SUPREME COURT OF QUEENSLAND

CITATION:	*Grocon Constructors (Qld) Pty Ltd v Juniper Developer No. 2 Pty Ltd & Anor* [2015] QSC 333
PARTIES:	**GROCON CONSTRUCTORS (QLD) PTY LTD** **ACN 120 476 495** (plaintiff) **v** **JUNIPER DEVELOPERS NO. 2 PTY LTD** **(RECEIVERS AND MANAGERS APPOINTED)** **ACN 123 200 699** (first defendant) **RIDER LEVETT BUCKNALL (QLD) PTY LTD** **ACN 055 768 655** (second defendant) **JUNIPER DEVELOPER NO. 2 PTY LTD** **(RECEIVERS AND MANAGERS APPOINTED)** **ACN 123 200 699** (plaintiff) **v** **NORTON ROSE (A FIRM)** (defendant)
FILE NO/S:	BS 9291 of 2011 BS 2106 of 2013
DIVISION:	Trial Division
PROCEEDING:	Applications for costs, written submissions
DELIVERED ON:	27 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10, 11, and 12 September 2015
JUDGE:	Peter Lyons J
ORDER:	**In proceedings BS 9291 of 2011 the plaintiff is to pay two-thirds of Juniper's costs of the separate hearing.**
CATCHWORDS:	PROCEDURE – COSTS – JURISDICTION – PERSONS NOT PARTIES TO PROCEEDINGS – where a contractor sued its principal for monies owing under a construction contract – where the contractor alleged that the liquidated damages clause, pursuant to which the principal withheld the monies claimed, was void as a penalty – where there was no suggestion that the contractor raised that issue without sufficient foundation, or otherwise improperly – where, in proceedings against its lawyers, the principal alleged that the manner in which the construction contract was drafted

created an unnecessary risk that the liquidated damages clause would be found to be void or unenforceable – where, in a separate hearing in advance of trials, it was determined that the clause was not void for the purposes of both proceedings – where the contractor did not seek, but did not oppose, the principal's lawyers' participation in the separate hearing – where the principal's lawyers were not in a materially different position to advance the case than the principal – where there were obvious practical advantages for the principal's lawyers in having the validity of the liquidated damages clause upheld at an early stage, including the limitation of damages, for which they may be liable in their proceedings against the principal – whether the contractor's conduct has made it fair or reasonable to impose on it costs associated with the principal's lawyers' participation in the separate hearing

PROCEDURE – COSTS – JURISDICTION – PERSONS NOT PARTIES TO PROCEEDINGS – where there was, as between the principal and its lawyers, at the separate hearing, in substance no issue – where the principal's lawyers were not in a materially different position to advance the case than the principal – where there were obvious practical advantages for the principal's lawyers in having the validity of the liquidated damages clause upheld at an early stage, including the limitation of damages, for which they may be liable in their proceedings against the principal – where the contractor did not create any uncertainty about who should be sued for the loss claimed – whether the principal should be liable to pay the lawyers' costs of the separate hearing

Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira (No 2)) [1986] 2 All ER 409; [1986] AC 965, distinguished.
Altamura v Victorian Railways Commissioners [1974] VR 33; [1974] VicRp 4, distinguished.
Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 ALR 406; [2001] CA 26, cited.
Australian Conservation Foundation v Forestry Commissioner Tasmania (1988) 81 ALR 166; [1988] FCA 144, cited.
Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2009] 2 Qd R 356; [2009] QSC 84, discussed.
Bullock v London General Omnibus Company [1904-7] All ER 44; [1907] 1 KB 264, cited.
Colburt v Beard [1992] 2 Qd R 67; [1992] FC 113, cited.
Cretazzo v Lombardi (1975) 13 SASR 4, cited.
Gould v Vaggelas (1984) 157 CLR 215; [1984] HCA 68, cited.
Gupta v Comer [1991] 1 All ER 289; [1991] 1 QB 629, cited.

Hall v Wilson [1954] VicLawRp 80; [1954] VLR 576, distinguished.
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, followed.
McDermott v Robinson Helicopter Co (No 2) [2015] 1 Qd R 295; [2014] QSC 213, cited.
Murphy v Young & Co's Brewery plc [1997] 1 All ER 518; [1997] 1 WLR 1591, cited.
Myers v Elman [1939] All ER 484; [1940] AC 282, cited.
Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2) [1999] 1 Qd R 518; [1998] QSC 018, cited.
Oasis Hotel Ltd v Zurich Insurance Co (1981) 124 DLR (3d) 455, cited.
Pritchard v J H Cobden Ltd [1987] 1 All ER 300; [1988] Fam 22, distinguished.
Roads and Traffic Authority (NSW) v Palmer (No 2) [2005] NSWCA 140, discussed.
Sanderson v Blyth Theatre Co [1903] 2 KB 533
Sinclair-Jones v Kay [1989] 1 WLR 114, cited.
Sved v Woollahra Municipal Council (1998) NSW Conv R para 55-842, discussed.
Symphony Group plc v Hodgson [1993] 4 All ER 143; [1994] QB 179, discussed.
Thiess v TC Channel 9 Pty Limited (No 5) [1994] 1 Qd R 156, cited.
Vestris v Cashman (1998) 72 SASR 449, cited.

