

# SUPREME COURT OF QUEENSLAND

CITATION: *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2)*  
[2013] QSC 170

PARTIES: **KOSHO PTY LTD ACN 104 663 792**  
(first plaintiff)  
and  
**CITY CO PTY LTD ACN 099 0723 748**  
(second plaintiff)

**v**  
**TRILOGY FUNDS MANAGEMENT LIMITED**  
**ACN 080 383 679**  
(defendant)

**TRILOGY FUNDS MANAGEMENT LIMITED**  
**ACN 020 383 679 IN ITS CAPACITY AS THE**  
**CUSTODIAN OF THE PACIFIC FIRST MORTGAGE**  
**FUND**

(first plaintiff)

and

**THE TRUST COMPANY (AUSTRALIA) LIMITED**  
**ACN 000 000 993 IN ITS CAPACITY AS THE**  
**CUSTODIAN OF THE PACIFIC FIRST MORTGAGE**  
**FUND**

(second plaintiff)

and

**THE PUBLIC TRUSTEE OF QUEENSLAND**  
(third plaintiff)

**v**

**RIEKO FUJINO**  
(defendant)

FILE NOS: BS 4728 of 2010  
BS 10543 of 2010

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING  
COURT: Supreme Court of Queensland

DELIVERED ON: 26 June 2013

DELIVERED AT: Brisbane

HEARING DATE: 12 June 2013

JUDGE: Applegarth J

ORDERS: **1. Judgment be given for the plaintiffs in the amount of \$10 for breach of the implied term of the contract pleaded at paragraph 17(a) of the Second Further**

**Amended Statement of Claim filed 7 August 2012.**

- 2. The plaintiffs' claim is otherwise dismissed.**
- 3. The plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceeding to be assessed on the standard basis.**

**CATCHWORDS:** PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COST OF ISSUES – where plaintiff succeeds on one part of liability case – where plaintiff fails to prove loss – where plaintiff awarded nominal damages only – whether to depart from the general rule that costs follow the event.

*Uniform Civil Procedure Rules 1999 (Qld)*, r 681 r 694.

*AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2)* [2009] QSC 75, cited

*Alborn v Stephens* [2010] QCA 58, cited

*BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64, cited

*In the Matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No 2)* [2008] FCA 1184, cited

*Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino* [2013] QSC 135, cited

*Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2000] QSC 432, cited

*Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229, cited

**COUNSEL:** I A Erskine for the plaintiffs in BS 4728 of 2010 and the defendant in BS 10543 of 2010 (“the Kosho/Fujino interests”)

J M Horton for the defendant in BS 4728 of 2010 and for the plaintiffs in BS 10543 of 2010 (“the Trilogy interests”)

**SOLICITORS:** Tress Cox for the Kosho/Fujino interests  
Clayton Utz for the Trilogy interests

- [1] In my reasons delivered on 29 May 2013 I indicated that I would make directions in relation to draft minutes of judgment and would hear the parties, if necessary, in relation to the form of order and costs.<sup>1</sup> The parties have now made submissions. In the light of those submissions, on 12 June 2013 I gave judgment in the Fujino or guarantee proceeding as follows:

1. Judgment for the Plaintiffs in the sum of \$9,611,721.39.

<sup>1</sup> *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino* [2013] QSC 135.

2. The Defendant pay interest to the Plaintiff in the amount of \$9,409,141.98 pursuant to the Finance Facilities dated 17 October 2007 and 24 June 2009 up to and including 6 June 2013.
  3. The Defendant's Counter-Claim filed 28 October 2010 be dismissed.
  4. The Defendant pay the Plaintiffs the costs of, and incidental to, this proceeding on an indemnity basis.
- [2] The remaining issue is the appropriate order as to costs of the Kosho proceeding. The Kosho interests submit that the defendant, Trilogy, should be ordered to pay 60 per cent of their costs of and incidental to the Kosho proceeding to be assessed on the standard basis, or alternatively that there be no order as to costs in the Kosho proceeding so as to reflect the Kosho interests' limited success. Trilogy submits that, subject to one discrete claim, it was the successful party in the Kosho proceeding and that, having regard to the limited success of the Kosho interests, they ought pay 85 per cent of Trilogy's costs of and incidental to the proceeding to be assessed on the standard basis.

