SUPREME COURT OF QUEENSLAND

CITATION:	*Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd (in liq) (No 3)* [2014] QSC 235
PARTIES:	**VERCORP PTY LTD** (first applicant) **HEGIRA LIMITED** ABN 7100 8610 357 (second applicant) **v** **ACN 096 278 483 PTY LTD (in liquidation)** (respondent)
FILE NO/S:	BS 6442 of 2004
DIVISION:	Trial Division
PROCEEDING:	Written submissions
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	23 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Philip McMurdo J
ORDER:	**1. The respondent pay to the applicants one half of their costs of the proceeding which was determined by the judgment of 29 October 2010; and** **2. There be no order for the costs reserved on 19 September 2008.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – SUBSTANTIAL SUCCESS – where the applicants succeeded on two of four claims at trial – where the decision was substantially upheld on appeal – where the applicants made an offer to settle prior to trial which was rejected – where the applicants seek their costs on an indemnity basis – whether the applicants should be awarded costs when they were equally successful as the respondent. *Uniform Civil Procedure Rules* 1999 (Qld), rule 360 *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust* [2010] QSC 334, cited. *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as*

trustee of the Williams Family Trust (No 2) [2010] QSC 405, cited.

COUNSEL: The applicants' submissions were heard on the papers

No submissions on behalf of the respondent

No submissions on behalf of the liquidator

SOLICITORS: Piper Alderman for the applicants

[1] This judgment deals with the costs of the proceeding which was tried some four years ago and decided by my judgment a month later.[1]

[2] The respondent was the registered owner of four pieces of freehold land which it had purchased from the second applicant. There was a contract for each lot but in relevantly identical terms. The respondent was required to construct a house on each lot to a certain standard. If it failed to do so the second applicant had an option to repurchase the lot. When the respondent did fail to do so, the second applicant purported to exercise its options to repurchase over two of the properties in late 2003 and the first applicant, as the second applicant's assignee, exercised the option to repurchase over the other two properties in 2006. The applicants sued for specific performance of these four contracts of repurchase. They succeeded as to two lots but failed on the others. For those contracts, a condition precedent to performance was not satisfied by the agreed date for performance, as a result of which the respondent had been able to terminate the contracts of repurchase.

[3] Each side appealed against that judgment. Each appeal was substantially unsuccessful. The only variation to the orders which had been made was to order specific performance of the two contracts which already I had held were enforceable against the respondent.

[4] The cost of the proceeding up to and including the trial were not sought when my judgment was given. Indeed they were not sought until the applicants raised them in late 2013. (It seems that much of the time from the judgment of the Court of Appeal until then was taken up by the applicants ultimately procuring a transfer of all four lots.) I made directions for written submissions about costs. But the lawyers for the respondent then withdrew. And shortly afterwards, although without the knowledge of the applicants or the court, the respondent's director caused the respondent to become a deregistered company.

[5] The applicants successfully applied for the reinstatement of the registration of the respondent and for the winding up of that company on 26 June 2014. For some time the applicants waited for the liquidator to decide whether to make any submission about the costs of the proceeding. I have evidence of communications between the applicants' lawyers and the liquidator in late July in which the liquidator was still considering whether he would make a submission. But nothing more was heard from him by 5 August, when the lawyers for the applicants asked me to rule upon their clients' application for costs. I am satisfied that the liquidator has had an ample opportunity to make submissions and I infer that he has decided not to do so.

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1 *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust (No 2)* [2010] QSC 405.

[6] The submissions for the applicants are extensive and propose various alternative orders, ranging from an order that the respondent pay the entirety of their costs on the indemnity basis to an order that they have at least 80 per cent of their costs and on the standard basis.

[7] The claim for indemnity costs is argued partly in reliance upon an offer to settle which the applicants made on 24 April 2009. They then offered to settle the proceedings upon terms that they would acquire all four lots for a total consideration of $3 million and that the respondent would pay 75 per cent of their costs to be assessed. By this litigation, they obtained orders for the transfer of two of those lots. But by dealings which postdated the judgment, they succeeded in acquiring the other two properties. The total consideration for the repurchase of the four properties has amounted to $2.71 million. Their argument is that the ultimate result was no less favourable to them than would have been the case from an acceptance of their offer to settle. Therefore they allege that they should have costs on the indemnity basis.

