SUPREME COURT OF QUEENSLAND

CITATION:	*Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd & Ors* [2005] QSC 389
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (first plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (second plaintiff) **v.** **GLENGALLAN INVESTMENTS PTY LTD** (defendant)
FILE NO:	1688 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (first plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (second plaintiff) **v.** **HGT INVESTMENTS PTY LTD** (defendant)
FILE NO:	1689 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (first plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION** (second plaintiff) **v.** **BARRY THORNTON** (defendant)
FILE NO:	1690 of 1991
PARTIES:	**EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)** (first plaintiff) and **RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION**

(second plaintiff)
v.
BRIAN JAMES PRENDERGAST
(defendant)

FILE NO: 1691 of 1991

PARTIES: **EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)**
(first plaintiff)
and
RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION
(second plaintiff)
v.
BARRY THORNTON AND HELEN RAE ANDERSON AS PERSONAL REPRESENTATIVES OF CYRIL WILLIAM ANDERSON DECEASED
(defendant)

FILE NO: 1692 of 1991

PARTIES: **EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LIMITED)**
(first plaintiff)
and
RURAL FINANCE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) IN LIQUIDATION
(second plaintiff)
v.
EDWIN THOMAS CODD
(defendant)

FILE NO: 9485 of 1998

DIVISION: Trial Division

DELIVERED ON: 19 December 2005

DELIVERED AT: Brisbane

HEARING DATE: 24 October 2005

JUDGE: Helman J.

CATCHWORDS: Procedure — Costs — ‘Offer to settle’ – what effect offers to settle should have on any order for costs in favour of the plaintiffs – whether the plaintiffs should be deprived of costs orders in relation to certain issues determined at the trial – whether order for costs should be made in favour of second plaintiff where it was unsuccessful, but was drawn into the

actions as a result of an issue raised by the defendants – whether plaintiffs should have costs order in relation to costs incurred in connexion with assessment of costs

*Potter v. Dickensen (*1905) 2 C.L.R. 669
Mathieson v. Burton (1971) 124 C.L.R. 1
Carr v. Finance Corporation of Australia (1982) 150 C.L.R. 139
McIvor v. Meshlawn Pty Ltd (unreported, no. 5901 of 1996, 10 November 1999)
Cretazzo v. Lombardi (1975) 13 S.A.S.R. 4
Hughes v. Western Australia Cricket Association (Inc.) [1986] A.T.P.R. 40
Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd [1997] Q.C.A 440

O. 26 r. 9, O. 90 r. 9(2) *Rules of the Supreme Court*
rr. 118(1), 377(2) *District Court Rules* 1968
rr. 360, 689(1), 682 *Uniform Civil Procedure Rules* 1999
s.118B *Supreme Court of Queensland Act* 1991
s. 20(2)(c) *Acts Interpretation Act* 1954

COUNSEL: Mr S.S.W. Couper Q.C. for the plaintiffs
Messrs D.R. Cooper S.C. and C.L. Francis for the defendants

SOLICITORS: Gadens Lawyers for the plaintiffs
Lees Marshall Warnick for the defendants

[1] In these proceedings it remains for me to determine what orders for costs should be made. I have received extensive written submissions, supplemented by oral submissions, on that subject. Each of the first and second plaintiffs seeks orders for costs against the defendants assessed on either the solicitor-and-client or the indemnity basis.

[2] The issues as to costs have been refined to five:

1. Whether any costs order at all should be made in favour of the second plaintiff;

2. Whether the plaintiffs, or either of them, should have a costs order in relation to costs incurred in connexion with the assessment of the costs of the defendant in action no. 1688 of 1991 pursuant to an order I made on 5 March 2002;

3. What effect, if any, offers to settle made on 25 November 1996 should have on any order for costs in favour of the plaintiffs, or either of them;

4. Whether the plaintiffs, or either of them, should be deprived of costs orders, and whether the defendants should have costs orders, in relation to certain issues at the trial; and

5. Whether the plaintiffs, or either of them, should recover costs reserved by Ryan J. on 2 October 1992.

[3] On behalf of the defendants it was argued that orders for costs should not be made in favour of the second plaintiff since the general rule is that costs follow the event, and only the first plaintiff succeeded in obtaining judgments against the defendants.

