**, while he defended the five Bodel claims, Mr Tomlinson did not conceal his fraudulent conduct in altering the quotations and putting them to the relevant plaintiffs. He did give evidence, which I ultimately rejected, that the figures had been worked out properly at the time using estimation software, and that somehow, his concerns about licensing justified his conduct. However, a defence of that kind did not amount to conduct which should attract indemnity costs; and

(b) **Second**, Mr Tomlinson defended the Bodel claims successfully. It would be strange if Mr Tomlinson could be required to pay costs of claims he defended successfully, much less that he could be required to pay costs on an indemnity basis.

[49] The question which remains is what costs order to make in respect of the Bodel claims. For convenience, I set out the relevant plaintiff for each relevant claim.

Project	**Plaintiff**
Townsville Property	Sentinel Countrywide
Springwood Property	Sentinel Springwood
Mackay Property	BCC Mackay
Creek Street Property	Sentinel Regional

Springwood Property AC	Sentinel Springwood

[50] It is convenient to start with Sentinel Springwood and BCC Mackay because those parties failed entirely at trial. There should be no order for costs in their favour. Further, I can see no reason why Mr Tomlinson should not be entitled to costs of those events in his favour, albeit on a standard basis.

[51] Sentinel Countrywide and Sentinel Regional, on the other hand, succeeded at trial on the Growth Australia and Verus claims respectively. Mr Johnstone contended, on their behalf (as I understood it), that the facts alleged in the other Bodel claims were relevant to making out the claims on which those plaintiffs succeeded. I disagree, at least to the extent of justifying the costs of those failed claims being recovered by those plaintiffs:

(a) The plaintiffs did not identify with precision why any particular allegation in the failed claims was material to the successful claims. Not everything would have been. The conspiracy claims against Mr Tomlinson were irrelevant and abandoned. Indeed, the lack of evidence of any kick back from Bodel was an oddity, which made those claims different from the others and undermined the basis for relying on those as some kind of similar fact or tendency evidence; and

(b) Mr Tomlinson (as I have observed) admitted the pattern of deception involved in altering and fabricating quotations, so proving more such examples would not have added much to the other claims, not least because they could have been, and would have been, admitted in cross-examination.

[52] Further, for the same reasons, I do not consider that Sentinel Countrywide and Sentinel Regional are not entitled to the costs of their failed Bodel claims and Mr Tomlinson is entitled to benefit from his success on those claims (though as will be seen, not by a costs order in his favour).

[53] To be clear (and for the benefit of any costs assessment), neither Sentinel Countrywide nor Sentinel Regional are entitled to recover their costs to the extent that those costs were incurred in relation to the Bodel claims.

Growth Australia claims

[54] Sentinel Regional failed in all its claims against Mr Tomlinson except the secret profit claim. Further, in respect of that claim, Mr Tomlinson did not conceal receipt of the payment at trial and conceded most of the key facts relating to the context of its receipt. While Mr Tomlinson was not frank about all the circumstances of his conduct in relation to the secret profit, I do not think the circumstances justify awarding indemnity costs against him for defending that claim.

[55] However, I do accept that Sentinel Regional is entitled to costs on a standard basis in relation to the secret profit claim. Further, the allegations relating to the other

Growth Australia claims were relevant allegations to establishing the secret profit claim. That needs to be taken into account in formulating any order.

[56] A single costs order is the most efficient course as between Mr Tomlinson and Sentinel Regional, which takes into account Mr Tomlinson's success on Sentinel Regional's Bodel claims and Sentinel Regional's success on the Growth Australia claims. Bearing in mind the relative scope of the two units of litigation, I think that a just costs order is that Mr Tomlinson pay 80% of Sentinel Regional's costs of the Growth Australia claims on the standard basis.

Verus claims

[57] Given its success, Sentinel Countrywide is entitled to its costs of the Verus claims against Mr Tomlinson and Verus. The question is whether those costs should be on a standard or indemnity basis.

[58] As against Verus, Sentinel Countrywide is entitled to its costs on an indemnity basis because it obtained an order no less favourable than its offer to Verus.[8] Verus advanced no argument why a contrary order should be made.

[59] An indemnity costs order ought also to be made against Mr Tomlinson. In contrast to his position in respect of the other claims, he failed on the claims relating to the Dubbo works. Further, he committed himself to a sophisticated and complex account which I rejected as false. His conduct amounted to dishonestly obtaining a benefit from his employer by conspiring with Verus. I consider his manner of conducting the trial in this respect merits an order for indemnity costs.

[60] A single costs order is (again) the most efficient course as between Mr Tomlinson and Sentinel Countrywide, which takes into account both parties' success against the other. Bearing in mind the relative scope of the two units of litigation, I think that a just costs order is that Mr Tomlinson pay 80% of Sentinel Regional's costs of the Verus claims on the indemnity basis.

Shield

[61] Shield failed on its claims. However, its role in the proceedings separate from the specific claims of the other plaintiffs was immaterial. However, to avoid doubt as to how to deal with Shield's position, I will order that there be no order as to costs in relation to the claims by Shield in the proceedings.