COUNSEL:

In BS No 9291 of 2011
MH Hindman for the plaintiff
P Dunning QC with P Franco QC for the first defendant
No appearance for the second defendant

In BS No 2106 of 2013
P Dunning QC with P Franco for the plaintiff
J McKenna QC with T Pincus for the defendant

SOLICITORS:

In BS No 9291 of 2011
Minter Ellison for the plaintiff
Holding Redlich for the first defendant
No appearance for the second defendant

In BS No 2106 of 2013
Holding Redlich for the plaintiff
Bartley Cohen for the second defendant

[1] On 23 April 2015, in a separate hearing in advance of trials[1] (*separate determination*), I determined that clause 35.7 of a contract made between Grocon and Juniper was not void

[1] See r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld).

on the grounds that it imposed a penalty, and made a declaration to that effect[2]. That determination was made, both in proceedings between Grocon and Juniper (*Grocon proceedings*), and proceedings between Juniper and Norton Rose (*Norton Rose proceedings*). Questions have arisen as to the costs orders to be made, as a consequence of that determination.

Background

[2] Juniper engaged Grocon to undertake the design and construction of a development at Surfers Paradise referred to as the Soul Project. Clause 35.7 made provision for the payment by Grocon of liquidated damages for failure to perform the contract in accordance with times specified in it. Norton Rose (then Deacons) acted as Juniper's solicitor in relation to the preparation of the contract.

[3] In the Grocon proceedings, Grocon sued Juniper for monies which it alleged Juniper owed it under the contract, for damages for its breach, and for other relief. Because Juniper had withheld payment of monies on the basis of an asserted entitlement to liquidated damages under clause 35.7, Grocon had in its statement of claim alleged the clause to be void as a penalty, and sought a declaration to that effect[3].

[4] It is convenient at this point to note that Grocon made a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) (*BCIPA*) resulting in an adjudicator's decision in its favour on 2 June 2011. The adjudicator's decision reflected a finding that clause 35.7 was void, being penal[4]. By virtue of s 100 of the BCIPA, the making of a payment pursuant to an adjudicator's decision is provisional in nature[5].

[5] In its counterclaim, Juniper alleged that it was entitled to a little under $34 million as liquidated damages under clause 35.7. Alternatively, it alleged that it was entitled to general damages for delay in an amount particularised at a little over $28.5 million. It alleged that overpayments had been made to Grocon, including by reason of the adjudicator's decision, and sought relief accordingly[6].

[6] In its reply, Grocon maintained that clause 35.7 was penal, and accordingly void[7].

[7] As a result of these allegations, on 23 April 2014, in the Grocon proceedings I ordered the determination of the question relating to the validity of clause 35.7 in advance of the trial.

[8] Juniper commenced proceedings against Norton Rose in 2013. It claimed damages for misleading conduct under s 52 of the *Trade Practices Act* 1974 (Cth) (*TPA*), breach of contract, and negligence[8]. In support of those claims, it alleged that the manner in which its contract with Grocon had been drafted created an unnecessary risk that clause 35.7 might be held to be unenforceable or void. That exposed it to arguments by Grocon that no liquidated damages were payable under the contract. It also alleged that it had been

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2 See [2015] QSC 102.
3 See its Statement of Claim filed on 13 October 2011, paras 30-34.
4 See Juniper's Statement of Claim against Norton Rose filed 6 March 2013 at [58].
5 See *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [48]; *J Hutchison Pty Ltd v CADA Formwork Pty Ltd* [2014] QSC 63 at [18].
6 See Juniper's Defence and Counterclaim against Grocon filed 5 February 2014.
7 See Grocon's Reply against Juniper filed 2 July 2014.
8 See Juniper's Statement of Claim against Norton Rose filed on 6 March 2013.

required "to pay many millions of dollars in additional payments to Grocon" pursuant to the adjudicator's decision; and that it had been subjected to added expense involved with claiming and proving general damages in its counterclaim against Grocon. It also alleged loss resulting from the drafting of the clause dealing with extensions of time. These losses were also said to be the consequence of breach of duty (tortious or contractual), or misleading conduct, on the part of Norton Rose.

[9] Norton Rose had not, at the time of the hearing to determine the question relating to clause 35.7, delivered a Defence; but it was accepted that it intended to contend that clause 35.7 was not void.

[10] On 26 August 2014 Applegarth J made orders, agreed to by each of Juniper, Grocon and Norton Rose, for the separate determination of the same question in the Norton Rose proceedings, and for the determinations in both proceedings to be heard together, resulting in the hearing before me referred to at the commencement of these reasons.

The parties' costs contentions

[11] It is convenient first to record the orders for which each of the parties contended. Juniper sought an order that Grocon pay Juniper's costs of the determination of the separate question in the Grocon proceedings[9]. Grocon accepted that it should be ordered to pay Juniper's costs of the determination of the separate question in the Grocon proceedings, except to the extent that those costs were increased by reason of the participation of Norton Rose[10].

[12] Norton Rose sought an order that Juniper pay its costs[11]. Juniper contended that there should be no order as to costs in the Norton Rose proceedings[12]; but if a costs order was made in favour of Norton Rose, Grocon should ultimately be liable to meet it[13]. Either there should be an order in the Norton Rose proceedings that Grocon pay Norton Rose's costs (*alternative A*)[14]; or an order should be made in the Norton Rose proceedings that Juniper pay Norton Rose's costs, and in the Grocon proceedings, the order as to costs in Juniper's favour should extend to Juniper's liability to pay Norton Rose's costs in the Norton Rose proceedings (*alternative B*)[15].