[4] The history of the actions is relevant to this question. The first plaintiff alone began the actions, relying on the alleged assignment to it in 1991. No issue was initially raised by the defendants in any of the actions as to the effectiveness of that alleged assignment. The defendant in proceeding no. 1688 of 1991 admitted the effectiveness of the assignment in the first version of its defence (dated 5 February 1992), but on 10 December 1993, on its application, White J. granted it leave to amend its defence by withdrawing the admission. Her Honour then concluded that there had not been an absolute assignment, that the first plaintiff had no standing to sue, and that its action should be dismissed. An appeal to the Court of Appeal by the first plaintiff against her Honour's dismissal of its claim, in appeal no. 262 of 1993 (to which I referred in my reasons delivered on 28 July 2005), was successful on 19 May 1994. No order was made concerning the leave to amend the defence so thereafter the effectiveness of the 1991 assignment was in issue in proceeding no. 1688 of 1991; and in due course it became an issue in the other proceedings. Because the defendants had put the effectiveness of the 1991 assignment in issue, orders were sought, and obtained, granting leave to join the second plaintiff, with its consent.

[5] Before the defendant raised the doubt to which I have referred by putting the effectiveness of the 1991 assignment in issue there was no reason to join the second plaintiff. After the defendants challenged the effectiveness of the 1991 assignment the joinder became necessary.

[6] That course was the proper one to follow because although the Court of Appeal in appeal no. 262 of 1993 decided by a majority that there had been an effective assignment in 1991, the majority (Fitzgerald P. and Derrington J.) were not at one in deciding that the assignment was an unconditional assignment at law rendering recourse to equity unnecessary. It followed that it was necessary to join the second plaintiff as assignor. As McPherson J.A. explained, the question of non-joinder of the assignor arose only if the assignment was not statutory but simply equitable, or if there was nothing more than a mere agreement to assign: to cover those possibilities the second plaintiff should have been made a co-plaintiff so that if the assignment were held to be equitable only the second plaintiff as assignor would be bound by the outcome of the proceedings. Moynihan S.J.A., in reasons delivered on 5 February 1998 on a successful application by the first plaintiff for leave to join the second plaintiff as a plaintiff in actions nos. 1689, 1690, 1691, and 1692 of 1991 concluded for the same reasons that it was appropriate to grant leave to the first plaintiff to join the second plaintiff.

[7] The question of the second plaintiff's assignment to the first plaintiff was complicated by the alleged assignment of November 1994, but the defendants put the effectiveness of that assignment in issue as well.

[8] The plaintiffs were represented throughout by the same solicitors and counsel and their primary position taken throughout was that it was the first plaintiff that was entitled to judgment in each action, but the plaintiffs made their respective claims in the alternative. That meant that if there were held to have been no effective assignment the second plaintiff would have been entitled to judgment against each defendant provided the other elements of the claims were established. If, however, the first plaintiff was entitled to succeed because there had been an effective assignment but that assignment was equitable only, the second plaintiff would be bound by the outcome of the proceedings.

