# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *The Beach Retreat P/L v Mooloolaba Yacht Club Marina Ltd & Ors* [2009] QSC 84 |
| PARTIES: | **THE BEACH RETREAT PTY LTD** ACN 077 526 259<br>(first plaintiff/first respondent)<br>**THE MOOLOOLABA YACHT CLUB LTD**<br>ACN 010 100 580<br>(second plaintiff/second respondent)<br>**v**<br>**MOOLOOLABA MARINA LTD** ACN 010 359 832<br>(first defendant/first applicant)<br>**SUNSHINE COAST AQUATIC CENTRE PTY LTD**<br>ACN 111 438 361<br>(second defendant/second applicant)<br><br>**And**<br><br>**ROBERT HEWETT NOBLE**<br><br>(Third Party) |
| FILE NO/S: | Appeal No 3478 of 2008<br>SC No 2882 of 2006 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 16 April 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7, 8 and 9 October 2008 |
| JUDGE: | Martin J |
| CATCHWORDS: | PRACTICE – Costs – Fixed Costs - where defendants applied for costs to be fixed – where an expert costs report was prepared - where preparation of additional cost report would be expensive and time-consuming – where plaintiff is impecunious – where plaintiff does not object to costs being fixed - whether costs should be fixed.<br><br>Costs – Fixed Costs – where the second defendant changed solicitors 5 days before trial – where the first acting solicitor anticipated a need to give evidence at trial – where the change of legal representation caused the second defendant to incur additional costs – where plaintiffs object without reason to the recovery of additional costs - whether the additional legal |

costs are recoverable.

Costs – Fixed Costs - where defendants retained separate legal representation – where defendants' pleadings similar – where defendants had different interests in the proceedings - where plaintiffs object to duplicate legal costs - whether both defendants' legal costs are recoverable.

COSTS – Non-parties – where defendants seek costs against non-party – where non-party and his wife were the sole shareholders of the first plaintiff – where non-party financed the plaintiffs' case – where the non-party stood to benefit if the plaintiffs were successful – where the plaintiff directed proceedings to be continued until trial – where plaintiffs, at the direction of the non-party, elected not to call evidence at trial – where plaintiffs did not object to dismissal of claim – where security for costs was asserted to be the appropriate remedy - where non-party was not given notice of defendants' intention to seek orders him - whether costs should be paid by non-party.

PRACTICE – Costs – where plaintiffs commenced multiple proceedings – where plaintiffs amended their statement of claim four times – where plaintiffs brought (and abandoned) claims against the defendant's directors - where plaintiffs made allegations of dishonesty – where plaintiffs elected not to bring any evidence at trial – where party did not object to the dismissal of claim – where plaintiffs rejected an offer to settle – whether plaintiffs had any hope of success – whether the plaintiffs were unreasonable in the conduct of their case - whether costs should be paid on an indemnity basis – discussion of principles.

COSTS – Taxation of Costs – General Principles – where an order for indemnity costs is made – where costs have been assessed on an indemnity basis excluding GST – whether order for costs on an indemnity basis should include an additional order for GST.

Australian Taxation Office Practice Statement LA 2008/16
Supreme Court of Queensland Practice Direction 3 of 2007
*Uniform Civil Procedure Rules* 687(2)(c)

*Ainger v Coffs Harbour City Council (No 2)* [2007] NSWSC 212
*Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406
*ASIC v Atlantic 3 Financial (Aust) Pty Ltd* [2008] QSC 9
*AWA Ltd v GR Daniels t/a Deloittes Haskins & Sells* (unreported, NSW Sup. Ct, Comm Div, Rogers CJ, 8 October 1992; BC 9201567)

*Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359
*Bartlett v Higgins* [1901] 2 KB 230
*Beach Petroleum v Johnson (No 2)* (1995) 57 FCR 119
*Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353
*Charlick Trading Pty Ltd v ANRC* [2001] FCA 629
*Chongherr Investments Pty Ltd v Titan Sandstone Pty Ltd* [2007] QCA 278
*Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225
*Collex Pty Ltd v Roads & Traffic Authority of NSW* [2007] NSWLEC 433
*Emanuel Management Pty Ltd (in liq.) v Foster's Brewing Group* [2003] QSC 299
*Emanuel Management Pty Ltd (In liquidation) v Foster Brewing Group Limited* [2003] QCA 552
*FAI General Insurance Co Ltd v Burns* (1996) 9 ANZ Ins Cas 61-384
*Forest Pty Ltd v Keen Bay Pty Ltd* (1991) 4 ACSR 107 at 111
*Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397
*FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340
*Gore v Justice Corporation* (2002) 119 FCR 429
*Grant v Australian Knitting Mills* [1937] SASR 113
*Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd* [2007] QDC 57
*Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242
*Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23
*Karam v Mansukhani* [2006] QCA 349
*Kennedy v Nine Network Australia Pty Ltd* [2008] QSC 134
*Knight v FP Special Asset Limited* (1992) 174 CLR 178
*Murphy v Young & Co's Brewery Plc* [1997] 1 All ER 518
*Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Limited (No 2)* [1999] 1 Qd R 518
*New South Wales Medical Defence Union Ltd v Crawford* (1993) 11 ACSR 406
*Rosniak v Government Insurance Office* (1997) 41 NSWLR 608
*Seven Network Ltd v News Limited* [2007] FCA 2059
*South Sydney District Rugby League Football Club Ltd v News Ltd* [2001] FCA 384
*Statham v Shephard (No 2)* (1974) 23 FLR 244
*Symphony Group Plc v Hodgson* [1994] QB 179
*Taylor v Pace Developments Ltd* [1991] BCC 406
*The Beach Retreat P/L & Anor v Mooloolaba Marina Ltd & Anor* [2008] QCA 224
*Vestris v Cashman* (1998) 72 SASR 449
*W A Gilbey Limited v Continental Liqueurs Pty Ltd* [1964] NSWR 527

*Yates v Boland* (1997) 147 ALR 685
*Young v Hoger* [2002] QSC 013

ORDER:

**(a) The costs of the Marina Company in defending these proceedings:**
**(i) Be paid on an indemnity basis**
**(ii) Be fixed in the sum of $319,000**
**(iii) Be paid by Robert Hewett Noble.**

**(b) The costs of SCAC in defending these proceedings:**
**(i) Be paid on an indemnity basis**
**(ii) Be fixed in the sum of $436,000**
**(iii) Be paid by Robert Hewett Noble.**

**(c) The costs of SCAC in respect of its counterclaim:**
**(i) Be paid on an indemnity basis**
**(ii) Be fixed in the sum of $1,500**
**(iii) Be paid by Robert Hewett Noble**

**(d) The costs of the Marina Company and SCAC of and incidental to this application:**
**(i) Be paid on the standard basis**
(ii) **Be paid by Beach Retreat, MYC and Robert Hewett Noble.**

COUNSEL: B D O'Donnell QC with him D B O'Sullivan for the applicants/defendants
P Dunning SC with him C Jennings for the respondents/plaintiffs
PJ O'Shea SC for Robert Noble (third party)

SOLICITORS: Clayton Utz for the applicants/defendants
Sajen Legal for the respondents/plaintiffs
McInnes Wilson for Robert Noble (third party)

[2] This is an application by the defendants for orders that:

(a) Their costs of the proceedings be fixed;
(b) Their costs be paid by a non-party, Robert Hewett Noble ("Mr Noble"); and
(c) Their costs of defending the proceedings be paid on the indemnity basis.

[3] The following is a brief description of the parties and their relationships at the relevant time:

(a) The first plaintiff ("Beach Retreat") was incorporated on 17 February 1997 and is a secured creditor, by a fixed and floating charge, of the second plaintiff.
(b) The second plaintiff ("MYC") was incorporated on 15 October 1979 and, from October 1979 to 1 September 2006, operated the business

known as the "Mooloolaba Yacht Club" in conjunction (since 1982) with a marina facility operated by the first defendant.

(c) The first defendant ("the Marina Company") was incorporated on 25 March 1982 and, by a written contract entitled "Shareholders' Agreement" dated 6 December 2004 ("the Shareholders' Agreement"), agreed with MYC to incorporate the second defendant ("SCAC").

(d) MYC and the Marina Company conducted their respective businesses from property located at 33 Parkyn Parade, Mooloolaba in the State of Queensland.

(e) SCAC was incorporated on 19 November 2004 and, since 1 December 2004, has been head sublessee of the premises by a lease dated 1 December 2004 between SCAC, as lessee, and the State of Queensland.

**Background**

[4] When this matter came on for trial on 25 March 2008 the plaintiffs, through their then counsel, informed me that they were not going to call any evidence nor would they resist an order that their claims be dismissed. This attitude of the plaintiffs had not been foreshadowed, nor was it explained. As a result, judgment was given for the defendants on the claim and for Sunshine Coast Aquatic Centre Pty Ltd on its counterclaim in the sum of $41,000.

[5] Consideration of the question of the costs of the trial was adjourned in order that the plaintiffs could appeal a ruling in which I had disallowed some amendments which had been made to the statement of claim. In the course of dismissing that appeal, Keane JA outlined the issues with which the action had been concerned. I gratefully adopt his Honour's summary for the purposes of these reasons:[1]

> "**The issues in the action**
> [6] Near the mouth of the Maroochy River at Mooloolaba is a parcel of land currently leased by the Crown to [SCAC]. [The Marina Company] operates a marina on part of that land. [MYC] operated a clubhouse on another part of the land until it went into voluntary administration in May 2005. [Beach Retreat] is a secured creditor of [MYC].
>
> [7] Prior to December 2004, each of [MYC] and [the Marina Company] had leased part of the land from the Crown. On 1 December 2004 [MYC] and [the Marina Company] entered into a Shareholders' Agreement whereby it was agreed that [MYC] and [the Marina Company] were each entitled to appoint an equal number of directors of [SCAC]. It was agreed that the shareholders would procure [SCAC] to grant a sub-lease to [MYC] over the land then occupied by [MYC] and [the Marina Company] on terms to be agreed. On this basis, the previously existing leases from the Crown to [MYC] and [the Marina Company] were surrendered.

---

1 [2008] QCA 224.

[8] [MYC] and [the Marina Company] had caused [SCAC] to be incorporated. Each of [MYC] and [the Marina Company] held three shares in [SCAC]. On 1 December 2004 the Crown granted [SCAC] a lease of the land.

[9] It should be noted that, significantly for the arguments agitated on the appeal, cl 13.1 of the Shareholders' Agreement provided that if either of [MYC] or [the Marina Company] committed an event of default as defined, the defaulter would transfer its shares to the other shareholder. Under cl 13.2 of the Shareholders' Agreement, the entry by either party into voluntary administration is an event of default.

[10] On 19 April 2005 [MYC] and [SCAC] executed an agreement under which [SCAC] agreed to sub-lease to [MYC] the land occupied by [MYC] subject to the consent of Queensland Transport.

[11] On 12 May 2005 [MYC] went into voluntary administration.

[12] On 7 June 2005 the creditors of [MYC] resolved to enter into a Deed of Company Arrangement ("the DOCA").