[13] Grocon resisted any order which would make it liable for the costs of Norton Rose[16]. It submitted that, in the Norton Rose proceedings, the costs of the determination of the separate question should either be reserved, or costs in the cause, as between Juniper and Norton Rose[17].

[14] Although it might be thought more logical to commence with the consideration of the question whether a costs order should be made in favour of Norton Rose against either of the other parties, it is convenient, particularly because of the possibility of an order in accordance with alternative B, to commence by considering whether Grocon should be

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9 Juniper's Submissions on Costs of 7 May 2015 (*JSC).*
10 Grocon's Submissions on Costs of 7 May 2015 (*GSC*) at [2].
11 Norton Rose's Submissions on Costs *(NSC)* of 8 May 2015.
12 JSC at [4].
13 JSC at [4] and [5].
14 JSC at [55].
15 JSC at [56].
16 GSC at [2]-[4].
17 GSC at [26]-[27].

liable for the costs of Norton Rose, whether directly or indirectly; and if not, then to consider whether an order should be made in Norton Rose's favour only against Juniper. Before doing that, it is appropriate to refer briefly to the Court's jurisdiction to make an order in an action for costs against a person who is not a party to that action (*non-party order*); and to some general principles relating to the exercise of the relevant discretion. While the submissions for Juniper made passing reference to the jurisdiction to make a costs order in favour of a person not a party to the proceeding[18], no one sought an order in Norton Rose's favour against Grocon in the Grocon proceedings, and accordingly it is unnecessary to give further consideration to such an order.

The power to award costs against a non-party

[15] In *Knight v FP Special Assets Ltd*[19] the High Court held that this Court has power to make a non-party order. At that time s 58 of the *Supreme Court Act* 1867 (Qld) provided,

> "The Supreme Court shall have power to award costs in all cases lawfully brought before it and not provided for otherwise than by this section."

[16] The Court held that the operation of s 58 was displaced by order 91 r 1 of the Rules of the Supreme Court, the rule being the source of the power. Relevantly the rule provided,

> "… the costs of and incident to all proceedings in the Court … shall be in the discretion of the Court or Judge …"

[17] Section 58 of the *Supreme Court Act* has been repealed, the relevant provision now being s 15 of the *Civil Proceedings Act* 2011 (Qld), which states,

> "A court may award costs in all proceedings unless otherwise provided."

[18] Also, O 91 r 1 has been repealed, the current analogous rule being r 681(1) of the Uniform Civil Procedure Rules 1999 (Qld) (*UCPR*). It is in the following terms:-

> "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."

[19] In my view, there is no material difference between the provisions considered in *Knight's* case, and those currently in force. Accordingly, I conclude that the Court retains the power to make a non-party order. I note that Martin J came to the same conclusion in *Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*[20] (*Beach Retreat*).

[20] In setting out r 681, I have included the provision to the effect that costs generally follow the event. On a previous occasion, I concluded that, for the purposes of this rule, an event is a separate issue[21]; which expression would appear to include a unit, or identifiable part, of the litigation[22]. The result is that, prima facie, a party successful at a separate hearing should be awarded its costs.

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[18] JSC at [30].

[19] (1992) 174 CLR 178.

[20] [2009] 2 Qd R 356; see also *Burns v State of Queensland and Croton* [2007] QCA 240 at [14], when r 689 was in terms equivalent to the current r 681.

[21] See *McDermott v Robinson Helicopter Co (No 2)* [2015] 1 Qd R 295 especially at [41], [43].

[22] *Colburt v Beard* [1992] 2 Qd R 67 at 70; *Thiess v TCN Channel 9 Pty Limited (No 5)* [1994] 1 Qd R 156 at 208.

[21] In *Beach Retreat*[23] Martin J helpfully collected some statements of principle from other cases relating to the exercise of the power to make a non-party order. I shall attempt to state their effect. The general rule is that only parties to proceedings are subject to costs orders; and a non-party order will only be made if the interests of justice justify a departure from the general rule[24]. An application for such an order should be treated "with considerable caution"[25]. Such an order should be made only when "exceptional circumstances make such an order reasonable and just"[26]. Such orders should be made "sparingly"[27]. The discretion is to be "exercised judicially and in accordance with general legal principles pertaining to the law of costs"[28]. A non-party 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"[29]. His Honour also adopted the proposition that what is required is "a fact-specific inquiry informed by various relevant considerations"[30]

[22] In *Symphony Group*, Balcombe LJ[31] identified circumstances in which such an order has been made. Those circumstances (slightly modified, and without reference to the authorities cited by his Lordship) are:-

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;

2. Where a person has maintained or financed the action;

3. Where the non-party is a solicitor whose conduct has led to the incurring of costs in a way which brings it within a statutory criterion for the making of a costs order against the solicitor[32], or the solicitor's conduct would justify the order in the exercise of the Court's inherent jurisdiction in relation to the conduct of solicitors[33].

4. Where the person's wrongful conduct has caused the action (in *Symphony Group* the circumstance was described as one where the person had caused the action);

5. Where a person is a party to a closely related action, heard at the same time but not consolidated;

6. Group litigation where an action has been selected as a test case.

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23 At [38].
24 *Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2)* [1999] 1 Qd R 518 (*Naomi Marble)* at 544.
25 *Symphony Group plc v Hodgson* [1994] QB 179 (*Symphony Group*) at 193.
26 *Beach Retreat* at [38], citing *Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518 at 531 and *Knight* at 208.
27 *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406 at [34].
28 *Knight* at 192, citing *Oasis Hotel Ltd v Zurich Insurance Co* (1981) 124 DLR (3d) 455 at p 462.
29 *Beach Retreat* at [38], citing *Vestris v Cashman* (1998) 72 SASR 449 at 468.
30 *Beach Retreat* at [38].
31 At 191.
32 *Sinclair-Jones v Kay* [1989] 1 WLR 114; *Gupta v Comer* [1991] 1 QB 629.
33 *Myers v Elman* [1940] AC 282.