Costs orders

[62] The result of the above analysis is that the following orders are made as to costs:

(a) Sentinel Springwood and BCC Mackay pay Mr Tomlinson's costs of the claims by those plaintiffs against Mr Tomlinson on the standard basis;

(b) There be no order as to costs of Sentinel Regional's and Sentinel Countrywide's Bodel claims against Mr Tomlinson;

---

[8] Rule 360(1)(a). There is no question that Sentinel Countrywide was willing and able to carry out what was proposed in the offer as required by Rule 360(1)(b).

(c) Mr Tomlinson pay 80% of Sentinel Regional's costs of the Growth Australia claims by Sentinel Regional against Mr Tomlinson on the standard basis;

(d) Mr Tomlinson pay 80% of Sentinel Countrywide's costs of the Verus claims by Sentinel Countrywide against Mr Tomlinson on an indemnity basis; and

(e) Verus pay Sentinel Countrywide's costs of the claims by Sentinel Countrywide against Verus and of Verus' counterclaims on an indemnity basis; and

(f) There be no order as to costs in respect of Shield's claims in the proceedings.

INTEREST

[63] I am persuaded that this is an appropriate case for compounding interest. Both judgments are for amounts that arose from a fraudulent breach of fiduciary duty by Mr Tomlinson (and participation in that breach by Verus), and no good reason is shown why those funds were not put to use, at least in reducing liabilities in mortgage or overdraft accounts. Mr Tomlinson, for his part, contends that recovery of the loss from Growth Australia was relevant. It is not. The point of the order is to recover his gain from holding the funds, not to address a loss to Sentinel from being kept out of those funds.

[64] I therefore order that:

(a) Mr Tomlinson pay interest up to judgment on the Sentinel Regional judgment sum in the amount of $9,785.41; and

(b) Mr Tomlinson and Verus pay interest up to judgment on the Sentinel Countrywide judgment sum in the amount of $9,895.73.

OTHER ORDERS

[65] Mr Tomlinson seeks the discharge of the caveat over his property on the basis that no judgment was given to sustain the caveat. This submission misconceives the basis of the caveat. The grounds relied upon in the caveat were not just claims in the proceedings for proprietary remedies, but also included the Mareva orders made by Justice Dalton in the Supreme Court on 15 June 2018 (the **Mareva orders**).

[66] The caveat relates to a residential property owned by Mr Tomlinson and his wife as joint tenants (the **Property**). The caveator is identified in a schedule as all the Sentinel plaintiffs, along with some Sentinel entities which were not, at the time of trial, parties to the proceedings. Item 4 Grounds of Claim provides:

> An Order of the Supreme Court of Queensland made on 15 June 2018 restraining the registered owners from disposing or, dealing with or diminishing the value of their assets, including the land described in Item 2; and that the registered owners have paid to the registered mortgagee sums received by them as secret commissions in breach of the

> fiduciary duties of Neil Dane Tomlinson, entitling the caveators to trace such payments into the interests of the registered owners in the said land.

[67] Mr Tomlinson correctly submitted that no equitable proprietary remedies were granted in relation to the Property in the proceedings. However, the alternative grounds for the caveat remain, because on 3 February 2021, I extended her Honour's Mareva orders until further order. However, I extended those orders only in respect of Mr Tomlinson.

[68] Despite my specific direction in Order 5, no further order was sought in respect of the Mareva orders by the plaintiffs after I delivered the Reasons. As will be seen, this leaves the Mareva orders in an unsatisfactory state which cannot be permitted to persist. It also raises issues about the sustainability of the caveat, at least in its current form.

[69] As to the Mareva order, the relevant order for present purposes is Order 5, which provides:

> The First, Second and Third Respondents shall not remove from Australia or in any way dispose of, deal with or diminish the value of any of their assets in Australia…up to the unencumbered value of $730,000…

[70] That order only now applies to Mr Tomlinson. However, the amount restrained cannot be sustained post-judgment. The effect of the orders made in the proceedings is that the total amount of the judgment obtained including interest against Mr Tomlinson is less than $100,000. There are also the orders for costs, but no estimate of the value of those orders is put before the Court, nor is there any indication that the plaintiffs intend to do so.

[71] This is an extremely unsatisfactory situation. A Mareva order involves an extraordinary interference in the affairs of a respondent. A party with the benefit of such an order has a duty to ensure that it does not operate oppressively and to seek its adjustment promptly when circumstances change. That duty remains after judgment is obtained.

[72] The order made on 3 February 2021 was not in a form which ordinarily contemplated continuing after judgment. The law is conveniently articulated in Mr Biscoe's text as follows[9]:

> **6.83** If the applicant is successful at the inter partes stage, the inter partes order may be expressed to be 'until further order', as was the freezing order approved by the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [75]. 'Until further order' is the classic formulation of the duration of an order intended to operate only until judgment in the action is given or termination of the suit: *Fatimi Pty Ltd v Bryant* [2002] NSWSC 750 at [228]-[232] per Campbell J who also said:
>
> > It is, of course, possible for a Mareva Order to continue in force after judgment has been obtained, if there are reasons to fear that assets of a judgment debtor might be dissipated, and execution thereby frustrated: *Balfour Williamson (Australia) Pty Ltd v Douterluigne* [1979] 2 NSWLR 844. However, in that case it is usual to make an express order at the time of judgment, that the Mareva Injunction continue in force in aid of execution *(Stewart Chartering Ltd v C&O Managements SA* [1980] 1 All

[9] Biscoe, *Freezing and Search Orders* (LexisNexis Butterworths, 2nd Edn).