[13] The respondents then, acting on the footing that [MYC] was in default under the Shareholders' Agreement, removed [MYC's] nominees to the board of [SCAC], and purported to effect a transfer of [SCAC's] shares to [Beach Retreat].

[14] In the appellants' action, it was alleged that the DOCA was terminated on 30 August 2006 and that [MYC] was ready, willing and able to perform its obligations under the Shareholders' Agreement. [MYC] demanded the retransfer of its shares in [SCAC] and the reinstatement of its nominees to its board.

[15] The respondents refused these demands, just as they refused to recognise the validity of the sub-lease of 19 April 2005.

[16] Until the the controversial amendments to which I have referred were made, the appellants' claims were that:

(a) the transfer of shares in [SCAC] contravened s 437D of the *Corporations Act* 2001 (Cth), as a transaction or dealing affecting [MYC], a company under administration;

(b) the [Marina Company's] refusal to return the shares to [MYC], and to reinstate [MYC's] nominees on [SCAC's] board was in breach of the Shareholders' Agreement and in breach of fiduciary duties owed by the [Marina Company's] to [MYC];

(c) [SCAC] was in breach of the sub-lease of 19 April 2005 by reason of its refusal to recognise its validity and to submit it to Queensland Transport for its consent;

(d) [the Marina Company], through its directors, Messrs Baker, Wagner and Jackson, knowingly participated in [SCAC's] breaches of fiduciary duty;

(e) the respondents, by reason of the foregoing, acted oppressively to the second appellant within s 234 of the *Corporations Act*.

[17] Until the amendments were made, the appellants sought relief including:

(a) specific performance of [SCAC's] obligations under the sub-lease of 19 April 2005;
(b) declarations that the transfer of [MYC's] shares in [SCAC] to [Beach Retreat] were void;
(c) an order that the respondents do all things necessary to retransfer the shares and to reinstate [MYC's] nominees to the board of [SCAC]."

[6] On 29 August 2008 I ordered that a joint report on the various costs issues be prepared. Pursuant to that order, Mr Michael Graham (retained by the defendants) and Mr Anthony Garrett (retained by the plaintiffs) prepared a Joint Expert Report.

**Fixing the costs**

[7] Rule 687(2)(c) of the *Uniform Civil Procedure Rules* provides that the court may order a party to pay to another party an amount for costs fixed by the court. Guidance in the application of this rule can be found in Practice Direction 3 of 2007 which provides:

"1. Rule 687(2) of the Uniform Civil Procedure Rules provides, in part, that instead of assessed costs, the court may order a party to pay to another party "an amount for costs decided by the court" or "an amount for costs to be decided in the way the court directs".

2. This Practice Direction is intended:

a. to encourage parties to agree on the amount of costs otherwise to be assessed; and
b. to signal the authority of the court, in an appropriate case, to fix costs, and to ensure parties are in a position to inform that process.

3. a. The court has a broad discretion to fix costs, and will do so where that will avoid undue delay and expense, but only provided the court is confident to fix costs on a reliable basis.
b. Parties should therefore, at all relevant times in the course of the hearing of a matter, be in a position to inform the court of their realistic estimate of the amount of the recoverable costs, on a standard or indemnity basis, should that party be the beneficiary of a costs order. Where practicable, the estimate should be verified on affidavit.
c. Preferably parties should not, for this purpose, be put to the expense, and suffer the delay, of preparing a

> costs statement complying with the UCPR. Any estimate must nevertheless be carefully formulated and realistic."

[8] The principles which, in the exercise of the discretion allowed by the rule, should be applied have been the subject of recent consideration in a number of cases:

(a) Purpose of the rule: to avoid the expense, delay and aggravation involved in protracted litigation arising out of assessment of costs;[2]
(b) Fundamental basis of an order: the court must be satisfied that the approach taken to the estimate of costs is logical, fair and reasonable;[3]
(c) Process: an assessment by which costs are fixed does not require a process similar to that of an ordinary assessment of costs. The court applies a broad brush.[4]

[9] I intend to fix costs for the following reasons:

(a) A joint report by expert costs assessors has been provided to the court and there is no reason to regard it as being other than logical, fair and reasonable in its conclusions;
(b) The report agrees on all issues of quantum subject to decisions being made on whether costs should be allowed at all for:
    (i) The costs of a report from expert accountants,
    (ii) The costs of a report from expert valuers,
    (iii) The costs incurred by SCAC in changing solicitors some five days before trial,
(c) If a further, more detailed assessment was undertaken it would cost between $50,000 and $60,000 and take some four to five months to complete;
(d) The plaintiffs are impecunious – it would be wrong to require the defendants to spend more money which is unlikely to be recovered from the plaintiffs;[5] and
(e) The plaintiffs do not object to costs being fixed (but they do submit that, if costs are fixed on an indemnity basis, they should not include GST).

[10] It is convenient now to turn to those matters which require a decision on whether some of the costs incurred are recoverable.

**The expert reports**

[11] The defendants seek to recover the costs incurred in obtaining a report from each of:

---

2 *Beach Petroleum v Johnson (No 2)* (1995) 57 FCR 119; *Seven Network Ltd v News Ltd* [2007] FCA 2059; *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23.
3 *Beach Petroleum v Johnson (No 2)* (1995) 57 FCR 119.
4 *Harrison v Schipp* (2002) 54 NSWLR 738; *Beach Petroleum v Johnson (No 2)* (1995) 57 FCR 119; *Seven Network Ltd v News Ltd* [2007] FCA 2059.
5 *ASIC v Atlantic 3 Financial (Aust) Pty Ltd* [2008] QSC 9 at [32].

(a) HLB Mann Judd (accountants) – to provide evidence in relation to the plaintiffs' claim of loss, and

(b) Taylor Byrne (valuers) – to provide evidence on the damages claimed in SCAC's counterclaim.

[12] About a week before the trial was set down to commence, the defendants retained Clayton Utz in place of their former solicitors (Frangos Lawyers). I will deal with the circumstances in which that occurred later. Mr Sammut (a member of Clayton Utz) deposes to receiving draft reports from the experts shortly after 20 March 2008. Those reports are exhibited to his affidavit. The Taylor Byrne report is undated but the inspection of the property is noted as having been undertaken on 11 March 2008. The draft HLB Mann Judd report is dated 19 March 2008.

[13] On 21 February 2008 I made, among other orders, the following orders:

> "8. The parties exchange expert reports, if any, by Wednesday 12 March 2008.
>
> 9. The experts thereafter meet to identify (i) the expert issues, (ii) the issues on which they agree, (iii) the issues on which they disagreed, and (iv) the reasons for the disagreement, and are to prepare and provide to the parties a joint report addressing each of matters (i) to (iv) by Wednesday 19 March 2008."

[14] The defendants offered no explanation for not having complied with that order or, more generally, for the delay in obtaining those reports.

[15] The plaintiffs argued that, as the reports had not been dealt with in accordance with pre-trial directions and had not been served on the plaintiffs, the defendants bore the onus of demonstrating why the costs of those reports should be allowed.

[16] In argument, Mr O'Donnell QC (for the defendants) acknowledged that it would have been necessary to have obtained leave in order to use the reports had the trial gone on. He submitted that there would have been reasonable prospects of obtaining the necessary leave but that the key issue on this argument was whether the costs were reasonably incurred by the defendants. As he put it: "Was it reasonable for them to engage experts on this issue, albeit that the expert reports were running late?"

[17] The test to be applied to the recoverability of costs on an assessment under the *Uniform Civil Procedure Rules* depends on whether the assessment is on the standard basis or the indemnity basis. Where costs are to be assessed on the standard basis, then *UCPR* r 702(2) mandates that an assessor "must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed".

[18] Where those costs are being assessed on an indemnity basis, *UCPR* r 703(3) provides that "a costs assessor must allow all costs reasonably incurred and of a reasonable amount, having regard to" various matters which are not relevant to these proceedings.

[19] The test of whether some expenditure was "necessary or proper", as that phrase is used in r 702, is to be applied by reference to the circumstances that existed when the work was done, not in relation to the eventual state of the circumstances at the trial.[6]

[20] The correct approach was explained, in more detail, by Asprey J in *WA Gilbey Ltd v Continental Liqueurs Pty Ltd*:[7]

> "[A] Taxing officer in a party and party taxation should allow a successful litigant, in whose favour an order for costs has been made, a just and reasonable amount in respect of each item claimed in such litigant's bill of costs where such item was, in fact, incurred on behalf of the litigant by his solicitor in respect of some step or matter in the litigation which either (1) was necessarily taken or performed for the attainment of justice or the maintaining or defending of the litigant's rights in the circumstances of the particular case, or, (2) although not necessarily taken or performed for such purposes, would reasonably have been taken or performed for any of those purposes by a solicitor acting at the time when it was taken or performed without extravagance in conformity with the then situation of the case and not in conflict with the statutes and rules, the practice of the court, and the usages of the legal profession appertaining to such a case."

[21] It is not possible, at this remove, to say what would have happened had the trial proceeded and had leave been sought by the defendants to adduce the evidence in the expert report. As I have noted above, that is not the test, but I think it likely that leave would have been granted, with it also being likely that a limited adjournment (if sought by the plaintiffs) would have been granted.

[22] It was not argued, nor could it have been, that the material in the reports was not relevant. I have no doubt that it was material to the issues and that it was "necessary or proper" within the meaning of r 702 for the reports to be obtained and the necessary costs incurred.

[23] I will, therefore, allow the costs of obtaining the reports. As I have decided that costs will be on the indemnity basis that will be reflected in the amount which I fix.

**The change of solicitors of SCAC**

[24] Michael Frangos of Frangos Lawyers was the solicitor for SCAC from the start of proceedings on 5 April 2006 until he withdrew on 20 March 2008. He swore an affidavit in which he details the reasons for his withdrawing as solicitor for SCAC in favour of Clayton Utz. He was not cross-examined on that affidavit. In that affidavit he deposes to not intending or expecting to give evidence at the trial until the plaintiffs served their fourth amended statement of claim on 5 March 2008 which added a new claim under the *Property Law Act* 1974. They were the amendments which I later disallowed. At the same time as the amended pleading

---

6 *Bartlett v Higgins* [1901] 2 KB 230 at 237, 240; *Grant v Australian Knitting Mills* [1937] SASR 113 at 115; *W A Gilbey Ltd v Continental Liqueurs Pty Ltd* [1964] NSWR 527 at 535; *Charlick Trading Pty Ltd v ANRC* [2001] FCA 629 at [11].

7 [1964] NSWR 527 at 534.

was delivered, amendments to witness statements (previously served) were also delivered and it became apparent to Mr Frangos that the amendments were directed at supporting the amendments relating to s 228 of the *Property Law Act*. After that date he received communications from the solicitors for the plaintiffs which caused him to seek advice from Mr O'Donnell QC and Mr O'Sullivan about his position. He was advised that there was a possibility that he would be required to give evidence about factual matters relevant to the s 228 claim.

[25] On 14 March 2008 the plaintiffs' solicitors wrote to Mr Frangos with respect to a letter he had sent them about their statement of claim. The plaintiffs' solicitors said, among other things: "Your objections raise factual issues requiring evidence from, and cross-examination of, your Mr Frangos. As a courtesy to your firm, we put you on notice that such cross-examination will likely involve issues relating to credit."