[23] The fourth proposition is based on *Pritchard v J H Cobden Ltd*[34] (*Pritchard*). The fifth proposition is based on *Aiden Shipping Co Ltd v Interbulk Ltd*[35] (*Aiden Shipping*). Both cases are discussed later in these reasons.

[24] I also note that his Lordship observed that these classes are "neither rigid nor closed"[36].

Should Grocon bear the costs of Norton Rose's participation?

[25] There are some features of the present proceeding which make it different from many of the cases dealing with non-party orders. Since the submissions refer to categories of cases where such orders have been made, and because it would appear that a fact-specific inquiry is to be conducted, it is convenient to note those features at this point.

[26] The first feature is that this proceeding was concerned only with the determination of an issue, namely whether clause 35.7 was void as imposing a penalty. Juniper has not yet established that it has a valid claim against Grocon.

[27] The second is that the causes of action raised by Juniper against Norton Rose, based on alleged breaches of a duty of care and misleading conduct, are quite different from its claim against Grocon for damages for delay in the performance of its contract.

[28] The third feature of the current proceeding is that, although the validity of clause 35.7 must be established by Juniper for one branch of its claim against Grocon for damages for delay, so that it is formally an element of its cause of action, as a matter of substance, the clause goes to the measure of its loss. The obligation which was breached, resulting in the loss for which Juniper sues, is the obligation to perform aspects of the contract within specified times. Juniper has an alternative claim for that loss.

[29] A fourth feature is that while the validity of clause 35.7 is relevant in the Grocon proceedings to the quantum of Juniper's claim, in the Norton Rose proceedings, it is relevant to whether Norton Rose breached its duty to Juniper, or was guilty of misleading conduct. However, Norton Rose may still remain liable for damages in relation to the drafting of the liquidated damages regime (including clause 35.7) even if the clause is held to be valid. That is because the alleged damages include the payment of moneys as a result of the adjudicator's holding the clause to be penal and the cost of preparing the claim for unliquidated damages for delay. Moreover the Norton Rose proceedings are not based only on the liquidated damages regime, but extend to the clause providing for extensions of time.

[30] The fifth feature is that a finding that clause 35.7 is effective will not only be of assistance to Norton Rose on some aspects of the liability case against it; an early finding will prevent the continuing accrual of loss for which it is alleged to be liable. That loss is Juniper's ongoing costs of preparing its claim for general damages for delay. On the other hand, if in the Grocon proceedings it was determined that the clause was not effective, that would present great difficulties for Norton Rose in the proceeding against it. It was very much in Norton Rose's interest to have the enforceability of the clause upheld in the Grocon proceedings.

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34 [1988] Fam 22.
35 [1986] AC 965.
36 *Symphony Group* at 192.

[31] The first basis on which Juniper submitted that Grocon should be liable for costs associated with the participation of Norton Rose is that Grocon "has caused the hearing and has caused the penalty issue to be a live issue in both proceedings"[37]. This is based upon the fourth of the categories identified by Balcombe LJ in *Symphony Group*[38]. As formulated by his Lordship, the category was one "(w)here the person has *caused* the action". The category was based upon *Pritchard*, which had some quite unusual features. The plaintiff had suffered brain damage through the defendants' negligence, causing a personality change which in turn led to a divorce. The plaintiff's action for damages was heard at the same time (and so, by the same Judge) as matrimonial proceedings by the plaintiff's wife for financial relief related to the divorce[39]. The breakdown in the marriage was held to be a consequence of the personal injuries caused by the defendant[40]; and it was conceded that the injuries caused the divorce[41]. It was in those circumstances that the trial Judge made an order that the defendants in the personal injuries case pay the costs of the plaintiff in the matrimonial proceedings. It would appear that, at the trials, the parties considered that any question of the plaintiff's costs in the matrimonial proceedings, as against the defendants in the personal injuries proceedings, should be dealt with under the Court's powers to award costs, rather than as damages; and that those defendants agreed that they should be ordered to pay those costs[42].

[32] It is in those circumstances that Balcombe LJ described this as a case where "the person has *caused* the action". The divorce, and the former wife's proceedings for financial relief, were a consequence of the defendant's negligence, even if the costs were not sought as damages. It is for that reason that it seemed to me that a modification of his Lordship's characterisation of the case was appropriate. In my view *Pritchard* does not stand for the proposition that where any conduct whatsoever of a non-party is causally related to the bringing of litigation, then an order for costs can be made against that person. It was a case where the matrimonial proceedings were the consequence of the tortious conduct of another party. It seems unlikely that the category is as broad as was described in *Symphony Group*. For example, the provision of proper legal advice may cause a party to institute proceedings; as might a witness's honestly mistaken recollection of events. I would not take these cases to be intended to come within this category. Likewise, costs have not been ordered against litigation funders who did not have an interest in the action[43].