> ER 718 at 719 per Robert Goff J; *Devlin v Collins* (1984) 37 SASR 98 at 99 per King CJ, 105 per Zelling J, 116 per White J; *Deputy Commissioner of Taxation v Winter* (1988) 92 FLR 327 at 329-330 per Yeldham J).
>
> **6.84** In *Cantor Index Ltd v Lister* [2002] CP Rep 25 where an interlocutory freezing order was expressed to be 'until further order', Neuberger J held that it continued after judgment until a further order was made. His Honour also held that the usual English provision for the order to expire if security by way of payment into court in a specified sum was made, did not include payment not court by a third party, pursuant to a post-judgment garnishee order, towards satisfaction of the judgment debt. In *Yamabuta v Tay* (1995) 16 WAR 262 it was held that a Mareva order expressed to be granted 'until trial' should be construed to mean until judgment in the action.
>
> **6.85** If at an inter partes hearing a freezing order is continued by consent until further order with liberty to apply, the following dicta of Palmer J in *Commonwealth Bank of Australia v Saleh* [2005] NSWSC 843 at [10]-[12] would be in point:
>
> > A plaintiff seeking an interlocutory injunction always ears the burden of demonstrating that the circumstances of the case warrant the Court, in its discretion, granting what can often be an intrusive remedy before the case is fully heard on the merits. An order that is commonly made by consent in proceedings where an interlocutory injunction is sought is that the injunction be granted against the defendant and continued 'until further order of the Court'; 'leave to apply' is usually granted in addition, although it is implicit in any event. The formulation 'until further order —liberty to apply' signifies that the defendant is at liberty to apply to the Court at any time prior to final determination of the proceedings in order to ask the Court to exercise its discretion afresh as to whether the interlocutory injunction should be continued.
>
> As a general rule, if a defendant who has consented to an interlocutory injunction 'until further order', brings the matter back before the Court for further consideration, it remains the burden of the plaintiff who obtained the injunction to satisfy the Court that the injunction should be continued; the mere fact that the defendant has previously consented to the injunction 'until further order' does not reverse the burden so that the defendant must then satisfy Court that the injunction should be discharged.
>
> This, of course, is the general rule: it will not apply where the terms of the consent orders show that the parties had a different intention.

[73] The successful Sentinel plaintiffs have not sought an express order that the Mareva orders continue in any form after judgment. Further, assuming that the order does continue until after judgment, the circumstances contemplated in Palmer J's judgment set out in paragraph 6.85 of the above quote have arisen. Mr Tomlinson has sought to challenge the continuance of the caveat and this necessarily puts the question of the continuation of the Mareva orders before this Court.

[74] In my view, the plaintiffs have not properly addressed their responsibility as applicants holding the benefit of Mareva orders:

(a) The orders in their current form are for a sum far in excess of the amount of the judgment obtained;

(b) The orders in their current form are in favour of applicants who do not hold the benefit of any judgment and indeed have failed in their claims;

(c) The orders in their current form are not apposite to apply where judgment has been entered; and

(d) There has been no attempt to put forward evidence to justify or explain why orders of the kind contained in the Mareva orders should be continued.

[75] These problems also in turn affect the sustainability of the caveat. There are additional problems with the caveat:

(a) It remains in a form which identifies the interest of Mrs Tomlinson, as joint tenant, as one which is subject to the restraint on registration of any instrument. This would be effective to prevent her taking steps to sever the joint tenancy; and

(b) The caveators still include many entities which, following judgment, have no interest to sustain the caveat.

[76] In the circumstances, I order that the Mareva orders be discharged and that the caveat be removed.

[77] I considered giving the successful plaintiffs an opportunity to be heard before I made those orders. However, those plaintiffs have already been afforded an opportunity to make submissions about any consequential orders they required following on from the Reasons. In addition, despite Mr Tomlinson raising concerns about the caveat, and despite my request to be provided with copies of the Mareva orders and the caveat, the successful plaintiffs have still not sought to be heard on the orders or the caveat.

[78] Further, the plaintiffs, as applicants and caveators, have not paid sufficient attention to their obligations arising from the Mareva orders.

[79] Finally, it is clear neither the caveat nor the Mareva orders can be sustained in anything like their current form.

[80] At 3:29 pm today, I received an email from Mr Tomlinson asking, “Can I please make a request that I consent to the costs orders being made against me?” That odd email does not state that he does so consent, nor is it clear to me exactly what he was asking permission to consent to. The judgment was complete when that ambiguous communication arrived. This matter has already been outstanding for an overly long period and I did not think it appropriate for the Court to engage in an ongoing communication process to work out exactly what Mr Tomlinson meant.