[9] Because the second plaintiff was drawn into these actions as a result of the issue raised by the defendants, and because its joinder was reasonable, I conclude that the defendants should be ordered to pay the costs of the actions so far as they were increased by the joinder of the second, and ultimately unsuccessful, plaintiff. That course is supported by the following annotation in *The Supreme Court Practice* 1999 vol. 1 to Order 15 rule 4 (Joinder of Parties):

> **Joinder of parties in the alternative** – Where there is or may be a doubt as to which of two or more persons is entitled to the relief claimed, *e.g.* whether C made a contract with A or with B, such persons may be joined as plaintiffs in one action, and make their respective claims in the alternative. The costs, in so far as they are increased by the joinder of the unsuccessful plaintiff, are in the discretion of the Court under O.62, r.3, but where the joinder was reasonable, as where the defendant has himself raised the doubt, the defendant may be ordered to pay such costs (on the analogy of *Bullock v. L. G. O. Co.* [1907] 1 K.B. 264). (p. 215)

(Order 62 rule 3 sets out the general principles concerning entitlement to costs.) An order for costs in favour of the second plaintiff will best achieve the result referred to in the annotation.

[10] Having become a party, the second plaintiff was obliged to make discovery etc., and so it could not be a mere 'passive' party, as was contended on behalf of the defendants.

[11] It was said on behalf of the second plaintiff that it should have its costs on the indemnity basis 'because the defendants, properly advised, should not have continued to pursue [the assignment] point'. On behalf of the second plaintiff one argument for that proposition was based on the Court of Appeal decision in appeal no. 262 of 1993 and the further notices of assignment in November 1994. (There was a second argument advanced for the second plaintiff concerning an order for costs on more than the standard basis, but I shall return to that later.)

[12] While it is true that it may be thought in hindsight that the assignment point was one upon which the defendants had little hope of succeeding, no attempt was made on behalf of the plaintiffs to bring it to an early conclusion before the trial of the actions – for proper reasons, as I shall explain. In those circumstances I am not persuaded that it is in a different category from any other issue upon which the defendants failed, i.e. it is not in a special category warranting the award of costs to the second plaintiff on the indemnity basis.

[13] On behalf of the defendants it was argued that the second plaintiff should be deprived of any costs because the questions relating to the effectiveness of the assignments relied on by the first plaintiff could conveniently have been decided separately from the other issues in the actions before trial. I am not persuaded that such a course would have been convenient because it would not have resolved the principal issues in the actions, but rather would have provided another opportunity for interlocutory appeal and delay of the proceedings.

[14] My determination on the first issue as to costs is then that in each action the defendant should be ordered to pay to the second plaintiff its costs of the action to be assessed on the standard basis.

[15] The second issue as to costs concerns a suspended assessment of the costs of the defendant in action no. 1688 of 1991 pursuant to orders I made on 5 March 2002. Costs orders were made then in favour of the defendant against the first plaintiff. The Court of Appeal decision on the appeals from my decision of 30 November 2001 was handed down on 27 September 2002. The plaintiffs' application for special leave to appeal to the High Court was filed in October 2002, and the defendant delivered its bill of costs in March 2003. The first directions hearing concerning the assessment of costs was on 16 July 2003 and the assessment of the defendant's costs began on 22 September 2003 and continued for two weeks. At the end of the two weeks the assessment was set down for further consideration for eight days in December 2003. Special leave to appeal to the High Court was granted on 14 November 2003 and after that the assessment was suspended. The defendant was of course entitled to proceed to recover its costs pursuant to the orders in its favour made on 5 March 2002, but, having done so when an application for special leave to appeal to the High Court was pending, it accepted the risk that the assessment would be rendered futile. That has indeed been the result and the first plaintiff now claims, as I have related, its costs associated with the assessment of the defendant's costs.

[16] On behalf of the defendant in action no. 1688 of 1991 this part of the relief sought was resisted on the grounds, first, that the first plaintiff could have sought a stay of the assessment hearing pending the determination of the application for special leave to appeal; and secondly, that there is no authority or power to grant the relief sought. While it is true that the first plaintiff could have sought a stay of the assessment, it was not obliged to do so in my view: it was entitled to rely on the understanding that the defendant was entitled to proceed if it saw fit, but subject to the risk that the proceeding might prove to be futile if special leave were granted and the plaintiffs' appeal were to succeed. On the question of authority or power I was referred on behalf of the defendant to the *obiter dictum* of Griffith C.J. in *Potter v. Dickenson* (1905) 2 C.L.R. 668 at p. 678 that the term 'costs' as it is used in proceedings in a court of law includes 'all the necessary expenses of a party in establishing his case'. I am not persuaded that the first plaintiff, in appearing at the assessment hearing, was doing more than endeavouring to establish its case on issues of costs arising from the orders made against it. It follows that what it did came within the category to which Griffith C.J. referred.