[26] After giving further consideration to the matter and seeking further advice from counsel, Mr Frangos decided that it was appropriate that he withdraw and he determined that the best course was for him to be replaced by Mr Sammut of Clayton Utz. He was drawn to that conclusion because Mr Sammut was familiar with the matter through his involvement in it as solicitor for the directors of the defendant companies during the period when they had been defendants to the plaintiffs' action.

[27] This issue was addressed by the expert costs assessors in the following way:

> "In determining the Second Applicant's costs of the defence of the proceedings assessed on the indemnity basis in the sum of $436,000.00, the Experts have assumed that it was appropriate for the Second Applicant to change solicitors from frangos [sic] Lawyers to Clayton Utz, Solicitors and the proportion of professional fees relevant to the work performed by Clayton Utz, Solicitors during the relevant period (and included in the agreed amount of $436,000.00) is $84,000.00. In the event that it is determined that it was not reasonable for the Second Applicant to change solicitors from frangos [sic] Lawyers to Clayton Utz, Solicitors then it is agreed that in lieu of the amount of $84,000.00 for professional fees for work performed by Clayton Utz, Solicitors, the appropriate allowance on an indemnity basis should be limited to $27,000.00 for professional fees on the basis that such work was "notionally" performed by frangos [sic] Lawyers (in lieu of Clayton Utz, Solicitors). This would mean that the allowance in respect of the Second Applicant's costs of the defence of the proceedings assessed on an indemnity basis would be reduced from $436,000.00 to $379,000.00 in the event that the Court determines that it was not reasonable for the Second Applicant to change solicitors from frangos [sic] Lawyers to Clayton Utz, Solicitors."

[28] The plaintiffs do not challenge the propriety of Mr Frangos acting in the way he did. They could not. They challenge, rather, the amount sought to be recovered; on the basis that the excess of $57,000 ($84,000 - $27,000) was not reasonably incurred. They note, correctly, that the expert costs assessors only deal with this so far as indemnity costs are concerned and draw the conclusion (as I do) that the extra costs were not "necessary or proper" for the purposes of r 702(2). However, the experts

do agree that "assum[ing] that it was appropriate for the Second Applicant to change solicitors from frangos [sic] Lawyers to Clayton Utz, Solicitors [then] the proportion of professional fees relevant to the work performed by Clayton Utz, Solicitors during the relevant period (and included in the agreed amount of $436,000.00) is $84,000.00" on an indemnity basis.

[29] The plaintiffs, though, do not propose why the amount was not reasonably incurred other than that the experts agree that, had the matter not gone to another solicitor, then the notional indemnity cost for that period would have been $27,000. They merely point to the substantial difference in amounts.

[30] They also refer to the well known decision of Sir Robert Megarry VC in *EMI Records Ltd v Ian Cameron Wallace Ltd* where he said, on the assessment of indemnity costs under a rule which allowed "all costs … except in so far as they are of an unreasonable amount or have been unreasonably incurred":[8]

> "Everything is included unless it is driven out by the words of exclusion, namely, "except in so far as they are of an unreasonable amount or have been unreasonably incurred." I should add that in applying to an opposing party a sub-rule intended for taxations as between solicitor and his own client, I think that it is open to the paying party to take any point and make any objection which the client could have raised, had he been taxing the bill.
> …
> Where … the costs are to be paid not by the client to his own solicitor but by another party to the litigation, these provisions [concerning the presumption that costs are reasonable if approved by the client] seem entirely inappropriate. It would be monstrous if the loser could complain of nothing that the winner has authorised. Confident of success (as many are, when moving for contempt), the winner may have authorised half a dozen conferences with three expert witnesses, when two conferences with a single expert would plainly have been ample. He may have needlessly employed the most expensive silks and a pair of juniors. He may throughout have insisted on his case being conducted by two of the senior partners in his solicitors' firm, instead of one. He may have done dozens of other things which to a greater or lesser extent were costs unreasonably incurred to an unreasonable amount. Some of these matters (such as the array of counsel) may be visible to the judge when he makes his order, so that he could insert some appropriate provision in his order; but much may lie concealed until disclosed on taxation."

[31] In this case the loser can "complain" of things which have been authorised, but the complaint must be supported by more than indignation at the amount. In the absence of any evidence about the amount being inappropriate and in the light of the experts' opinion that, if it was reasonable to change solicitors, then $84,000 was the amount which should be allowed and as I have decided that an order for indemnity costs should be made, the higher amount will be allowed.

---

8 [1983] 1 Ch 59 at 72-73.

**Duplication of Costs**

[32] The plaintiffs also contend that there was no need for two sets of costs to be incurred so far as the defendants were concerned. This was not an issue which was considered by the expert costs assessors.

[33] The plaintiffs' submission was:

> "[175] The principal grievance alleged by MYC in these proceedings was SCAC and the Marina Company's refusal to, on MYC coming out of administration, return the MYC shares, re-appoint its nominated directors to SCAC, and re-submit the MYC sublease to QT for approval. The Marina Company and SCAC were united in their interest and opposition to the plaintiffs' claim in the sense they each had a common interest in (i) protecting the head lease and (ii) ensuring the Marina Company, and not MYC, retained control and ownership of SCAC. There was no conflict of interest, and no risk of such a conflict, between the defendants. In those circumstances, the defendants should not be allowed more than one set of costs: *Baulderstone Hornibrook Engineering Pty Ltd* [2006] NSWSC 583."

[34] The principles which apply in these circumstances are:

(a) Subject to three provisos, a court will not normally allow two sets of costs to defendants where there is no possible conflict of interest between them in the presentation of their cases. The provisos are:
   (i) If a conflict of interest appears possible but unlikely, the defendants should make any necessary inquiries from the plaintiff as to the way in which his case is to be put if this would resolve the possibility of conflict between defendants.
   (ii) There could be circumstances in which, although the defendants were united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation.
   (iii) Even if defendants are acting reasonably in maintaining separate representation for some time or for some purposes, they may still be deprived of part of their costs if they act unreasonably by duplicating costs on any particular matter or at any particular time.[9]

(b) If there are differences in the facts or law relating to the several defendants, or if they have different interests, or if there is a reasonable difference of opinion about the conduct of the defence, then the costs of separate representation may be allowed.[10]

---

[9] *Statham v Shephard (No 2)* (1974) 23 FLR 244 at 246-247.

[10] *Verduci v Catanzarita* (1980) 53 FLR 156 at 159; *South Sydney District Rugby League Football Club Ltd v News Ltd* [2001] FCA 384.

[35] While there may not have been a conflict of interest between the defendants, there were different interests. For example, there was not a common claim of breach of contract. The claim against SCAC was that it was obliged to give a sub-lease to MYC. The marina company had no interest in the land over which MYC sought the sub-lease. Of course, after mid 2005, SCAC became a wholly owned subsidiary of the marina company but the allegations straddled the time before and after the acquisition of shares. There are other examples including the claim of improper purpose against the directors of SCAC which would have justified separate representation. There can be no hard rules about costs in these circumstances; they must be sufficiently flexible to adapt to the myriad of factual circumstances which can arise. In this case, the disparity in issues faced by each defendant was sufficient to justify separate representation.

**Costs sought against an individual**

[36] Mr Noble and his wife are the only shareholders in Beach Retreat. He is the company secretary and has the management of that company. The defendants seek an order that he pay their costs.

[37] When dealing with this troubling area of the exercise of discretion it is worthwhile bearing in mind Lloyd LJ's statement in *Taylor v Pace Developments Ltd*:[11]

> "There is only one immutable rule in relation to costs, and that is that there are no immutable rules."

[38] The statutory basis for the making of a costs order against a non-party is to be found in *Uniform Civil Procedure Rules* r 681. It provides:

> **"681 General rule about costs**
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
> (2) Subrule (1) applies unless these rules provide otherwise."

[39] Before turning to the particular circumstances of this case, it is appropriate to set out some fundamental premises upon which any discretion should be exercised:

(a) A non-party costs order will ordinarily be made "when, in the circumstances of the particular case, it is just and equitable that a non-party pay the costs of a party to the litigation."[12] Put another way, a court will ordinarily not make a non-party costs order unless the interests of justice justify a departure from the general rule that only parties to proceedings are subject to costs orders.[13]

(b) As there is no doubt as to the jurisdiction to make such an order, the circumstances in which an order of this nature will be made are those which are confined by questions of discretion. Many different ways of expressing the degree of caution necessary have been set out in the authorities. They include that any such application should be treated

---

11 [1991] BCC 406 at 408; see also *Symphony Group Plc v Hodgson* [1994] QB 179 at 192

12 *Vestris v Cashman* (1998) 72 SASR 449 at 468.

13 *Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2)* [1999] 1 Qd R 518 at 544.

"with considerable caution".[14] Such orders should be granted only when "exceptional circumstances makes such an order reasonable and just".[15] Such orders should be granted only "sparingly".[16]

(c) As with any discretion, it must be "exercised judicially and in accordance with general legal principles pertaining to the law of costs".[17] The exercise of the discretion is accurately described by the author of "*Law of Costs*": "It inevitably comes down to a fact-specific inquiry informed by various relevant considerations."[18]

[40] In the United Kingdom the instances in which non-party costs orders have been made were summarised by Balcombe LJ in *Symphony Group Plc v Hodson*. At page 191 of the report the following appears:

> "Since *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965 there has been a number of reported decisions where the court has been prepared to order a non-party to pay the costs of proceedings. These decisions may be conveniently summarised under the following heads.
>
> (1) Where a person has some management of the action, e.g. a director of an insolvent company who causes the company improperly to prosecute or defend proceedings: see *In re Land and Property Trust Co. Plc.* [1991] 1 W.L.R. 601; *In re Land and Property Trust Co. Plc.* (No. 3) [1991] B.C.L.C. 856; *In re Land and Property Trust Co. Plc.* (No. 2) The Times, 16 February 1993; Court of Appeal (Civil Division) Transcript No. 160 of 1993; *Taylor v. Pace Developments Ltd.* [1991] B.C.C. 406; *In re A Company (No. 004055 of 1991)* [1991] 1 W.L.R. 1003 and *Framework Exhibitions Ltd. v. Matchroom Boxing Ltd.* (unreported), 23 September 1992; Court of Appeal (Civil Division) Transcript No. 873 of 1992. It is of interest to note that, while it was not suggested in any of these cases that it would never be a proper exercise of the jurisdiction to order the director to pay the costs, in none of them was it the ultimate result that the director was so ordered.
>
> (2) Where a person has maintained or financed the action. This was undoubtedly considered to be a proper case for the exercise of the discretion by Macpherson of Cluny J. in *Singh v. Observer Ltd.* [1989] 2 All E.R. 751, where it was alleged that a non-party was maintaining the plaintiff's libel action. However, on appeal the evidence showed that the non-party had not been maintaining the action and the appeal was allowed without going into the legal issues raised by the judge's decision: see *Singh v. Observer Ltd.* [1989] 3 All E.R. 777n.

---

14 *Symphony Group PLC v Hodson* at [193].

15 *Murphy v Young & Co's Brewery Plc* [1997] 1 All ER 518 at 531 and *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 208.