[33] I should add that Balcombe LJ's characterisation of *Pritchard* is not one that I would easily arrive at from the reasoning in that case. O'Connor LJ (with whom the other members of the Court agreed), said in *Pritchard*[44],

> "Lord Goff of Chieveley said (in *Aiden Shipping*),[45] that he could not imagine the discretion being used against some person who has no connection with

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37 JSC at [38](a).
38 At 192.
39 *Pritchard* at 28-29; 37.
40 *Pritchard* at 37.
41 *Pritchard* at 39.
42 *Pritchard* at 51.
43 See the cases discussed in *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [79]-[81], [83]; I note that Sir John Balcombe (formerly Balcombe LJ) was a member of the English Court of Appeal for one of these cases, *Murphy v Young's* Brewery [1997] 1 WLR 1591; in other cases where costs were awarded against a funder, the funder usually had an interest in the outcome of the litigation.
44 At p 51.
45 In *Aiden Shipping* at 1061.

> the proceedings in question. In the present case they were not so unrelated and it seems to me the order could not be attacked on that ground. I think that there are substantial grounds for saying that in all the circumstances of this case it is not unfair that the defendant should be held to the order to which they agreed after the hearing before the judge."

[34] I would respectfully read O'Connor LJ as saying that the personal injuries proceedings and the divorce proceedings were related; and that "all the circumstances", no doubt including that the defendant's tortious conduct, caused the matrimonial proceedings, and the defendant's consent to the non-party order at first instance, meant that the order should not be disturbed.

[35] Since the Norton Rose proceedings do not relate solely to the liquidated damages regime, I do not consider that I am in a position to hold that the bringing of those proceedings was caused by Grocon's attack on the validity of clause 35.7. However, the sequence of events associated with this litigation, including the proceedings under the *BCIPA*, lead me to conclude that that attack caused Juniper to include allegations relating to the clause in its pleading in the Norton Rose proceedings. The significance of that finding will be discussed later in these reasons. I would note at this point that it cannot be said in the present case that any tortious (or other wrongful) conduct of Grocon has caused Juniper to make these allegations in the Norton Rose proceedings.

[36] Juniper submitted that the separate hearing in the Norton Rose proceedings was caused by Grocon's advancing the argument that clause 35.7 was void[46]. It submitted that although there were practical reasons for the early determination in the Grocon proceedings, those considerations did not apply in the Norton Rose proceedings, and accordingly no occasion for an early hearing in those proceedings would have arisen but for Grocon's allegation that the clause was void. It would follow that Grocon should pay the costs of the early and separate determination of the question in the Norton Rose proceedings.

[37] I am not prepared to accept that reasoning. I have accepted that Grocon's raising of the issue relating to clause 35.7 has led Juniper to raise that issue in the Norton Rose proceedings. However Juniper's submissions are based on the proposition that there is nothing about those proceedings themselves which would warrant an early determination of the question. While, therefore, the position taken by Grocon about the validity of clause 35.7 accounts for the position taken by Juniper in the Norton Rose proceedings, it does not account for an early determination of that question in those proceedings.

[38] As mentioned, there were obvious practical advantages for Norton Rose in having the validity of clause 35.7 upheld at an early stage; and in both proceedings. From Juniper's point of view, Norton Rose's participation in the separate hearing gave it an ally. It seems to me that these considerations explain the early hearing in the Norton Rose proceedings (initiated, I note, by Norton Rose), rather than the raising of the allegation by Grocon as to the validity of clause 35.7. I recognise that once the view was taken that there should be an early determination of the question in the Grocon proceedings, considerations relating to the efficient use of Court resources supported the simultaneous determination of the question in the Norton Rose proceedings. However, these considerations do not seem to have played any operative role in the events which led to the joint hearing. Norton

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[46] JSC at [39].

Rose did not refer to them in its letter of 22 August 2014 in effect requesting a joint hearing; and that course had particular advantages to it. Accordingly, I consider that Grocon's raising of the allegation that clause 35.7 was void, has at best a remote connexion with Norton Rose's participation in the separate determination. Before considering whether, nevertheless, the discretion should be exercised against Grocon, I shall discuss another submission made by Juniper.

[39] Juniper also submitted that this case came within the fifth category identified by Balcombe LJ in *Symphony Group*, namely, where the person against whom the order is sought is a party to a closely related action, heard at the same time, but not consolidated. His Lordship referred to *Aiden Shipping* as an example.

[40] *Aiden Shipping* was described as "a classic third party situation"[47]. A ship owner had brought arbitration proceedings against charterers for damage to a ship, and the charterers brought similar proceedings against the sub-charterers for the same damage. The owners sought to widen the remission in their arbitration; and the charterers accordingly sought to widen the remission in the arbitration involving the sub-charterers. The applications were heard together, unsuccessfully, and an order was made that the owners pay the charterers' costs, to include costs paid by the charterers to the sub-charterers. An appeal against these orders to the Court of Appeal was successful; but the orders were reinstated by the House of Lords, it holding that there was jurisdiction to make an order for costs, not confined to the costs of the parties to the proceedings.

[41] Lord Goff, who delivered the principal judgment, said[48]

> "If two separate sets of proceedings are heard together, because they have common features, it may be a matter of pure chance whether the expense of presenting an argument or evidence relevant to the common feature falls within one or other of the two sets of proceedings. Sometimes, indeed, it may be very difficult to attribute costs to one set of proceedings rather than the other. It is surely consistent with the interests of justice that, in such a case, the court's jurisdiction to make a global order for costs relating to both sets of proceedings should not be fettered by the imposition of an implied limitation upon that jurisdiction … Courts of first instance are, I believe, well capable of exercising a discretion under the statute in accordance with reason and justice. I cannot imagine any case arising in which the order for costs is made, in the exercise of the court's discretion, against some person who has no connection with the proceedings in question."