### Relevant principles

- [3] The power to award costs is governed by specific rules and also general principles. Rule 681(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* provides that the costs of a proceeding are in the discretion of the Court but follow the event, unless the Court orders otherwise. Rule 684 permits the Court to make an order for costs in relation to a particular question in, or a particular part of, a proceeding.<sup>2</sup> Neither party seeks an order pursuant to r 684.
- [4] Authorities concerning the general discretion of the Court to award costs recognise that:
- “ Ordinarily costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order.
  - Where a litigant has succeeded only upon a portion of the claim, the circumstances may make it reasonable that the litigant bear the expense of litigating that portion upon which he or she has failed.
  - A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other parties' costs of them. In this sense 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or law.”<sup>3</sup>
- [5] Ordinarily, the fact that a successful plaintiff fails on particular issues does not mean that it should be deprived of some of its costs.<sup>4</sup> As Muir JA observed in

<sup>2</sup> *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [6] – [7].

<sup>3</sup> *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 234-235 [11].

<sup>4</sup> *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2)* [2009] QSC 75 at [15].

*Alborn v Stephens*, “a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs.”<sup>5</sup> Still, a successful party which has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party’s costs of them.<sup>6</sup>

- [6] The proposition that a successful party will be deprived of its costs or be ordered to pay part of the other parties’ costs only in special circumstances or for good reason is well-established. Principles or even rules of thumb which refer to “a successful party” beg the question of the standard by which success is to be measured. Is a plaintiff which makes a multi-million dollar claim on a variety of legal grounds but obtains a judgment for nominal damages, namely \$10, based upon limited success on only one of the various causes of action pursued by it successful?
- [7] In one sense such a plaintiff has been successful, namely in establishing the defendant’s liability, and unsuccessful in establishing an entitlement to anything of value. Equally, it might be said that the defendant in such a case has been successful, namely in defending the plaintiff’s multi-million dollar claim for damages, and that the plaintiff’s success in establishing a single breach of contract is no real success at all in litigation which has a commercial objective, namely an award of substantial damages.
- [8] The phenomenon of each party claiming to have been successful, or to have each enjoyed a substantial measure of success, is familiar.<sup>7</sup>

### **The parties’ submissions**

- [9] The Kosho interests submit that where, as here, there is an award of nominal damages, the Court may deprive a successful litigant of all, or more usually, part of its costs. It submits that in such a case the proper approach is that summarised by Dutney J in *Manwelland Pty Ltd v Dames & Moore Pty Ltd*.<sup>8</sup> They submit that the Kosho interests did not improperly or unreasonably raise issues, and that 80 per cent of the evidence, documentation and hearing was devoted to the question of liability and 20 per cent to damages. I am asked to infer that the costs borne by both sides were substantially equal and that, following *Manwelland*, Trilogy should pay 60 per cent of the costs of the Kosho interests to be assessed on the standard basis. In oral submissions counsel for the Kosho interests accepted that the suggested apportionment of 80 per cent : 20 per cent as between liability and damages might be too high. Reliance was placed upon the burden of trial preparation, including assembling documentary evidence, and that, to prove its case Kosho had to prove that all of the special conditions had been satisfied. This involved other special conditions, not simply Special Conditions (p), (q) and (s) which proved contentious, being proved. Since the hearing on costs I have reviewed the affidavit material and the pleadings.

---

<sup>5</sup> [2010] QCA 58 at [8].

<sup>6</sup> *Hughes v Western Australian Cricket Association (Inc.)* (1986) ATPR 40-748 at [48136].

<sup>7</sup> As to the perceptions of the parties and the role of the judge in such a case see *In the Matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No 2)* [2008] FCA 1184 at [3] – [4] per Finkelstein J.

<sup>8</sup> [2000] QSC 432 at [65] – [66]. This provisional view about the disposition of costs was not adhered to in the light of further submissions on costs heard on 28 November 2000, also reported as [2000] QSC 432. The further submissions and final decision on costs related to an offer to settle and the position originally adopted by the parties to the calculation of damages.