16 *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406 at [34].

17 *Knight v FP Special Assets Ltd* at 192.

18 *Law of Costs*, 2nd ed. Lexis Nexus, Butterworths, Australia 2009 at [22.16]

> (3) In *Gupta v. Comer* [1991] 1 Q.B. 629 this court approached the power of the court to order a solicitor to pay costs under Ord. 62, r. 11 as an example of the exercise of the jurisdiction under section 51 of the Act of 1981.
>
> (4) Where the person has caused the action. In *Pritchard v. J. H. Cobden Ltd.* [1988] Fam. 22 the plaintiff had suffered brain damage through the defendant's negligence. That resulted in a personality change which precipitated a divorce. This court held that the defendant's agreement to pay the costs of the divorce proceedings could be justified as an application of the *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965 principle: see [1988] Fam. 22, 51.
>
> (5) Where the person is a party to a closely related action which has been heard at the same time but not consolidated - as was the case in Aiden Shipping itself.
>
> (6) Group litigation where one or two actions are selected as test actions: see *Joseph Owen Davies v. Eli Lilly & Co*. [1987] 1 W.L.R. 1136.
>
> I accept that these categories are neither rigid nor closed. They indicate the sorts of connection which have so far led the courts to entertain a claim for costs against a non-party."

[41] Lord Justice Balcombe then went on to set out some generalised guidelines which are of assistance:[19]

> "In my judgment the following are material considerations to be taken into account, although I do not suggest that there may not be others which are relevant.
>
> (1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965, 980F. The judge should treat any application for such an order with considerable caution.
>
> (2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a Calderbank offer (*Calderbank v. Calderbank* [1976] Fam. 93); and the knowledge of what the issues are before giving evidence.

---

[19] At 192. It must be borne in mind that the capacity to order costs against non-parties in England Wales appears to be wider than it is in Australia due to the provisions of s 51(1) of the *Supreme Court Act* 1981 (England and Wales).

> (3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Ord. 15, r. 6(2)(b)(i) or (ii).
>
> Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.
>
> …"

[42] The Court of Appeal in this State has considered this issue in *Burns v State of Queensland and Croton*.[20] In that case, Jerrard JA (with whom Cullinane and Jones JJ agreed) said:

> "[13] In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, Mason CJ and Deane J, with whom Gaudron J agreed, wrote as follows at 192-193:
>
> > 'For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.'
>
> [14] That judgment dealt with the power given by Order 91 rule 1 of the *Supreme Court Rules 1900* (Qld), to make costs orders against non-parties. The provisions of the *Uniform Civil Procedure Rules 1999* (Qld) r 689(1) and r 766(1)(d), relevantly replacing Order 91 r 1, do not lead to any different result from the power described in *Knight v FP Special Assets*.
> …
>
> [16] Dawson J in *Knight v FP Special Assets Ltd* described the power to award costs against a non-party a little differently, in these terms (at CLR 202):
>
> > 'The cases therefore establish a long asserted jurisdiction to award costs in appropriate cases against a person who is not a party to the proceedings where that person is the effective litigant standing behind an actual party or

---

[20] [2007] QCA 240.

> where there has been a contempt or abuse of the process of the court.'

His Honour went on to explain that the principle was that the real litigant rather than the nominal party might be made liable for costs, recognising that that would happen in exceptional cases. In *Kebaro Pty Ltd v Saunders* (2003) FCAFC5, the Full Federal Court, in a passage cited with apparent approval by Muir J in *Rushton (Qld) Pty Ltd v Rushton (NSW)* [2004] QSC 47, wrote as follows:

> '[103] In our opinion, the authorities established, on the foregoing analysis, the following propositions:
>
> - A non-party costs order is exceptional relief, although some categories of factual situations are now recognised as within the discretion, for example, the situation described by Mason CJ and Deane in *Knight* at 192-193. The width of the jurisdiction is illustrated by a recent English decision that there can be circumstances in which it would be appropriate to order costs **in favour** of a non-party against a party (see *Individual Homes v MacBreams Investments*, 23 October 2002, High Court of Justice Chancery Division at 8).
> - While such an order is extraordinary, the categories of case are not closed, although an order warrant its exercise, a sufficiently close connection, or as Gobbo J expressed it, a 'real and direct and ...material' connection with the principal litigation, must be demonstrated; in the words of Callinan J the non-party can fairly be liable if adjudged by its conduct, to be a real party to the litigation, even if not **the** real party.'(emphasis added)
>
> [17] I agree with that analysis, which stresses the nature of such an order. The decisions analysed in the judgment include *Symphony Group PLC v Hodgson* [1994] QB 179, in which Balcombe LJ in the UK Court of Appeal identified as relevant matters whether the non-party had some management of the action, had maintained or financed it, or had caused it. Likewise in *Murphy v Young & Co's Brewery* [1997] 1 WLR 1591, the UK Court of Appeal included as relevant factors whether the non-party had an interest in the outcome, whether the non-party initiated the litigation, had control over it, or had intermeddled in it. In *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner for Taxation* (2001) 179 ALR 406 Callinan J, when awarding costs against a non-party (in hopeless litigation it had backed) held the non-party was a real party to the litigation in very important and critical respects."

[43] Finally, there is this accurate and useful summary:[21]

---

[21] *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 at [210].

> "What is significant from a survey of the cases in which orders have been made against non-parties is that they tend to satisfy at least some, if not a majority, of the following criteria:
>
> (a) the unsuccessful party to the proceedings was the moving party and not the defendant;
> (b) the source of funds for the litigation was the non-party or its principal;
> (c) the conduct of the litigation was unreasonable or improper;
> (d) the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest; and
> (e) the unsuccessful party was insolvent or could otherwise be described as a person of straw."

[44] I turn now to the particular circumstances which apply in this case.

[45] The defendants have summarised their submissions as follows:

> "25. Mr Noble should be ordered to pay the Plaintiffs' costs of the proceedings because the evidence will establish that:
>
> a. Both plaintiff companies are men of straw. It is common ground that neither has assets which would enable them to meet orders for costs;
> b. Mr. Noble and his wife are the individuals behind Beach Retreat. They have financed the conduct of the action by both plaintiffs, including putting up the funds provided by both plaintiffs as security for costs;
> c. Mr. Noble has directly managed the plaintiffs' conduct of the action. That was true from the outset in respect of the claims made by Beach Retreat and, in respect of MYC, at least from October 2006 when Beach Retreat's solicitors became the solicitors for MYC. Mr. Noble is the person who gives instructions to the plaintiffs' solicitors, and makes decisions on behalf of both plaintiffs;
> d. Mr. Noble stood to benefit if the plaintiffs were successful. His company was to have the benefit of a sublease from MYC, a management agreement with MYC and a loan agreement. The sublease would enable Beach Retreat to effectively operate the restaurant, bar and gaming machines of the Club for its own profit;
> e. Mr. Noble is the effective litigant standing behind the plaintiffs.
>
> 26. Because the Plaintiffs are mere shells, if the court does not make Mr Noble liable for the Defendants' costs, they will be unrecoverable. That would be a gross injustice in the circumstances obtaining in this case: where the Plaintiffs have, at Mr. Noble's behest, aggressively pursued a panoply of serious allegations (including of dishonesty) against the Defendant companies over more than two years, but then declined to put any evidence before

> the court to prove even one of those allegations, once the trial actually commenced. The injustice is particularly acute in circumstances where the Defendants are not profit-making companies, but rather entities limited by guarantee whose officers are volunteers. …"

[46] I will use that summary to consider the relevant issues.

*Impecuniosity*

[47] There is no contest on this point. The plaintiff's impecuniosity was a reason for the granting of earlier orders for security for costs.

*Is Mr Noble "behind" the plaintiffs?*

[48] Mr Noble and his wife are the only directors and shareholders of Beach Retreat. That company is the trustee of the Beach Retreat Discretionary Trust and Mr Noble and his wife are the only appointors of that trust. The trust has a number of named beneficiaries. Mr and Mrs Noble appear to be the beneficiaries in substance. Mr Noble swore an affidavit that he and his wife were the only members of the "consortium" standing behind the Beach Retreat Discretionary Trust.

*Has Mr Noble directly managed the plaintiffs' conduct of the action? In other words, was Mr Noble the "real party"?*

[49] Mr Noble identifies two sources of funds used by Beach Retreat to support this action. The first was from bank loans supported by guarantees from Mr and Mrs Noble. The second was directly from loans provided by Mr and Mrs Noble. He identifies those funds as being used to pay:

(a) Moneys required in connection with a deed of company arrangement;
(b) Moneys paid in respect of the legal costs of Beach Retreat and MYC in these proceedings, and in respect of the matters the subject of these proceedings; and
(c) Moneys paid into court in respect of security for costs.

[50] In an affidavit filed on 4 April 2008 Mark Stephen Sammut exhibits a "statement of evidence" of Robert Noble. He deposes that the statement of evidence was served during the course of proceedings. While it was unsigned, it was Mr Sammut's understanding that it was a statement of the evidence that Mr Noble would give at trial. There has been no challenge to that evidence. In that statement Mr Noble lists a number of activities which he undertook in an effort to find an economic solution for MYC. This was as a result of his agreeing to the request from Ken Down to assist MYC. As part of those efforts MYC and Beach Retreat entered into a sublease, a management agreement and a loan agreement. He says that under those agreements, MYC would consolidate its debt and would be provided with an income stream from the management agreement to service that debt and pay it off. Under the sub-sublease, Beach Retreat was responsible for rent and all operating costs concerning the restaurant, bar and function room facilities. The agreements also allowed for MYC to benefit from a profit-sharing clause with Beach Retreat.

[51] In June 2005, Beach Retreat paid out MYC's secured creditor in full. Following that, further payments were made to the deed administrators of MYC in the sum of $836,000. At about the same time, MYC entered into the Deed of Company Arrangement and Mr Noble says that Beach Retreat has made payments of $1,100,500 in connection with the Deed of Company Arrangement. He says that such payments were made to secure MYC's financial viability.

[52] While Mr Noble, in his statement, said that Beach Retreat had paid out the secured creditor, in letters from his solicitors about this matter, it was said:

> "Mr Noble paid those funds to the bank on behalf of the 'Chelbridge' consortium and pursuant to their approval. By virtue of his rights of subrogation, Mr Noble now stands in the shoes of the Bank of Queensland as secured creditor."

A similar letter was sent from Beach Retreat's solicitors to the solicitors for the Bank of Queensland.

[53] I have no doubt that Mr Noble played a central and essential role in the conduct of Beach Retreat and, at various times, MYC. He provided funds for Beach Retreat for it to pay the administrators of the DOCA, and for stock for MYC; he undertook for MYC's unsecured creditors to use part of Beach Retreat's anticipated profits to repay their debts to MYC; and at the end of 2005 and early 2006 he was a principal in negotiations between MYC and the defendants concerning a proposed new sublease by SCAC to MYC. He was also involved in many other matters after the proceedings commenced, eg, attempting to persuade SCAC to grant a lease to MYC; attempting to persuade the marina company to transfer three shares in SCAC back to MYC; offering to release Brian Baker (then a defendant) from the claims against him in return for Baker providing a comprehensive statement for the plaintiffs; and attempting to procure approval from Queensland Transport to the instrument of sublease of April 2005 between MYC and SCAC.