[8] Rule 360 of the *Uniform Civil Procedure Rules* 1999 (Qld) does not apply here because the applicants did not obtain *a judgment* which was no less favourable than the offer to settle. Their judgment was considerably less favourable than that offer. But they suggest that their offer to settle is material because ultimately, by a combination of the judgment and their own negotiations after the case was decided, they have obtained an outcome which is less favourable to the respondent. This submission cannot be accepted. They cannot have the benefit of an offer to settle, if accepted, which would have put them in a better position than that to which they were then entitled.

[9] Next the applicants criticise the conduct of the respondent in the proceeding. They refer to comments I made in an interlocutory judgment where I said that the "respondent's conduct [in its attempts to plead its case] falls well short of what is now required of litigants and in particular within proceedings upon this [Commercial] List".[2] The applicants provide further instances of unreasonable conduct by the respondent in the litigation, which is unnecessary to repeat here.[3] Each of those criticisms are well made. But ultimately I am not persuaded that an order for indemnity costs is warranted. Those factors, however, are still relevant for the orders which should be made.

[10] The applicants' submissions contain a carefully prepared tabulation of the issues at the trial and the outcome upon each issue. It is fair to say that most of the issues were resolved against the respondent. Again, those matters are relevant.

[11] However, the applicants' submissions do not confront the fact that they sued upon four alleged causes of action and proved only two of them. The respondent could claim to have had as much success as the applicants from this litigation. It is irrelevant that all four lots have ended up in the applicants' hands. None of the alternative orders proposed by the applicants is appropriate for a case where half their claims were successfully defended. I do not see this as equivalent to a case where, for example, a plaintiff succeeds on the single cause of action but only in a lesser sum than was sought. According to my judgment and that of the Court of

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2 *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust* [2010] QSC 334 at [2].

3 Paragraphs 25.2 through 28 of the written submissions.

Appeal, the applicants should not have sued upon two of these contracts. Therefore, the appropriate starting point is that the two sides enjoyed equal success in the outcome so that there should be no order or orders for costs by which one side would do better than the other. However, I accept that allowance has to be made for the conduct by the respondent as detailed in the applicants' submissions, which must have had the effect of unnecessarily adding to the expense of this litigation.

[12] In all the circumstances, the appropriate order is for the respondent to pay one half of the applicants' costs of the proceeding to be assessed on the standard basis.

[13] There remains a question of the costs which were reserved on 19 September 2008, which were the costs of the respondent's successful application for an interlocutory injunction to prevent the applicants from entering the four lots in order to demolish or make improvements upon them. The state of the improvements was said to be in breach of covenants in the original contracts for the sale of the lots by the second applicant. The question which was then debated was whether the respondent was bound by those covenants. Consistently with my final judgment, the respondent at one stage had been bound by them. But by September 2008, the respondent had duly terminated two of the contracts. Therefore, the respondent was entitled to resist the applicants' entry upon two of the lots. It is therefore inappropriate to award any of those reserved costs in favour of the applicants, where the merits, it can now been seen, were relevantly equal.

[14] The applicants also referred to an order for costs on 16 December 2008 in which I ordered that the costs of the interlocutory application then before the court be each party's costs in the cause. It was submitted that they should be the applicants' costs now without any discount. In my view, that order should remain in its present terms with the consequence that the applicants will be able to recover 50 per cent of them.

[15] Lastly there are the costs of the counterclaim. It is said that by the order of the Court of Appeal, that counterclaim was dismissed. But that order was not made by the Court of Appeal. The subject of my judgment and that of the Court of Appeal was the applicants' claim. The counterclaim was not subsequently prosecuted. Although there seems to be no real possibility that the counterclaim will be reactivated, I am reluctant to dismiss it without notice to the liquidator. Until that is done, there should not be an order for costs upon it.

[16] The order will be that the respondent pay to the applicants one half of their costs of the proceeding which was determined by the judgment of 29 October 2010 and that there be no order for the costs reserved on 19 September 2008.