[17] My determination on the second issue as to costs is then that the defendant in action no. 1688 of 1991 should be ordered to pay to the first plaintiff its costs of the assessment of the costs in question. As the orders made on 5 March 2002 were

against the first plaintiff only, the second plaintiff had no interest in the assessment and so has no basis for seeking an order from me now.

[18] On 25 November 1996 the plaintiffs made a written offer to settle action no. 1688 of 1991 pursuant to Order 26 rule 9 of the *Rules of the Supreme Court*, which were then in force. The terms of the offer were as follows:

> (a) the Defendant will pay to the First Plaintiff by bank cheque the amount of Four hundred and fifty-six thousand, four hundred and ninety-eight dollars and seventy-five cents ($456,498.75) within fourteen days of the date of acceptance of this offer by the Defendant;
>
> (b) the Defendant will pay to the First Plaintiff the Plaintiffs' party and party costs of the action and counter-claim up to the date of acceptance of this offer (including all reserved costs) with such costs to be taxed if agreement is unable to be reached as to the amount of those costs between the Plaintiffs and the Defendant;
>
> (c) if the Defendant fails to pay to the first Plaintiff the amount referred to in paragraph (a) within 14 days of the date of acceptance of this offer that amount will thereafter bear interest at the rate and in the manner provided for in the Loan Agreement referred to in paragraph 2 of the amended Writ of Summons dated 24 January 1995.
>
> (d) The Plaintiffs will release the Defendant from all claims arising out of this action upon payment of the money referred to in paragraphs (a) and (b);
>
> (e) the Defendant will release the Plaintiffs (upon acceptance of this offer) from all claims arising out of the action and counter-claim and any claim arising out of any matters pleaded in this action.

It is not in issue that the offer was not accepted before it expired (fourteen days after the day of service) or that the first plaintiff obtained a judgment no less favourable than the offer. It has been demonstrated on behalf of the plaintiffs in annexure B to written submissions dated 1 August 2005 that the sum owing by way of principal and interest as at 30 June 1996, $791,340, was considerably more than the sum the plaintiffs offered to accept.

[19] Order 26 rule 9 was as follows:

> **9** (1) Where the plaintiff makes an offer to settle which is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle the Court shall order the defendant to pay the plaintiff's costs fixed on a solicitor and client basis, unless the defendant shows that another order for costs is proper in the circumstances.

[20] The *Rules of the Supreme Court* expired on 30 June 1999: *Supreme Court of Queensland Act* 1991, s. 118B. They were replaced by the *Uniform Civil Procedure Rules* 1999 which came into force on 1 July 1999. On behalf of the plaintiffs reliance was placed on their accrued rights under Order 26 rule 9. By operation of s. 20(1) and (2)(c) of the *Acts Interpretation Act* 1954, the expiry of an Act does not affect 'a right, privilege or liability acquired, accrued or incurred under the Act'. By operation of s. 118 of the *Supreme Court of Queensland Act* 1991 (as inserted in that Act by s. 6 of the *Courts Legislation Amendment Act* 1995 and as amended by s. 4 sch. 1 of the *Statute Law Revision Act (No. 2)* 1995) and of s. 20A of the *Acts Interpretation Act*, Order 26 rule 9 was of the same authority, force and effect as if it were a provision in an Act. Any right the plaintiffs might have to costs orders fixed on a solicitor-and-client basis which had been acquired or which had accrued before the expiration of the *Rules of the Supreme Court* was therefore preserved. Accrued rights include rights contingent on the happening of an event: see e.g. *Mathieson v. Burton* (1971) 124 C.L.R. 1 at pp. 23-25, and *Carr v. Finance Corporation of Australia [No. 2]* (1982) 150 C.L.R. 139 at pp. 151-152. The order for costs sought on behalf of the plaintiffs, as set out in the written submissions made on their behalf, were for costs to be assessed on the indemnity basis. In the more recent oral submissions the plaintiffs' position was modified to seek in the first place an order for costs to be assessed on the solicitor-and-client basis and only alternatively an order for costs to be assessed on the indemnity basis.