[42] It will be apparent from my earlier description of the Grocon proceedings and the Norton Rose proceedings that I consider the connection between them to be somewhat limited. Nevertheless, it seems to me that there is some connection between them, at least arising because of the allegations in the Norton Rose proceedings relating to the drafting of the provisions of the contract relating to liquidated damages. Moreover the separate determination involved a hearing to determine the same question, conducted at the same time, in both proceedings.

[43] It would seem that the characterisation of the proceedings in *Aiden Shipping* as "a classic third party situation" was influential in the exercise of the discretion to make the costs

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[47] *Aiden Shipping* at 981.
[48] At 980-981.

order[49]. Grocon submitted that the present case cannot be so described; and that this is a case where a defendant in one proceedings having raised an issue in its defence, the plaintiff, acting in its own interest, decided to commence another proceeding[50]. Obviously the present case is not a classic third party situation. Reliance on the factors which led to the exercise of the discretion to make an order against the owners in *Aiden Shipping* would not, it seems to me, provide a firm basis for making an order against Grocon in the present case.

[44] In *Knight*[51] Mason CJ and Deane J (with whose reasons Gaudron J agreed[52]), when discussing the power to make a non-party order, adopted a statement by Lambert JA in *Oasis Hotel Ltd v Zurich Insurance Co*[53] to the effect that the jurisdiction "must be exercised … in accordance with general legal principles pertaining to the law of costs". To say that the present case is not analogous to a classic third party case of the kind considered in *Aiden Shipping* is not to dispose of the argument that the connection between the two sets of proceedings is sufficient to justify a non-party order. Consistent with one of Grocon's submission, the cases which, it seems to me, provide some analogy are those where a plaintiff has instituted separate sets of proceedings against different defendants, succeeding against one but not against the other. Here Juniper has succeeded against Grocon on the question for determination; but to the extent that the question was in issue in the Norton Rose proceedings, I held that the view of the clause reflected in Juniper's pleading against Norton Rose was wrong. It seems to me that principles of some relevance to this situation are to be found in cases dealing with applications for a Bullock order[54] or a Sanderson order[55].

[45] The circumstances in which such orders might be made were considered by the High Court in *Gould v Vaggelas*[56] (*Gould*). Brennan J said[57]

> "Although the making of a Bullock order is in the discretion of a trial judge, the mere joinder of two causes of action against separate defendants in the one action is insufficient to support the making of an order against an unsuccessful defendant when the other defendant is exonerated. A judicial discretion can be exercised to make a Bullock order against an unsuccessful defendant in an action brought against two or more defendants for *substantially the same damages only if the conduct of the unsuccessful defendant in relation to the plaintiff's claim against him showed that the joinder of the successful defendant was reasonable and proper to ensure recovery of the damages sought*: cf *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation*[58] (*Maffra*)". (emphasis added)

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49 *Aiden Shipping* at 974, 981. This characterisation may mask, rather than explain, the basis on which the costs of the sub-charterers were passed back to the owners, in light of the complexities associated with costs orders in third party proceedings: see dal Pont at [11.35]-[11.39].

50 Grocon's submissions on costs in reply of 14 May 2014, at [14].

51 At 192.

52 *Knight* at 205.

53 (1981) 124 DLR 3(d) 455, 462.

54 *Bullock v London General Omnibus Company* [1907] 1 KB 264.

55 *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

56 (1995) 157 CLR 215.

57 *Gould* at p 260.

58 (1948) 77 CLR 544 at p 566.

[46] In the same case, Gibbs CJ rejected as too broad the proposition that such an order might be made if it was reasonable for the plaintiff to bring the action against two or more defendants. Having referred to *Maffra* his Honour said[59]

> "In my respectful opinion, however, the mere fact that the joinder of two defendants was reasonable does not mean that the unsuccessful defendant should be ordered to pay, directly or indirectly, the costs of the successful defendant."

[47] His Honour continued[60]

> "Obviously a judge should make a Bullock order only if he considers it just that the costs of the successful defendant should be borne by the unsuccessful defendant, and, if nothing that the unsuccessful defendant has said or done has led the plaintiff to sue the other defendant, who ultimately was held not to be liable, it is difficult to see any reason why the unsuccessful defendant should be required to pay for the plaintiff's error or overcaution."

[48] Gibbs CJ also adopted[61] the following statement by Blackburn CJ in *Steppke v National Capital Development Commission*[62]

> "… there is a condition for the making of a Bullock order, in addition to the question whether the suing of the successful defendant was reasonable, namely that the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant".

[49] Wilson J (with whom Murphy J agreed[63]) said[64] that a Bullock order "may be made where the costs in question have been reasonably and properly incurred by the plaintiff as between him and the unsuccessful defendant", citing *Bullock*, *Maffra* and *Altamura v Victorian Railways Commissioners*[65]. In applying that principle, his Honour relied upon the fact that, in his pleading, the unsuccessful defendant had alleged that the plaintiff's loss had been caused by the successful defendant.