[54] The plaintiffs submit that Mr Noble was the driving force behind the Deed of Company Arrangement by which MYC was to be refinanced and which in turn was to give his company, Beach Retreat, long term access to the site and to operate the clubhouse facilities. This does not appear to be seriously contradicted. He used his own resources to refinance MYC and he was the principal negotiating party for MYC and Beach Retreat with respect to SCAC's agreement concerning leases over the site. It appears that he gave the instructions for the commencement of these proceedings.

[55] It seems tolerably clear that it was in Mr Noble's interests that Beach Retreat succeed because, if it did, he would have been the principal beneficiary. If Beach Retreat was to fail then he would have lost a substantial amount of money which had been outlaid to refinance MYC. It was through his conduct, and that of his wife to the extent that she was involved, that he came to control and manage a key part of the site or, at least, that was intended by the arrangements which were put in place.

[56] On behalf of Mr Noble, though, it is pointed out that the consortium which has been mentioned above, was originally intended to contain more members than Mr Noble and his wife. That, it is said, points to the conclusion that the consortium and the related trust were not established as a vehicle for Mr Noble and not established for

the purpose of making a profit for Mr Noble. That may well be correct. However, it appears reasonably clear that in continuing with the operations of the consortium/ trust/Beach Retreat, Mr Noble did engage in actions which, if successful, would have resulted in a profit for him. In cross-examination Mr Noble agreed that the Beach Retreat trust became a vehicle for him and his wife to make their investment in the yacht club.[22]

[57] Mr Noble, in cross-examination,[23] agreed that one of the terms of the sublease intended to allow Beach Retreat to operate the facilities included clauses relating to a payment to Beach Retreat for what was called accumulated losses expended in negotiating with the administrators and the creditors of the sub-sublessor. The total amount, though, which was envisaged, exceeded the accumulated losses by $500,000. Mr Noble accepted the proposition put to him that: "You would walk away with all your expenses reimbursed and $500,000 in your pocket?"

[58] Mr Noble had no obvious connection with the yacht club. He was not a member. He did not have boat berthed at the club. He had no involvement with sailing activities on the Sunshine Coast or at all. He lived in Sydney.

[59] Mr Noble agreed that part of the reason Beach Retreat became involved in the litigation was in order to achieve a better financial position for itself than it would have without the litigation.[24] He agreed that without Beach Retreat achieving that better financial position it could not repay him and his wife the moneys which they had borrowed and on-lent to Beach Retreat. He accepted that he had a personal financial interest in the success of the litigation and that he gave instructions to the solicitors for Beach Retreat throughout the history of the litigation. He acknowledged that the legal fees paid to the solicitors for Beach Retreat came from money which he had lent Beach Retreat and that Beach Retreat's ability to repay that money was dependent upon success in the litigation or through a settlement negotiated either within or without the litigation process.

[60] Mr Noble also lent MYC the funds it needed to pay its own legal fees either through money given directly from him and his wife or from loans from the bank which were secured by guarantees and securities provided by Mr and Mrs Noble. Mr Noble also accepted that he was aware that there were allegations in the statement of claim that the marina company had set out to get for itself assets which the yacht company had previously held (the lease over the premises the yacht club had previously occupied and the shares that the yacht club had held in SCAC) and that it had done that for improper purposes. He was also aware that those allegations remained in the statement of claim until the morning of trial.

[61] He admitted that the decision that the plaintiff should not offer evidence at the trial and should not resist judgment being entered against the plaintiffs was his decision.

[62] The response to the submission set out above by the defendants from Mr Noble was that while he was a director of the first plaintiff, and was actively engaged in advancing his interests, and was its representative for the purpose of the proceeding and was a beneficiary of the trust of which the first plaintiff was trustee, that was not sufficient to demonstrate that the benefit of the proceedings brought by the first

---

22 T 1-36.
23 T 1-44.
24 T 1-53.

plaintiff flowed to anyone other than Beach Retreat. That, though, does not take Mr Noble outside the ordinary sphere in which directors of companies act. Indeed, that is the norm for private companies. Similarly, private companies are not uncommonly companies of limited means which rely on their shareholders for support and funding.

[63] At least, it can be concluded that Mr Noble was the driving force in Beach Retreat, that he stood to gain in at least two ways if Beach Retreat was successful in the litigation and then in the conduct of the enterprise: he would be relieved of the debts which he had incurred and guarantees for which he was liable; and he would receive a large sum of money effectively as a "success fee" if the enterprise did prove to be profitable. Without success in the litigation or through some negotiated settlement, Mr Noble would be liable for a substantial amount to the bank for which he had supplied guarantees; he would lose hundreds of thousands of dollars which had been advanced by him and his wife; and he would lose the opportunity to participate in what he hoped to be a profitable enterprise.

*Mr Noble's response*

[64] Mr O'Shea SC, for Mr Noble, advances four principal reasons for not making the order sought.

(a) The appropriate remedy was an order for security for costs;
(b) No effective notice of an intention to seek this order was given;
(c) Mr Noble was not the "real party";
(d) Mr Noble's interest in the litigation was not sufficient to justify this sort of order.

*Was security for costs the appropriate remedy?*

[65] In many situations, it is a strong argument against ordering a non-party to pay costs that an order for security for costs was available at an earlier stage of the proceedings; although, as was pointed out by Mason CJ and Deane J in *Knight v FP Special Asset Limited*,[25] there are limitations attaching to the availability of security for costs:

> (a) Security for costs is not a remedy in all cases in which justice calls for an order for the award of costs against a non-party, and
> (b) The amount awarded as security is no more than an estimate of the future costs and it is not reasonable to expect a defendant to make further applications at every stage when it appears that costs are escalating so as to render the amount of security previously awarded insufficient.

[66] Nevertheless, in this case, Mr Noble's argument is that, because the defendants sought and obtained security for some costs and did not give notice of an intention to seek costs against him until the "eve" of trial, they should not be allowed "to resile from the course which they followed".[26]

[67] I do not accept the argument that a party which seeks (and obtains) security for costs is precluded from obtaining an order against a non-party. The reasoning

---

[25] (1992) 174 CLR 178 at 190-191.
[26] Submissions for Mr Noble [5].

referred to above in *Knight* and other cases is not that a successful application for security will prevent an order being made against a non-party, rather it is that the omission to make an application can be a strong argument against exercising the discretion against a non-party. In *Vestris v Cashman*, Lander J said:

> "A failure to make an application for security for costs cannot be decisive. At the very best a failure to make an application for security for costs is a factor which may be taken into account in determining whether it would later be just to make an order that a non party to the proceedings pay the costs of a successful party."[27]

[68] Obtaining one or more orders for security for costs will not, if other matters warrant it, stand in the way of obtaining an order against a non-party, for the difference between the costs which have been secured and those which have been assessed. There are two reasons for this:

(a) As was recognised in *Knight*, it is not reasonable to expect a defendant to continue making further applications to the court at every stage when it appears that costs are escalating, and

(b) In this State, at least, orders for security have traditionally been made on a conservative basis in relation to the quantum of costs.[28]

*No notice of intention to seek an order against Mr Noble*

[69] Generally, a non-party should be warned about being at risk as to costs, but such a warning, while a relevant consideration, is not a prerequisite to such an order.[29]

[70] In this case, formal written notice was not given to Mr Noble until 22 March 2008 (Easter Saturday) when the trial was to commence on 25 March 2008. It was argued for Mr Noble that, an order for security for costs having been obtained, he had been placed in the position described by Branson J in *Yates v Boland*: [30]

> "Those who stand behind the company may then make a decision ordinarily at an early stage, as to whether to make the financial commitment necessary to allow the litigation to proceed."

[71] Mr Noble argues that "the financial commitment" was only that created by the order for security and that he did not understand that a further liability could be imposed. It was submitted that: "It is productive of injustice if the defendants are permitted to obtain a personal costs order after standing by without giving notice of the existence of that risk.[31] That submission cannot be accepted. As Lander J said in *Vestris*:

> "An application for security for costs is a means by which a party to the proceedings gives notice to the other party and thereby the backer

---

27 *Vestris* at 472.

28 *Emanuel Management Pty Ltd (In liquidation) v Foster Brewing Group Limited* [2003] QCA 552; *Karam v Mansukhani* [2006] QCA 349; and *Kennedy v Nine Network Australia Pty Ltd* [2008] QSC 134.

29 *Yates v Boland* [2000] FCA 1895; *Gore v Justice Corporation* [2002] 119 FCR 429; and *Vestris v Cashman*.

30 (1997) 147 ALR 685 at 695.

31 Submissions from Mr Noble [10].

> of that party that the moving party is keen to be protected against a failure to be able to meet costs."[32]

[72] In the same case, Olsson J said:

> "… common fairness dictates that a defendant seeking to place a known-party at risk of an order for costs must, either by bringing a timely application for security or, alternatively, at least by letter advising the defendant's intention, place the non party on notice of that risk, so that the non party will not, in effect, be lulled into a false sense of security and ambushed. …"[33]

[73] In *Gore v Justice Corporation*[34] an unsuccessful application for security was regarded as having been sufficient to put a non-party on notice. The successful application for security in this case constituted sufficient notice.

*Was Mr Noble the "real party"?*

[74] This is an area in which the admonition that "a non-party costs order is exceptional relief"[35] bears repetition. It is not the case that a non-party, such as a company director, will be susceptible to such an order simply because he or she has actively promoted the company's interests before and during the litigation. The duties owed by directors may require them, in some cases, to be quite robust in the presentation of a claim.

[75] It is argued for Mr Noble that he cannot be regarded as the "real plaintiff" because the benefit of the proceedings brought by Beach Retreat would not flow to anyone other than Beach Retreat as trustee. Reference was made on his behalf to the observations in *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*:[36]

> "… No doubt it is true, as his Honour found, that Mr Yazbek was the driving force behind FPM Constructions and was its representative for the purposes of the litigation. That does not mean, however, that the benefit of the proceedings brought by FPM Constructions for progress payments, in law, flowed to anyone other than FPM Constructions, nor that the company was other than the proper defendant in proceedings brought by the Council. Nor is the fact that Mr Yazbek was the sole director and secretary of the company inconsistent with that conclusion. Were it otherwise, the corporate veil would, in effect, be nullified at the very point at which it provides protection against personal liability for the shareholders and directors. The carefully crafted exceptions to the principle would overtake the principle itself were that the case."

[76] Had a trial been held, and had Beach Retreat been successful, then Mr Noble would have been in a much better position than otherwise. His investment, through direct

---

32 At 472.
33 At 458.
34 (2002) 119 FCR 429.
35 *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [103].
36 [2005] NSWCA 340 at [206].

loans and guaranteed third party loans would have been likely to have been repaid. Thus, he would have recovered his money and been relieved from his liabilities under guarantees. This distinguishes Mr Noble's position from that considered in *FPM Constructions*.