[21] If the costs orders sought were to be made in reliance on the *Uniform Civil Procedure Rules*, rule 360 could apply and costs could be ordered to be assessed on the indemnity basis. Some time was devoted in the course of the hearing to a debate on suggested differences between assessments made on the solicitor-and-client basis and those made on the indemnity basis. As I have mentioned, the plaintiffs' primary point was to seek costs to be assessed on the solicitor-and-client basis. That was the result in *McIvor v. Meshlawn Pty Ltd* (unreported, 10 November 1999, no. 5901 of 1996) in which Moynihan S.J.A. concluded that where offers had been made under Order 26 and had lapsed when the *Uniform Civil Procedure Rules* came into force any consequences of non-acceptance of an offer fell for consideration under the *Rules of the Supreme Court* rather than under the *Uniform Civil Procedure Rules*. I am in respectful agreement with his Honour that that is the correct outcome in a case of this kind. If costs are to be assessed on other than the party-and-party or standard basis, they must, in a case like this where any rights have been acquired or have accrued under the *Rules of the Supreme Court*, be assessed on the solicitor-and-client rather than on the indemnity basis.

[22] An argument was advanced on behalf of the defendants with reference to an offer to settle, also dated 25 November 1996 but by the first plaintiff only, in action no. 1689 of 1991 to the effect that the offer was uncertain, particularly in terms (b), (d), and (e). Since there was no material difference between the terms of the offer made in action no. 1689 of 1991 and the terms of the offer made in action no. 1688 of 1991, the argument applies equally to the offer made in action no. 1688 of 1991, but I am not persuaded that it has any merit. In (b) a procedure, taxation, is provided for ascertaining costs if agreement cannot be reached, and so I am unable to detect any uncertainty in that term. As to (d) and (e), the reference to claims is clearly a reference to all claims arising from the pleaded facts, however formulated. It is not confined to claims as they were then framed, but contemplates possible

reformulated claims. Again no uncertainty results since any reformulations would be confined to those arising from facts already pleaded.

[23] The offer to the defendant in action no. 1688 of 1991 was made on behalf of both plaintiffs, the second plaintiff having been joined pursuant to an order for leave to do so recorded as having been made by Fryberg J. on 24 January and 17 February 1995. I see no reason to deprive the first plaintiff of its costs fixed on the solicitor-and-client basis, but the second plaintiff can not rely on Order 26 rule 9 because it did not obtain any judgment against the defendant.