- [10] The Kosho interests submitted at the hearing on costs on 12 June 2013 that a substantial part of the hearing and preparation for it was concerned with Special Condition (s) and that it occupied 50 per cent of the hearing time and 50 per cent of the burden of preparing for trial. For the reasons which follow, I do not accept such a high percentage, but do accept that preparation for the hearing and the conduct of the hearing in connection with issues related to Special Condition (s) upon which the Kosho interests succeeded was substantial.
- [11] The parties in their submissions did not seek to justify any apportionment of costs as between liability and quantum, or between particular issues going to liability, by reference to a calculation of the time taken at the hearing, transcript pages or percentages of affidavits. Reference was made to particular witnesses who were called in relation to particular issues. However, I was invited to make my costs order on the basis of the parties' submissions concerning apportionment of costs and counsel accepted that I should take a "broad brush approach".
- [12] Counsel for Trilogy sought to emphasise the very limited success which the Kosho interests had enjoyed, and the number of witnesses and the number of reports that were devoted to the issue of loss. On the question of liability, counsel for Trilogy placed particular reliance upon the fact that the Kosho interests succeeded on only one of the many breach of contract claims asserted and that there were separate claims upon which the Kosho interests failed entirely, including alleged contravention of s 52 of the *Trade Practices Act 1974* (Cth) ("*TPA*"), unconscionable conduct and claims of a "deliberate tactic". Special Condition (s) was said not to have occupied the large amount of time which the Kosho interests submitted.

### **Determination of costs in the Kosho proceeding**

- [13] In order to determine the parties' submissions concerning an appropriate allocation of costs, including an appropriate apportionment as between liability and quantum in the Kosho proceeding, it is first necessary to distil and remove parts of the hearing which were devoted to issues that arose only in the Fujino proceeding. This includes witnesses and parts of the evidence of witnesses who were devoted to the unconscionability issues that were litigated in the Fujino proceeding.
- [14] Within the Kosho proceeding a substantial amount of preparation for trial and at the hearing was devoted to the issue of loss upon which the Kosho interests failed. I have regard to the number of reports and the number of witnesses which related to the issue of loss, including substantial later affidavits by Mr Slijderink, and the time taken at the hearing on the issue of loss. I also have regard to the proportion of the parties' written submissions which were devoted to the issue of loss.
- [15] In the absence of detailed evidence concerning preparation for trial, including the time required by legal representatives to confer with expert witnesses and other witnesses who gave evidence in relation to loss, and to prepare to cross-examine expert witnesses, I consider that an appropriate apportionment within the Kosho proceeding is 60 per cent as to liability and 40 per cent as to loss.
- [16] Within the issues that were litigated in connection with liability, there were discrete issues upon which the Kosho interests failed entirely. As to the aspect of its claims upon which it succeeded, which related to Special Condition (s) and a breach of one (or arguably two) of the implied terms for which the Kosho interests contended, it

was necessary for the Kosho interests to prepare substantial material by way of background in order to achieve the success which they enjoyed in connection with Special Condition (s) and to call witnesses who gave evidence in connection with the circumstances under which Special Condition (s) was not fulfilled. Special Condition (s) necessitated the calling of more witnesses than Special Condition (p). Witnesses were called on discrete issues upon which the Kosho interests entirely failed, including the “deliberate tactic” issue upon which it failed.

- [17] The Kosho interests’ unsuccessful pursuit of issues in relation to Special Condition (p) was not improper or unreasonable and does not provide a basis for ordering that they should pay Trilogy’s costs of responding to that issue. However, the Kosho interests’ lack of success in establishing its case in relation to Special Condition (p) and, more importantly, its lack of success in establishing the various other claims it made in relation to liability should be reflected in an order for costs which does not unfairly burden Trilogy with an obligation to pay that part of Kosho’s costs upon which Kosho was entirely unsuccessful. I also take into account City Co’s lack of success on its claims in relation to the Surfers Paradise land and the release of Trilogy’s security over that land.
- [18] In a case in which neither party submits that some arithmetic allocation is possible in respect of liability issues, the appropriate course is to deprive the Kosho interests of a substantial part of their costs on liability issues so as to reflect their success in establishing a case for breach of contract in connection with Special Condition (s) and to reflect their lack of success (and Trilogy’s success) on other liability issues.
- [19] Applying the principles which I have earlier discussed to the liability issues in the Kosho proceeding, and having regard to the measure of success and measure of failure which each party had on liability issues, I consider that an appropriate determination would be to award the Kosho interests 40 per cent of their costs of litigating the liability issues.
- [20] As to the issue of loss, Trilogy succeeded and, viewed separately, in a proceeding in which loss occupied about 40 per cent the starting point would be an order that the Kosho interests pay 40 per cent of Trilogy’s costs of and incidental to the Kosho proceeding.
- [21] *Manwelland* is distinguishable from the present case, although I intend to apply a similar approach to that provisionally adopted by Dutney J. *Manwelland* was a case in which the plaintiff sued in respect of advice which it received. It claimed damages for breach of contract, for negligence and for contravention of s 52 of the *TPA*. The plaintiff failed to establish that it suffered substantial loss and accordingly obtained judgment only for nominal damages for breach of contract. The case is similar to this one to the extent that it involves an award of nominal damages for breach of contract. However, in that case the same facts were relied upon to prove the breach of contract, the breach of a general duty of care and a contravention of the *TPA* through the provision of wrong advice. If the plaintiff in *Manwelland* had established that it had suffered loss and damage then it would have succeeded in respect of each of its claims. In this case the plaintiffs have failed to prove a contravention of the *TPA*, succeeded in establishing only one (or arguably two) of the implied terms for which they contended and did not establish a number of the breaches of contract for which they contended. They also failed to establish a