[77] Further, Mr Noble did not always engage in this matter while cloaked with the corporate veil. In a letter written in his personal capacity to Neil Odgers (then Chairman of SCAC Board of Directors) he said, among other things, the following:[37]

> "I write to you in your capacity as Chairman of the SCAC Board to give you and your Board Members … one last chance to approve the Beach Retreat's Sub-Sub-Lease with MYC before the deadline…
>
> …
>
> There are thus two alternatives for the site, either the SCAC Board approves the Sub-Sub-Lease or there are likely to be protracted legal arguments which would not be beneficial to anyone. …
>
> SCAC directors, in deciding whether to approve the Sub-Sub-Lease, would also need to consider the existing Beach Retreat claim against them for procuring a breach of contract, breach of trust and breach of fiduciary duty. …
>
> There will thus be an even greater chance that SCAC directors, including you yourself who was not part of the earlier claim, will become liable for substantial financial damages and damage to their reputations."

[78] This illustrates Mr Noble exerting pressure and supports the contention by the defendants that he was the real party.

[79] Mr Noble was instrumental in commencing this litigation. He financially supported Beach Retreat. He took it upon himself to exert pressure on the defendants. He would have been relieved of liabilities and had debts repaid had the plaintiffs been successful. Had the plaintiffs been successful and the project gone ahead then he could have been the beneficiary of profits made by the Beach Retreat trust. He decided that the action would not go ahead and that no evidence would be offered. His conduct was very similar to that described by de Jersey J (as he then was) at the trial of the action which was considered by the High Court in *Knight*:

> "I do not think it necessary that Mr Knight be joined as a party prior to the making of an order. It suffices, as far as I am concerned, to identify him as the real instigator of the litigation and the person who has been conducting it; a person who, having caused the commencement of the action and then its abandonment should not be allowed now to shelter behind the company, devoid of assets, and leave the defendants to bear their own substantial costs incurred in the meantime. I say that conscious that the

---

[37] Affidavit of I V Wagner, Ex IVW2.

> defendants already have some protection because of the order made with relation to security to costs, but in principle that should not deny them the added protection they should obtain from the order which they seek here."[38]

[80] So far as MYC is concerned, Mr O'Donnell QC made the following submission with which I agree:

> "It's true, of course, he was only a director of the first plaintiff, not the second plaintiff, and he said the directors of the second plaintiff were involved in giving instructions on behalf of the second plaintiff. But the plaintiff's action was a combined action. They asserted essentially the same causes of action against both defendants. Their common representation and the 2 plaintiff's actions were run in tandem. For example, when they resisted the order for security for costs, it was a common resistance by both plaintiffs. When they amended the pleadings, it was a common amendment. When they appeared by your Honour on directions hearings, it was a common representation, making common submissions."

[81] The actions of Mr Noble have placed him in that special position in which it is appropriate to make the exceptional order rendering him liable for the costs which would otherwise be ordered against the plaintiffs.

**Costs – standard or indemnity basis?**

[82] I have already referred to the circumstances which obtained when this matter was called on for trial.[39] The plaintiffs did not then, nor on the appeal, nor at this hearing provide any explanation or reason for their conduct. They were clearly in a position to call witnesses who could have provided such an explanation, but they did not. In those circumstances, it is open to me to draw the inference (and I do) that nothing any of the plaintiffs' possible witnesses could have said would have assisted their case on this point.

[83] The tests which can be applied to determine at what level costs should be awarded are not closed.[40] There are, though, well accepted principles to which recourse should be had when considering this point.

[84] In *AWA Ltd v GR Daniels t/a Deloittes Haskins & Sells*,[41] Rogers CJ Comm Div identified four broad categories of case in which indemnity costs have been awarded. They are:

> (a) Where there has been misconduct or inappropriate conduct, by a party in the course of the litigation. This could include deliberately delaying the proceedings by putting a knowingly false defence, or

---

38 Referred to in *Forest Pty Ltd v Keen Bay Pty Ltd* (1991) 4 ACSR 107 at 111

39 [4], above.

40 *FAI General Insurance Co Ltd v Burns* (1996) 9 ANZ Ins Cas 61-384

41 Unreported, NSW Sup. Ct, Comm Div, Rogers CJ, 8 October 1992; BC 9201567.

bringing proceedings for an ulterior motive (cf *Degman v Wright (No 2)* [1983] 2 NSWLR 354; *Packer v Meagher* [1984] 3 NSWLR 486).

(b) Where the claim had such a remote prospect of success that the action should not have been brought or continued. In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 Woodward J said (at 410): "I believe that it is appropriate to consider awarding 'solicitor and client' or 'indemnity' costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion."

(c) Where the proceedings were brought in the public interest or as a test case (cf *Australian Federation of Consumer Organisations v Tobacco Institute of Australia Limited* (1991) 100 ALR 568, *Baltic Shipping Co v Dillon* ("The Mikhail Lemontov") (1991) 22 NSWLR 1).

(d) Where an offer or compromise or formal settlement offer has been rejected. This area has now been taken over by the explicit provisions in the UCPR.

[85] The defendants concentrated on the first two categories. So far as they are concerned, there are other expositions of the case law which assist.

[86] In *Colgate-Palmolive Co v Cussons Pty Ltd*,[42] Sheppard J discussed the subject generally and identified categories of cases in which it would be appropriate to make such an order. These categories were not meant to be exhaustive:

> "Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131 at 152); evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp* (supra)); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davis J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson* (1987) 10 NSWLR 525; *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724 (Court of Appeal); *Crisp v Kent* (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27

[42] (1993) 46 FCR 225.

> September 1993) and an award of costs of an indemnity basis against a contemnor (eg Megarry V-C in *EMI Records* (supra)). Other categories of cases are to be found in the reports."

[87] Other prerequisites for an indemnity costs order have been suggested which cover or overlap each other in this area, for example:

(a) "… evidence of unreasonable conduct, albeit that it need not rise as high as vexation." *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608;
(b) Where the proceedings had no reasonable prospect of success. *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359;
(c) Where a party persists in a hopeless case. *Huntsman Chemical Company Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242;
(d) Where there is evidence of a relevant delinquency or abuse of process or ulterior purpose or unreasonableness. *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359; *New South Wales Medical Defence Union Ltd v Crawford* (1993) 11 ACSR 406

[88] A continuing refrain in many of these cases is to the effect that an indemnity costs order is not to be made as a matter of course. There are many of these warnings which should be applied where there is no provision in the rules (such as for unaccepted offers) to the contrary. In general, a court should not make such an order unless satisfied that there is a "special case",[43] a "special reason",[44] or "clearly exceptional circumstances"[45] and so on.

[89] The defendants submit that an indemnity costs order should be made for the following reasons:

(a) The irresponsible action of prosecuting serious allegations, including of dishonesty, and then not supporting the allegations with evidence;
(b) The plaintiffs had no real prospect of succeeding and, knowing this, abandoned their case on the first day; and
(c) The plaintiffs rejected an offer to settle.

[90] As to the last point – it was mentioned in the defendants' written submissions but not pursued at the hearing. I am satisfied that the offers referred to in the submissions were not of a sufficiently formal nature that their refusal should affect a costs order.

[91] A large part of the submissions of both the plaintiffs and defendants was concerned with the merits of the plaintiffs' case. Where there has been no evidence and, of course, no findings as to the facts, a particularly difficult situation arises. There has been no exposure of the various contentions against the background of evidence and no consideration of the relative strengths and weaknesses of the cases. Thus, the

---

43 *Young v Hoger* [2002] QSC 013.
44 *Smits v Tabone* and *Blue Coast Yeppon Pty Ltd v Tablone* [2007] QCA 337.
45 *NSW Medical Defence Union Ltd v Crawford* (1993) 11 ACSR 406.

argument takes place in a factual vacuum and this can lead to a serious over or under estimation of the true strength of the case being examined.

[92] I will deal first with the actions of the plaintiffs in consenting to judgment on the first day. It is said for the plaintiffs that "the mere abandonment of a claim is not, itself, sufficient grounds to warrant a special costs order" and they rely, in large part, on the decision in *Huntsman Chemical Company of Australia Ltd v International Pools Australia Ltd*.[46]

[93] In *Huntsman Chemical* Kirby P and (with some misgivings) Mahoney JA decided that indemnity costs should not be awarded in circumstances where an appellant had abandoned all but one of its appeals against several respondents. The reasons of Kirby P are clearly confined to the situation of an appeal. At no time does he, or Mahoney JA, profess to extend their reasoning to trial courts. In refusing an order for indemnity costs, Kirby P set out the following reasons:[47]

> "1. Although the provision of indemnity costs has become more common in recent times, including on appeal, most of the orders made follow the application of the amendments to the Rules which allow for indemnity costs in cases of unreasonable refusal of offers of compromise. **In my experience, it is extremely unusual for indemnity costs to be ordered in this Court**, even on the late abandonment of an appeal. …
>
> 2. Considerable store was placed upon the late abandonment of the appeals and the acknowledgment that this was said to provide that the appeals were always hopeless. Whilst that argument has force, **it would be undesirable for the Court, by its costs orders, to discourage the proper, but late, abandonment of unwinnable appeals or points**. Yet this might occur if there were a suggestion that such an act of responsible advocacy would be penalised by the making of a special costs order. …
>
> 3. If the Court is entitled to take notice of the reality that party and party costs cover only a proportion of the actual costs charged to clients in proceedings such as the present (as I think it can), **it can surely also take notice of the reality that it is only shortly before the hearing of proceedings that parties and their lawyers typically give them full attention.** This may be undesirable. Costs orders can to some extent help to discourage procrastination and postponement of serious consideration of a case. But it seems scarcely likely that any such orders will ever be able fully to remove the realism that tends, especially in large cases, to accompany the proximity of the hearing date. …
>
> 4. The fact that a party and party costs order leaves some burden of costs upon a successful party may seem unjust. But in highly developed legal systems of the world it is not unknown to have a

---

46 (1995) 36 NSWLR 242.

47 At 247-249.

general regime whereby each party to litigation bears its own costs.
…
5. **If a general rule of indemnity costs were adopted in commercial litigation, it could present a risk that costs recovery entitlements would be abused**. Of course, in the event of an indemnity cost order, this Court would retain supervision of the conduct of legal practitioners. However, the ordinary rule of party and party costs imposes a degree of restraint in the accumulation of costs of litigation. Recent experience in the Court suggests that more attention may be needed to the control of excessive expenditure on legal costs in particular cases which a general or common regime of indemnity costs might not so successfully ensure …

6. Although in the present case it was suggested that the appeals against the judgment of Cole J in favour of International were self-evidently hopeless from the start, the case involved far greater complexities than existed in *Premier Woodworking* where this Court made a special order. **The Court has not, for the purpose of disposing of this motion, proceeded to examine seriatim the grounds of appeal and issues that would have been raised**. What may have been readily apparent in *Premier Woodworking* is not so obvious in the present case. Chemplex and Ferro pointed to the extensive written submissions (more than twenty pages) advanced out of prudence on behalf of International to defend the judgments of Cole J in its favour. Whilst these submissions were offered in a proper defence of International's interests, they do indicate that, had it been necessary to do so, International was ready to argue its case in full; and

7. In the law, **the application of a retrospective rule is always undesirable. Sometimes it is unavoidable. Inevitably, an order of indemnity costs in the present litigation, would involve the acceptance of a new approach by this Court**. True, in form, the order would be limited to the present parties. But just as *Premier Woodworking* was invoked to support the course urged in these appeals, it would be inescapable that an order for indemnity costs in the present case would be invoked in future appeals involving commercial litigants where either the appeal was belatedly abandoned or was found to be without merit, for example, by reference to the *Abalos* principles. It is probably fair to say that when Ferro and Chemplex made their late decision to abandon the appeals against International, they did not anticipate that a possible price of doing so would be an indemnity costs order. Whilst it was always a theoretical possibility, the making of such an order in such a case would accurately have been described as extremely rare. In the past, such orders have generally been made (outside the circumstances provided by the Rules) only in case where the bringing of the proceedings was, or bordered on, vexation or oppression of a litigant or a misuse of the Court's process. It was not suggested that the appeals against the judgment

> in favour of International fell into that class. Thus, had Chemplex or Ferro asked their legal advisers immediately before abandoning the appeals about the cost consequences of doing so, it would have been reasonable for them to have been told that they would be ordered to pay costs, but on a party and party basis."