[24] Offers to settle, all dated 25 November 1996, in the actions other than no. 1688 of 1991 were in terms of no material difference from those in the offer to the defendant in action nos. 1688 and 1689 of 1991, but they were made by the first plaintiff only. The second plaintiff was not joined in actions nos. 1689, 1690, 1691, and 1692 of 1991 until after Moynihan S.J.A.'s order dated 20 March 1998 granting leave to the first plaintiff to join the second plaintiff. The first plaintiff was granted leave to join the second plaintiff in what is now action no. 9485 of 1998 by Botting D.C.J. on 11 June 1998. I should mention here that rule 118(1) of the *District Courts Rules* 1968 was in the same terms as Order 26 rule 9. The *District Courts Rules* also expired on 30 June 1999 by operation of the *Supreme Court of Queensland Act*, s. 118B. Those rules too were replaced by the *Uniform Civil Procedure Rules*. Any right to a costs order fixed on the solicitor-and-client basis the first plaintiff might have acquired or which might have accrued to it under rule 118(1) was also preserved by operation of s. 20(1) and (2)(c) of the *Acts Interpretation Act*. Section 7(1) of the *Acts Interpretation Act* provides that in an Act a reference to a law or a provision of a law includes a reference to the statutory instruments made or in force under the law or provision. Section 2(2) of the same Act provides that a reference to 'an Act' includes a reference to that Act. By operation of s. 7 of the *Statutory Instruments Act* 1992 the *District Courts Rules* were characterized as statutory instruments.

[25] As the offers in the actions other than no. 1688 of 1991 were made by the first plaintiff only no question of awarding costs in favour of the second plaintiff on the solicitor-and-client basis in reliance on Order 26 rule 9 or rule 118(1) therefore arises; nor am I persuaded that the second plaintiff should have the benefit of any offer 'as a matter of discretion', as was submitted on its behalf. As in action no. 1688 of 1991, it was not in issue that the offers in the other actions were not accepted before they expired or that the first plaintiff obtained a judgment no less favourable than the offer. It was similarly demonstrated in annexure B that in each case the sum owing by way of principal and interest as at 30 June 1996 was considerably more than the sum referred to in the offer.

[26] When the offers were made no steps had been taken in the actions other than no. 1688 of 1991 for more than three years, the last step having been taken in each action on 21 April 1993 when the first plaintiff delivered particulars of its amended reply and answer. In a letter dated 20 August 1996 from the defendants' solicitors to the plaintiffs' solicitors, reference was made to the date of the last step. The defendants' solicitors added that according to the rules, as that step had been taken more than three years before, the first plaintiff required leave to proceed in the actions – a reference to Order 90 rule 9(2), which was as follows:

> (2) When 3 years have elapsed from the time when the last proceeding was taken, no fresh proceeding shall be taken without the order of the Court or a Judge, which may be made either ex parte or upon notice.

Rule 377(2) of the *District Courts Rules* 1968 was in the same terms as Order 90 rule 9(2).

[27] It was not argued on behalf of the defendants that the making of an offer was a fresh proceeding prohibited by Order 90 rule 9(2) or rule 377(2), but it was asserted on their behalf that the applications for leave to proceed were not filed until 28 May 1997 and leave was not granted until 20 March 1998. That is true of actions nos. 1689, 1690, 1691, and 1692 of 1991: Moynihan S.J.A. granted the first plaintiff, until then the only plaintiff, leave to proceed on that day. In what is now action no. 9485 of 1998 Forde D.C.J. granted the first plaintiff, again the only plaintiff, leave to proceed on 28 February 1997. It was argued on behalf of the defendants that there was no proper or informed basis upon which they could have assessed the offers, and that the plaintiffs did not actively pursue the actions nor make full and complete disclosure of documents until after March 1998. Further, it was pointed out on behalf of the defendants, prior to the making of the offers the first plaintiff was well aware of the need to join the second plaintiff as a necessary party to the actions, the first plaintiff having been granted leave to join the second plaintiff in action no. 1688 of 1991 in January 1995. In spite of that knowledge, the offers did not include any offer of release or indemnity in respect of any claim that might have been made against the defendants by the second plaintiff.

[28] Those considerations were no doubt all relevant to the defendants' assessment of the offers, but do not in my view disentitle the first plaintiff to the benefit of any right it acquired or that accrued to it under Order 26 rule 9 or rule 118(1) on the expiration of the offers. It must be borne in mind that the offers provided for substantial discounts on the claims, and that no doubt a factor in formulating the offers was an awareness that leave to proceed was required.