breach of the implied term of good faith by reason of the alleged “deliberate tactic” which was pleaded, persisted in but not proven.

- [22] In *Manwelland* the evidence was almost entirely in relation to liability and Dutney J estimated that at least 80 per cent of the evidence and documentation related to liability. On certain assumptions, the net result of the defendant paying 80 per cent of the plaintiff’s costs and the plaintiff paying 20 per cent of the defendant’s costs would be an order that the defendant pay 60 per cent of the plaintiff’s costs.
- [23] I have taken account of the fact that a large part of the Kosho interests preparation for trial related to issues of liability and the preparation of a large volume of documentation. By the same token, a large part of Trilogy’s preparation for trial would have involved reading and responding to voluminous affidavits and a large volume of documents. Neither party submits that one side’s costs of the Kosho proceeding would have been more than the other’s. In fact, the Kosho interests proceed on the basis that they were substantially equal.
- [24] I estimate that 60 per cent of the costs of the Kosho proceeding related to liability. Given the Kosho interests limited measure of success on liability, I consider that they should recover 40 per cent of their costs on liability issues. In other words, they are entitled to 40 per cent of 60 per cent of their costs or 24 per cent.
- [25] Trilogy is entitled to be paid its costs in relation to the issue of loss. The loss issues constituted 40 per cent of the proceeding. A separate order for costs would require the Kosho interests to pay 40 per cent of Trilogy’s costs of the Kosho proceeding.
- [26] An appropriate net result is one which requires the Kosho interests to pay 16 per cent of Trilogy’s costs of and incidental to the Kosho proceeding.
- [27] An order that the plaintiffs pay 16 per cent of the defendant’s costs of and incidental to the Kosho proceeding is an appropriate one to reflect the limited success which the plaintiffs achieved. In general terms, the Kosho interests’ success in obtaining only nominal damages should be reflected in requiring it to pay Trilogy’s costs of litigating issues of loss which I estimate to have occupied about 40 per cent of the Kosho proceeding. In addition, the Kosho interests should not be entitled to recover costs reflecting liability issues upon which it completely failed. It should be deprived of a substantial part of the costs which it incurred in pursuing liability issues upon which it failed. That said, this is not a case in which the Kosho interests should be ordered to pay a substantial part of the Trilogy interests’ costs upon liability issues upon which the Kosho interests failed, particularly the issue in relation to Special Condition (p) which involved an issue of construction. The alleged fulfilment of that Special Condition was not unreasonably raised. As a consequence, it would not be appropriate to order that the Kosho interests pay Trilogy’s costs of successfully defending issues in relation to Special Condition (p). Instead, the Kosho interests should be deprived of a substantial part of the costs associated with liability issues upon which they failed. This would leave them with an entitlement to be paid costs associated with the liability issues upon which they succeeded.
- [28] The Kosho interests’ success resulted in an award of damages of only \$10 in a case in which they pursued a multi-million dollar damages claim. Kosho’s lack of success, or failure, in proving the loss claimed is reflected in the order for costs which I intend to make. If Trilogy wished to protect itself against the possibility of

a nominal damages award then it might have made an offer to settle for a moderate amount so as to engage the rules governing offers to settle. There is no evidence that such an offer to settle was made.

- [29] The success which the parties enjoyed on issues of liability and loss is best reflected in a costs order that the plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceeding. This order will not disturb existing orders for costs such as specific orders made in relation to adjournment of the trial.

### **Orders**

- [30] The judgment of the Court will be:

1. Judgment be given for the plaintiffs in the amount of \$10 for breach of the implied term of the contract pleaded at paragraph 17(a) of the Second Further Amended Statement of Claim filed 7 August 2012.
2. The plaintiffs' claim is otherwise dismissed.
3. The plaintiffs pay 16 per cent of the defendant's costs of and incidental to the proceeding to be assessed on the standard basis.