[50] In *Altamura*, it was held to be reasonable to make a Bullock order because each of the defendants blamed the other for the plaintiff's injuries[66]. Kaye J held that such an order could be made, notwithstanding the causes of action alleged against each defendant were different, where the duty each defendant owed to the plaintiff was a duty to exercise reasonable care for his safety; and where the breaches were not unconnected, arising out of the same factual situation. It might also be observed that the damage claimed against each defendant was the same. Kaye J applied statements of O'Bryan J in *Hall v Wilson*[67] to the effect that the plaintiff could not tell, in advance of the completion of the trial, which of the defendants would be held legally responsible for his injuries, as a basis for finding that it was reasonable for the plaintiff to sue both; and that the unsuccessful

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59 At p 229.
60 *Gould* at 229.
61 *Gould* at 230.
62 (1978) 21 ACTR 23, 30-31.
63 *Gould* at 232.
64 *Gould* at 247.
65 [1974] VR 33.
66 *Altamura* at 35, 38.
67 [1954] VLR 576 at 577.

defendant should be regarded as the cause of the whole litigation, because of his conduct before action in not accepting sole responsibility or because his tortious conduct was done in such circumstances as to make the joinder of the other defendant reasonable[68]. The principles applied by Kaye J are not so broadly stated as to support a non-party order for costs in the present case.

[51] In *Sved v Woollahra Municipal Council*[69] (*Sved*) the plaintiffs had purchased a property when there had been departures from approved plans and specifications and defective workmanship in the construction of a building constructed on it. They claimed damages against the vendors, the builders and the local authority. Their claims against the vendors and the builders failed; and they were ordered to pay the costs of these defendants. Having succeeded against the local authority, they sought a Bullock order in respect of the costs of the successful defendants. Giles CJ Comm D identified a number of propositions relevant to the plaintiff's application[70]. The first was that it was not sufficient for the making of the order, that it was reasonable for the plaintiff to bring proceedings against multiple defendants. The second was that such an order might be made where the costs had been reasonably and properly incurred by the plaintiff as between it and the unsuccessful defendant. The third was that the conduct of the unsuccessful defendant "must have been such as to make it fair to impose some liability on it for the costs of the successful defendant, or that the conduct of the unsuccessful defendant must show that the joinder of the successful defendant was reasonable and proper to ensure recovery of the damages sought". His Honour then said,

> "The difference in formulations is probably more apparent than real, as reasonableness as between the plaintiff and the unsuccessful defendant will normally be demonstrated by some conduct of the unsuccessful defendant which made it proper that the successful defendant be joined or that the unsuccessful defendant should bear the costs of the successful defendant".

[52] In *Roads and Traffic Authority (NSW) v Palmer (No 2)*[71] (*Palmer*) Giles JA (with whom the other members of the Court agreed) cited his judgment in *Sved*, including those passages from which the propositions just stated have been derived. In that case, the plaintiff was injured when her car went off a road. She sued the Roads and Traffic Authority (*RTA*), a Council, and another party, being a contractor who carried out re-sealing work on the road, under contract to the Council, with funding from the RTA[72]. The basis on which the RTA was said to be liable was wholly vicarious, and the claim against it was dismissed on appeal. The plaintiff was successful against the other defendants, and sought a Bullock order in respect of the RTA's costs. Giles JA said[73]

> "It may have been reasonable for the plaintiff in her own interests to join the RTA as a defendant, but I do not think that there was conduct which made it just that the Council, and still less (the contractor) pay the costs payable by the plaintiff to the RTA. Neither the Council nor (the contractor) created any circumstances of uncertainty as to who was the proper defendant. They were not obliged to concede liability or make admissions in order to remove the

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68 *Altamura* at 37, 38.
69 (1998) NSW Conv R para 55-842, discussed in Dal Pont Law of Costs (3rd ed) para 11.25.
70 *Sved* at 56, 605.
71 [2005] NSWCA 140 at [30].
72 *Palmer* at [32].
73 At [35].

> RTA from contention, there being a respectable argument that the RTA was liable, and there is no reason to think that short of effective capitulation by the Council and (the contractor) the plaintiff would not have maintained her claim against the RTA. In my opinion, conduct has not been shown such as to make it fair to impose on the Council and (the contractor) liability for the costs of the RTA."

[53] The circumstances in which non-party orders have been made appear to me to be cases where the damage in respect of which the plaintiff has brought its claim is, in substance, the same, a proposition reflected in the passage quoted from the judgment of Brennan J in *Gould*. The approach taken in *Hall* and in *Altamura* would suggest that liability should be alleged to arise out of the same factual situation. Even then, *Sved* and *Palmer* would indicate that there must be more, by way of conduct of the unsuccessful defendant which makes it fair to impose on it the costs of the successful defendant, such as creating uncertainty about who was the proper defendant.

[54] Juniper does not claim the same damage against both Grocon and Norton Rose. While at a general level there is some common factual background to both proceedings, the factual situation alleged to give rise to Grocon's liability to Juniper is quite different from that alleged to give rise to Norton Rose's liability. Grocon has not caused any uncertainty about who should be sued for the loss claimed against it. Nor, in my view, has the conduct of Grocon made it fair (or reasonable) to impose on it costs associated with Norton Rose's participation in the joint hearing. Grocon has not asserted that the loss claimed against it was caused by Norton Rose. For present purposes it has done no more than assert that one of the methods by which Juniper seeks to quantify its loss based on delay is not maintainable.

[55] These considerations lead me to conclude that this is not a "closely related action", to use the language of Balcombe LJ in *Symphony Group*. Even if Juniper had sued both Grocon and Norton Rose in the same proceedings, it seems to me it would be novel to make Grocon liable for the costs of Norton Rose. The fact that a non-party order is made only in exceptional circumstances makes it even more doubtful that such an order should be made.