[29] On behalf of the defendants it was argued that because their witnesses (including Mr Thornton) were found to be truthful and because an unreported decision of Dowsett J. made on 17 May 1996 concerning round-robin transactions later upheld by the Court of Appeal (*Australian Horticultural Finance Pty Ltd v. Jekos Holdings Pty Ltd* [1997] Q.C.A. 440, 9 December 1997) appeared to support their cases, they acted reasonably in not accepting the offers of settlement and so the plaintiffs should be deprived of the benefits of Order 26 rule 9 and rule 118(1). I should add here, on the second point, that in a letter dated 20 August 1996 from the defendants' solicitors to the plaintiffs' solicitors, Dowsett J.'s decision was referred to as 'directly on point', but that in a reply dated 2 October 1996 the latter solicitors advised the former that it was not considered that the decision would be of any benefit to the defendants 'in relation to the present disputes'. In the reasons of the High Court the decision of the Court of Appeal in the *Jekos* case was referred to as having much influenced the Court of Appeal's decision in these cases on the 'real money' point. The *Jekos* decision might perhaps be understood as turning upon its particular facts, their Honours said; but if it stood for some more general principle it was wrong and should be overruled: paragraph 47. Neither consideration should have the effect contended for on behalf of the defendants: it is one of the normal risks of litigation that although a party's evidence is accepted as truthful the party

may still fail if the law is against him or her. Similarly there is always a risk that a previous decision thought to be a precedent favourable to the party's case may be found to be distinguishable or may be overruled.

[30] Action no. 9485 of 1998 was not transferred from the District Court at Brisbane (where it was no. 3398 of 1991) to the Supreme Court until 16 July 1998, when Byrne J. made an order to that effect, so that any costs of that action should be assessed on the relevant District Court scale until then.

[31] The conclusions I reached concerning the suggested uncertainty of the offer made in action no. 1689 of 1991 apply to the offers made in actions nos. 1690, 1691, and 1692 of 1991 and no. 9485 of 1998.

[32] My determination on the third issue is then that in each action the defendant should be ordered to pay to the first plaintiff its costs of the action on the solicitor-and-client basis. I think it only just, however, to deprive the first plaintiff of any order in respect of any costs incurred in any period from 21 April 1993 when no steps were taken. If there is a difference between the indemnity and the solicitor-and-client basis of assessment, the latter must be applied in this case.

[33] The fourth issue as to costs concerns issues determined in the actions. On behalf of the defendants orders were sought in their favour in respect of issues upon which, it was submitted, the plaintiffs had failed, and upon 'unnecessary' issues. The defendants rely on the general discretion in relation to costs conferred on the court by rule 689(1) of the *Uniform Civil Procedure Rules* and the particular discretion conferred by rule 682. There were, it was submitted, issues in the actions on which the plaintiffs were unsuccessful or which were otherwise unnecessary issues, and which occupied much time at the trial and 'in the litigation generally'. Several authorities were referred to in the course of argument on this question, including, as might have been expected, *Cretazzo v. Lombardi* (1975) 13 S.A.S.R. 4 and *Hughes v. Western Australian Cricket Association (Inc.)* [1986] A.T.P.R. ¶40-748. It is clear from those and other cases that a successful party who has failed on certain issues may not only be deprived of that party's costs of the issues, but may as well be ordered to pay the other party's costs of them: *Cretazzo v. Lombardi* at p. 12; *Hughes v. Western Australian Cricket Association (Inc.)* at pp. 48, 136 – 48, 137. It was submitted on behalf of the defendants that it would be inappropriate, and grossly unfair, that they should have to pay the costs relating to the issues I have referred to, particularly if those costs were to be awarded to the plaintiff on the indemnity basis. There should therefore be an apportionment of costs in respect of those issues, and, so it was submitted, the court should:

(a) Declare that twenty-five per cent. of the costs of the proceedings was attributable to those issues;

(b) Order that the first plaintiff have no more than seventy-five per cent. of its costs; and

(c) Order that the plaintiffs pay twenty-five per cent. of the defendants' costs.