[94] His Honour also considered the inferences which can be drawn from the abandonment of an appeal. He said:[48]

> "3. The belated abandonment of the appeals represents a complete vindication of the legal stance taken for International both at the trial and in this Court. **In the absence of some other explanation, the abandonment suggests that those advising Chemplex and Ferro ultimately, but belatedly, acknowledged the impossibility of succeeding in their appeals against the orders** of Cole J in favour of International. **Had there been even a small chance of success, it may be inferred (costs already having been incurred) that the appeals would have been presented**.
>
> …
>
> 4. **The reason for the abandonment of the appeals in the present instance is discernible from the grounds of appeal, such written arguments as were presented by the parties and a consideration of the reasons for judgment of the primary judge.** A factor which must always now be taken into account in deciding the utility and wisdom of an appeal, where primary findings may be affected by the impression and assessment of the primary judge of the witnesses presented at trial, is **the recent and repeated instruction of the High Court of Australia controlling the disturbance of such findings**: …. **It may be inferred that, in the present case, recognition of this consideration was the major reason for the abandonment of the appeals affecting International**." (emphasis added)

[95] While the reasoning of Kirby P was accepted by Mahoney JA, it was not accepted by the third member of the Court, Rolfe A-JA. He took a less stringent approach to the awarding of indemnity costs. He did, though, agree on the inference that could be drawn by the abandonment:[49]

> "For my part I find it unnecessary to comb through the grounds of appeal for the purpose of determining the present application. I think the appropriate starting point is that the appellants chose to abandon their appeals against International. **In the absence of any evidence to suggest that this was brought about as a result of some other reason, I infer the reason was that after due consideration of all the relevant material, in which I include the relevant legal principles, it was decided the appeals had no hope of success**." (emphasis added)

---

48 At 246-247.

49 At 270.

[96] The same inference, namely, that the plaintiffs' action had no hope of success can be drawn in this case. It is an inference which is easier to draw when no attempt was made at the original hearing, at the appeal, or on the costs hearing to explain the plaintiffs' abandonment of their actions. As Keane JA said:[50]

> "[68] The course taken by the appellants on 25 March 2008 was not explained, either at the trial or on appeal. **It may be that it should be seen as an acknowledgment by the appellants of the absence of substance in the allegations with which the appellants had vexed the defendants between the commencement of their proceedings and the making of the amendments**." (emphasis added)

[97] Notwithstanding that they did not condescend to explain their actions in not prosecuting their case the plaintiffs sought to demonstrate that their case was not hopeless – at length and in unremitting detail. In contending that the proceedings were not doomed from the beginning the plaintiffs submitted:[51]

> "The circumstances surrounding **the plaintiffs' election to call no evidence at trial gives rise to the reasonable inference that, in view of the disallowance of the amendments in the fourth amended statement of claim and impending order for security for costs made the first day of trial, the plaintiffs considered the balance of their claim was not of such merit as to warrant a trial**. This should be construed as responsible advocacy in the circumstances, not something warranting punishment by way of an indemnity costs order."

[98] The extent to which the plaintiffs went to demonstrate that their case was not without merit left me wondering why, if their case had some merit, they did not pursue it. The disallowance of the amendments sought at trial could not be regarded as a turning point for, as Keane JA, pointed out:[52]

> "In my respectful opinion, when one considers the case pleaded and particularised by the appellants closely, one is not left with any abiding concern that the loss of the opportunity to litigate that case occasioned any real prejudice to the appellants."

[99] If the plaintiffs decided that they did not want to pursue the action because it was "not of such merit as to warrant a trial" one must seriously question the purpose which drove the plaintiffs to commence multiple proceedings, to amend the Statement of Claim four times, to bring (and then abandon) a case against the defendants' directors, and to seek (unsuccessfully) summary judgment and injunctions.

[100] Further, the plaintiffs seemed unconcerned that they alleged that the Marina Company (through three named individuals) acted dishonestly in knowingly participating in breaches of fiduciary duty. In submissions, the plaintiffs said,

---

50 [2008] QCA 224 at [68].
51 Written submissions at [155].
52 [2008] QCA 224 at [53].

among other things, that they did not have to prove that the individuals were not honest. That may be correct, but I do not need to decide it. The point is that allegations of dishonesty were made (in documents which are available to be read by the public – the various Statements of Claim having been read on some of the interlocutory applications) which were the not the subject of any evidence.[53]

[101] A recent exposition of the development of a less confined approach to the award of indemnity costs can be found in *Chaina v Alvaro Homes Pty Ltd*:[54]

> **"[106]** The modern approach to the question of awarding indemnity costs is often sourced to the judgment of Holland J in *Degmam Pty Ltd (In liq) v Wright (No 2)* [1983] 2 NSWLR 354. In cases where the winning party has acted extravagantly, thus running up unnecessary costs, it may be inappropriate to require the losing party to pay all of the winner's costs. However, the question of indemnity costs will usually arise in circumstances where it is the losing party which has behaved inappropriately. *Degmam* itself was a case in which the unsuccessful defendant made factual allegations which were "false and deliberately concocted by her in an attempt to deny the plaintiff its rights and to shift all blame and legal liability … from herself": at 358. His Honour continued:
>
> > As well as that, she so conducted herself in the proceedings, by multiplying allegation upon allegation, and by prevaricating in the witness box, as grossly to prolong the litigation, thereby to cause the other parties to incur liability for solicitor and client costs far beyond what they could reasonably have expected to incur in litigation of genuine issues.
>
> **[107]** These principles were applied in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*, by Woodward J. His Honour referred to the case where an action had been commenced or continued in circumstances where "the applicant, properly advised, should have known that he had no chance of success": at 401. His Honour explained:
>
> > In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law.
>
> **[108]** In later cases it has been emphasised that the circumstances identified in *Degmam* and *Fountain* are not to be treated as exhaustive of the cases in which indemnity costs may be awarded: see, eg, *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2)* [1993] FCA 42; 46 IR 301 at 303 (French J). **It was sufficient, his Honour said, to enliven the discretion to award such costs that "for whatever**

---

53 *Emanuel Management Pty Ltd (in liq.) v Foster's Brewing Group* [2003] QSC 299 at [31].

54 [2008] NSWCA 353.

**reason, a party persists in what should on proper consideration be seen to be a hopeless case". An indemnity costs order will be warranted where proceedings were maintained by a party having "no reasonable prospect of success":** see, eg, *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 (Powell J); *Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242 at 273 (Mahoney JA).

**[109]** *The Pilbara Infrastructure Pty Ltd v BGC Contracting Pty Ltd* [2007] WASCA 257(S) (Pullin and Buss JJA, and Newnes AJA) held that **an indemnity costs order must be justified by "some special or unusual feature of the particular case": at [5]. Nevertheless, in declining to make such an order, the Court merely held that the respondent could not be accused of "having some ulterior motive, or wilfully disregarding the facts or the law": at [7].**

**[110]** In *Colgate-Palmolive*, Sheppard J sought to elucidate the principles to be derived from the earlier cases: at pp 232–233.

**[111]** Nevertheless, **more recent case-law generally shows a tendency to grant indemnity costs orders more readily than was the case in the past.** That may be seen to be an element of a broader policy directed to limiting the litigation of cases where there are no reasonable prospects of success: see, eg, Legal Profession Act 2004 (NSW), Part 3.2, Div 10. Such a policy is also reflected in the presumption in favour of an order of indemnity costs where an offer of compromise in accordance with court rules has been made by one party but not accepted by the other and where the offeror has bettered the offer in the litigation. Although the court may otherwise order, the fact that the offeree may be at substantial risk as to an adverse costs order, to be assessed on an indemnity basis, if the offer is bettered, places a significant financial incentive favouring careful consideration of such offers and careful assessment of the benefits of settlement.

**[112]** As appears from the discussion in *Commonwealth of Australia v Gretton* [2008] NSWCA 117 (Beazley JA, Mason P agreeing) at [48]ff, the test of unreasonableness, applied with respect to the consequences of refusing a *Calderbank* offer are likely to operate also with respect to other aspects of a party's conduct of litigation: see also *Gretton* at [117] (Hodgson JA), referring to *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 616 (Mason P, Clarke AJA agreeing).

**[113] While the general rule remains that costs should be assessed on a party and party basis, it is important that the standard to be applied in awarding indemnity costs not be allowed to diminish to the extent that an unsuccessful party will be at risk of an order for costs assessed on an indemnity basis, absent some blameworthy conduct on its part. A test of**

> **unreasonableness should not be upheld on other than clear grounds**. Nevertheless, the evaluative judgment thus engaged was satisfied by the findings of fact made by the trial judge and not directly challenged on appeal, except on the basis of other grounds referred to above. In those circumstances, the discretionary power to award costs on an indemnity basis was engaged and it was not demonstrated on *House v R* principles that the discretion had miscarried." (per Baston JA; emphasis added)

[102] The plaintiffs argue that they should not be the subject of an indemnity costs order in the absence of a warning from the defendants that such an order might be sought. In *Ainger v Coffs Harbour City Council (No 2)*,[55] it was said to be preferable that a party intending to seek indemnity costs should give due warning of that application before the appeal hearing, but that absence of prior notice did not preclude such an order being made. It is much easier to understand why such a preference should exist at the appeal level as, by that stage, the findings have been made and the questions of law identified. At the trial level, though, there should be no inflexible requirement that a warning be given. The variety of courses which a trial may follow means that such a requirement should not be imposed. This case is an example in point – there was no reason, given the plaintiffs' previous conduct, for the defendants to consider that such a warning might be necessary.