[34] The issues relied on on behalf of the defendants in this part of the argument were the assignment issue and the issues referred to as the 'knowledge' issues, i.e. those

dealt with in paragraphs 11-14 of the further amended statements of claim, paragraph 17A of the further further further amended defences and counter-claims, and paragraph 5A of the further further amended replies and answers.

[35] The assignment issue was not one on which the plaintiffs failed, but was it an issue which was unnecessary at trial? For the reasons I have already given on that subject I think not.

[36] The knowledge issues were those referred to in paragraphs 40-46 of the reasons I gave on 30 November 2001, and they were decided then in favour of the defendants. It is important to note the position those issues occupied in the scheme of the pleadings: they were allegations of alternative bases upon which the plaintiffs claimed they could succeed against the defendants if they failed on the 'real money' issue. They failed on the real money issue before me and in the Court of Appeal, but succeeded in the High Court. I found, as I recorded in my reasons published on 30 November 2001, that the plaintiffs had failed on the knowledge issues. Those issues were before the High Court. Their Honours explained in paragraph 55 of their reasons that there were disputes about when the defendants first learned of the way the transaction had been effected on 30 June 1989 and about whether steps then taken by the defendants constituted their adopting the benefit of the transactions, but, their Honours added, 'These disputes need not be resolved'. It follows, in conformity with the reasons of the High Court, that the status of the knowledge issues has therefore ceased to be that of issues upon which the plaintiffs failed but rather that of unresolved issues – unresolved because it is unnecessary to resolve them, as they were alternatives to a primary issue upon which the first plaintiffs succeeded. It is not now open to me to reconsider the knowledge issues purely to determine questions of costs, and I was not asked to do so. It follows from that that the defendants cannot pursue the costs orders they seek in reliance on my determination in 2001 on those issues.

[37] I therefore determine the fourth issue as to costs against the defendants. In case it should be thought that I am wrong in my determination of this issue, I should add that, although some time was devoted to evidence on the knowledge issues pursued by the plaintiffs, not all of that evidence was concerned exclusively with the plaintiffs' cases. Some of it was also relevant to issues pursued by the defendants as to their reliance on alleged representations made to induce them to sign the loan agreements. In supplementary written submissions dated 6 September 2005 an estimate is given of at least twenty-five per cent. of the time taken for evidence at the trial on the assignment and knowledge issues. In oral submissions on behalf of the plaintiffs an estimate of ten per cent. was contended for, but that estimate was made excluding the time taken on the assignment issue and on the knowledge issues where the evidence was relevant to issues raised by the defendants. Absolute precision in such matters is not possible, but my assessments are: twenty per cent. on the assumptions made on behalf of the defendants, and fifteen per cent. on the assumptions made on behalf of the plaintiffs.

[38] The fifth and final issue as to costs relates to costs reserved on 2 October 1992 in action no. 1688 of 1991. Among the orders I made on 5 March 2002 there was an order made by consent that costs reserved by Ryan J. on 2 October 1992 should be costs in the cause to be assessed on the standard basis. On behalf of the defendant it was submitted that the costs reserved by Ryan J. should be paid by the first plaintiff to the defendant on the standard basis. The second plaintiff had not been joined in

that action at that time. Those costs related to an application filed by the defendant for further and better discovery. On the day of the hearing the parties agreed to certain directions and the application was adjourned by consent to a date to be fixed. The first plaintiff subsequently made the requested discovery and there was no need to proceed with the application, which, it was submitted on behalf of the defendant, had been justified. The account of the circumstances relating to that application given to me on behalf of the defendant was not challenged on behalf of the first plaintiff and accordingly I am persuaded that that defendant should have the costs order it seeks.

[39] I shall make orders in accordance with the foregoing determinations. I shall invite the parties to submit an appropriate draft.