[103] Were the plaintiffs unreasonable in the conduct of their case? Was there any blameworthy conduct on their part? In my view, the answer to both questions is yes. The plaintiffs engaged the defendants in lengthy and expensive litigation – the expert costs assessors arrived at a total of nearly $600,000 in standard costs for both defendants. They gave no indication that they might not proceed – indeed they amended their statement of claim only weeks before the trial. If they had a case to pursue then, notwithstanding the disallowance of the most recent amendments, they could have proceeded and, if necessary, appealed the order of disallowance later. They were in the position described by Kirby P in *Huntsman Chemicals*: "Had there been even a small chance of success, it may be inferred (costs already having been incurred) that the appeals would have been presented." It must follow that, in the absence of any other explanation and the omission to give evidence on the issue, the plaintiffs realised that their case had no merit and, without notice to the defendants, surrendered to the inevitable on the first day of trial. There is no need, in those circumstances, to revisit the pleadings and conduct a post mortem examination on the abandoned body. The plaintiffs asked me to pick through the bones and to find flickering signs of life. It may be that there was some minor matter that could have been resuscitated; but I do not think so – the arguments of the defendants on the strength of the plaintiffs' case were much more compelling and, so far as it necessary, I hold, on the basis of the arguments proposed by the defendants that the plaintiffs' case had no reasonable prospects of success. But that is not the point. The aspects of this trial which took it out of the ordinary were: its history, the allegations of acting dishonestly, the abandoned actions against the directors, and the unexplained surrender at trial. In my opinion, against the background of the behaviour which preceded it, the conduct of the plaintiffs was unreasonable and constituted the type of special or unusual feature which justifies the making of an order for costs on the indemnity basis.

---

55 [2007] NSWCA 212 at [29].

**Goods and Services Tax**

[104] The defendants seek an order for fixed costs on an indemnity basis plus Goods and Services Tax ("GST"). I have decided in their favour on the first two points. I now turn to the question of whether I should add to the indemnity costs assessed by the experts an amount for GST.

[105] The experts have assessed the indemnity costs of defending the action of the Marina Company at $319,000 excluding GST.

[106] The experts have assessed the indemnity costs of defending the action and the costs of the counterclaim of SCAC at $437,500 excluding GST.

[107] It is agreed among the parties that:

(a) Each of the Marina Company and SCAC are registered for GST;
(b) Each of them is entitled to an input tax credit for the GST they have payed; and
(c) The indemnity costs assessed are less than the actual costs paid and, even if 10% was added to the assessed figure, it would still be below the actual costs.

[108] The defendants argue that I am required by the reasoning in *ChongHerr Investments Ltd v Titan Sandstone Pty Ltd*[56] (in which the Court of Appeal approved the reasoning of McGill DCJ in *Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd*[57]) to add an amount which equates to the notional GST on the professional costs recognised in the indemnity costs award to that award. This approach is, in my respectful opinion, misconceived and not what is required by those authorities.

[109] In *Hennessey Glass and Aluminium* McGill DCJ was concerned with a review, under UCPR r 742, of a costs assessment made by a Senior Deputy Registrar. Those costs were assessed on the standard basis. On this issue he said:

> "[126] Finally, the plaintiff submitted that the registrar erred in reducing the amount allowed by one-eleventh on the basis that this represented the GST component of costs, and it was necessary in order to limit the amount recovered to an indemnity, since the plaintiff was entitled to an input credit in respect of GST paid by it on amounts paid to the solicitors and others. After the costs statement was assessed, the registrar reduced the amount arrived at by one-eleventh, on the basis that one-eleventh of the amount paid by way of legal costs was GST, and the plaintiff was not entitled to be reimbursed in respect of that, because the plaintiff had already obtained an input tax credit in respect of it.
>
> [127] Broadly speaking, whenever goods or services, including legal services, are provided for consideration, there is a taxable supply, and the supplier has to pay GST of one-eleventh of the amount paid. However, when the supply is to a business which is

---

56 [2007] QCA 278.
57 [2007] QDC 57.

itself registered for the purposes of GST, and when the supply is of an input for the purposes of that business, it is entitled to an input credit in respect of that input representing the amount paid by way of GST, which can be set off against its own GST obligations. In effect, although it pays GST on the bill to the solicitor, it obtains credit for the amount so paid. This will not apply if the client is not registered as a business for GST purposes, for example, where the client is an individual who is not in business, as will normally be the case with the plaintiff in an action for damages for personal injury. It was accepted that the plaintiff in this case was registered for GST purposes and obtained input tax credits in respect of any GST paid by it. That would include any amount paid by the solicitors as outlays and reimbursed by the client.

[128] The Commissioner of Taxation has issued a public ruling, GSTR 2001/4, in relation to GST consequences of court orders and out of court settlements which, among other things, deals with the GST treatment of an award of costs or a negotiated costs amount. Costs are discussed from paragraph [145]. Paragraph [149] says:

> 'Accordingly, the payment of court ordered costs or costs negotiated in a settlement in the circumstances described will not be consideration for an earlier or current supply. It does not matter that the payment of the costs order or settled amount is made by an entity other than the unsuccessful party. The costs order or settled amount should take account of any entitlement to an input tax credit of the parties to the original supply.'

…

[140] It may be that, if the effect of an input tax credit meant that costs assessed on the standard basis plus the input tax credit came to an amount greater than the plaintiff had in fact paid the solicitor in respect of professional costs, the costs would have to be abated under the indemnity principle so that the client did not recover in total more than was actually paid. … That principle, however, should be applied in respect of professional costs by comparing the amount in fact paid less an input credit with the amount allowed on assessment, not in the way applied by the registrar. There would be double-dipping only if the amount in fact paid by the plaintiff to the solicitor were no more than the amount recovered on the assessment of costs on the standard basis, and that would not have been the case here. Accordingly, costs allowed in accordance with the scale, that is the professional costs rather than the outlays, should not have been reduced by one-eleventh. That is consistent with such authorities as I have been able to find, and in my opinion a proper application of the indemnity principle.

[110] In *ChongHerr Investments* the Court of Appeal referred to the last paragraph set out above and said:

> "[9] The next item in dispute relates to the respondent's contention that the appellant's claim in respect of the proceedings at first instance should be reduced by a GST input tax credit applicable to the professional costs incurred by the appellant at first instance. We agree with the views of McGill DCJ in *Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd*[2] that the necessity to give credit for an input tax credit applies not to solicitors' professional fees, but to outlays which attract GST."

[111] The distinction which should be drawn in this case is that it relates to indemnity costs and not costs which are fixed, at least in part, in accordance with a scale which allows for GST.

[112] Consideration has been given to the impact of GST on the assessment of party/party costs in *Merringtons Pty Ltd v Luxottica Retail Australia Pty Ltd.*[58] Master Wood concluded:

> "[43] In a party/party taxation the costs items drawn on Scale cannot be adjusted having regard to the impact of GST on the recipient of the costs. However, in relation to disbursements claimed, it is appropriate to deduct any GST before assessing the quantum in circumstances where the recipient has the ability to claim an input tax credit in respect of the service provided."

[113] The manner in which the experts reached their conclusion is not apparent on the face of their report but it is reasonable to assume that they had all the relevant bills and memoranda of fees and that they, in turn, would have disclosed the relevant entry for GST.

[114] As each of the defendants was entitled to an input tax credit for the GST each of them paid, it is appropriate to ignore GST on indemnity costs as it is an amount for which they are no longer liable, that is, it is not an "out of pocket" expense. In doing this, one is not concerned with scale costs and any amount they include to represent GST. To add to the indemnity costs already assessed a further 10% would be to change the experts' opinion as to the extent of the "costs reasonably incurred and of a reasonable amount".[59]

[115] I am fortified in this conclusion by one of the Practice Statements which the Australian Taxation Office issues for the assistance of its staff when dealing with many matters. Practice Statement LA 2008/16 covers "The GST Implications in the Recovery of Legal Costs (Professional Fees and Disbursements) Awarded by Courts or Settled by Agreement between the Parties". It contains the following examples:

> *"Example 1*
>
> 49. A party (receiving party) is registered for GST and entitled to claim legal costs from the other party (reimbursing party) either by costs awarded by the courts or settled by agreement between the parties.

---

[58] (No. 9435 of 2005, 16 June 2006, Supreme Court of Victoria, Master Wood, unreported)

[59] UCPR r 703(3)

50. The matter may be in any of the following jurisdictions: Victoria, Queensland, Federal Court and Federal Magistrates Court of Australia, Tasmania, Western Australia, Northern Territory, Australian Capital Territory and in limited circumstances in State Courts in New South Wales.

51. The assessment of costs is on the party/party basis and by application of a fixed scale of costs under the relevant court rules.

52. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

(i) court fees $100 (no GST payable)

(ii) search fees $220 (includes $20 GST payable), and

(iii) professional fees for solicitor of $660 (this is the fees as fixed by the scale of costs in the court rules and includes GST).

53. The receiving party is entitled to an input tax credit of $80.

54. The correct amount of legal costs to be paid by the reimbursing party is $960 (being $100 plus $200 plus $660). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $660 (including the GST component) for professional fees as fixed by the scale of costs in the court rules as they will not take into account a receiving party's entitlement to an input tax credit of $60.

*Example 2*

55. A party (receiving party) is registered for GST and entitled to claim legal costs from the other party (reimbursing party) either by costs awarded by the courts or settled by agreement between the parties (receiving party) from the other party.

56. The matter may be in any of the following jurisdictions of the State Courts of New South Wales and in the Supreme and District Court of South Australia.

57. The assessment of costs is on the party/party basis.

58. In South Australia the amount to be paid is by reference to a fixed scale of costs that provides that an input tax credit is to be taken into account in a schedule of costs.

59. In the State Court of New South Wales the amounts are to be paid by application of the *Legal Professions Act 2004*.

60. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

(i) court fees $100 (no GST payable);

(ii) search fees $220 (includes $20 GST payable); and

(iii) professional fees for solicitor of $660 (this includes GST).

61. The receiving party is entitled to an input tax credit of $80.

62. The correct amount of legal costs to be paid by the reimbursing party is $900 (being $100 plus $200 plus $600). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $600 for professional fees and not the $60 for the GST component as they will take into account the receiving party's entitlement to an input tax credit of $60.

*Example 3*

63. The circumstances are the same as in Example 2 except the costs assessment is on a solicitor and client basis or indemnity basis and in all jurisdictions.

64. The correct amount of legal costs to be paid by the reimbursing party is $900 (being $100 plus $200 plus $600). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $600 for professional fees and not the $60 for the GST component as they will take into account the receiving party's entitlement to an input tax credit of $60."

[116] It is the third example which is relevant in these proceedings and which supports the view I take of the appropriate means of dealing with GST in these circumstances. Thus, the order for indemnity costs will not include any amount, notional or otherwise, for GST.

**Orders**

[117] The amounts which I have fixed for costs have been taken from the Joint Expert Report.

[118] I order that:

(a) The costs of the Marina Company in defending these proceedings:
  (i) Be paid on an indemnity basis
  (ii) Be fixed in the sum of $319,000
  (iii) Be paid by Robert Hewett Noble.

(b) The costs of SCAC in defending these proceedings:
  (i) Be paid on an indemnity basis
  (ii) Be fixed in the sum of $436,000

(iii) Be paid by Robert Hewett Noble.

(c) The costs of SCAC in respect of its counterclaim:
(i) Be paid on an indemnity basis
(ii) Be fixed in the sum of $1,500
(iii) Be paid by Robert Hewett Noble

(d) The costs of the Marina Company and SCAC of and incidental to this application
(i) Be paid on the standard basis
(ii) Be paid by Beach Retreat, MYC and Robert Hewett Noble.