[56] The way the issue of the validity of clause 35.7 arose in the Grocon proceedings means that this is not a case where Juniper might "fall between two stools", as that expression is commonly used in this context. If Juniper fails to recover damages for delay against Grocon, that will not be because of Grocon's challenge to the validity of the clause. Nor are Grocon and Norton Rose each potentially liable for the same damage.

[57] Juniper's submissions pointed out that one reason for having the joint hearing was to avoid inconsistent determinations of the question[74]. In principle such a result should be avoided if possible. However, if clause 35.7 had been held to be invalid in the Grocon proceedings, it seems to me the risk of a contrary finding in the Norton Rose proceedings was lower than it would be in other cases. That is because of the limited nature of the relevant evidence, the question otherwise depending on legal principles. Indeed, if it had been determined in the Grocon proceedings that the clause was invalid, the conclusion itself would seem to me to be more important than the conclusion of the Court about the same matter in the Norton Rose proceedings. It seems to me the desirability of avoiding

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[74] JCS at 52.

inconsistent findings is not a factor of any weight in determining whether Grocon should be liable for costs relating to Norton Rose's participation in the separate determination.

[58] I would add that there is another feature which distinguishes the present case from many where a non-party order has been made. At the hearing, Juniper did not seek to maintain a case against Norton Rose in respect of the question for determination. Juniper's conduct does not suggest any real analogy with the cases where a plaintiff did not know against which defendant it should proceed. This is not a case, in contrast to others[75], where the outcome of the separate determination would depend significantly on the evidence led at a trial, so that Juniper was not in a position to know, until the completion of the evidence, what position it should take about the clause. Juniper has not suggested that it had been placed in a position of doubt about the validity of clause 35.7, whether by the conduct of Grocon or otherwise. The validity of the clause depended substantially on legal principles and the provisions of the contract; and, to the extent that evidence was considered, it was evidence of matters well-known to both Juniper and Grocon[76]. Juniper was in as good a position as Grocon to form a view about the clause. The fact that it sued Norton Rose does not demonstrate the contrary. That was simply the taking of a cautious position, in case the view which it had formed ultimately proved to be wrong.

[59] As Grocon submitted, there was no advantage to it in having Norton Rose participate in the determination of the separate question[77]. The participation of Norton Rose meant that it had two opponents, rather than one, potentially increasing the risk that Grocon would be unsuccessful on the determination. Moreover, as it submitted[78], it did not seek Norton Rose's participation. While it did not oppose the joint hearing, it submitted that it did so because it recognised the convenience to Norton Rose and Juniper[79]. Grocon's conduct does not, in my view, qualify as conduct which would make it reasonable, as between it and Juniper, for Norton Rose's costs.

[60] Juniper's submissions stated that to have the joint hearing was efficient from the Court's point of view[80]. Where a party in Grocon's position has taken what appears to me to be a sensible approach, which assists in the efficient disposition of an issue in litigation, I do not consider that to be a good reason why it should bear a greater costs burden than it would otherwise face.

[61] Grocon submitted that, even if it had not raised the validity of clause 35.7 in the proceedings against it, it would have been necessary to deal with it in the Norton Rose proceedings. That is because, in those proceedings, the alleged damage results from the fact that Juniper has been exposed to arguments by Grocon that no liquidated damages are payable under the contract; and Juniper has been required to pay money to Grocon as a result of the adjudicator's decision, because the adjudicator found the clause to be penal[81]. I am not prepared to give any weight to this submission. At least on the case pleaded by Juniper, which Grocon does not seem to challenge, the validity of clause 35.7 was raised by Grocon in the proceedings under the BCIPA. The inference I would draw is that Grocon's success on this issue in those proceedings resulted in Juniper's making

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75 Compare *Hall* at 577; *Altamura* at 38.
76 See [2015] QSC 102 at [52]-[102] and [108]-[116].
77 GCS at [29](a).
78 GCS at [29](a).
79 GCS at [29](a).
80 Juniper's Submissions in Reply on Costs dated 14 May 2015 (*JSR*) at [13](a).
81 GCS at [23].

alternative claims against Grocon for damages for delay, and commencing the Norton Rose proceedings.

[62] Juniper submitted that "the relevant claim in the Norton Rose proceedings was brought about by the penalty argument raised by Grocon"[82]. That submission may be accepted. However, it seems to me that the authorities do not establish that a costs order might be made against a non-party, simply by reason of the fact there is some causal connection between the conduct of the non-party, and the raising of an issue in other proceedings. As mentioned previously, there is no suggestion that issue was not properly raised by Grocon.

[63] Grocon[83], like Juniper[84] submitted that Norton Rose added nothing of substance to what was otherwise presented at the joint hearing. In response to Juniper's submission that no order should be made in favour of Norton Rose for these reasons, Norton Rose submitted that its participation was by agreement; and the issue was very significant in the Norton Rose proceedings[85].

[64] The usual rule is that if parties with parallel interests are separately represented, and are successful, the unsuccessful party will not be ordered to pay both sets of costs, without good reason[86]. None has been shown here.

[65] There has been no suggestion that Grocon raised the issue without any sufficient foundation, or otherwise improperly. It was taking a legitimate step in the conduct of its defence to Juniper's counterclaim. It seems to me in principle undesirable for a party who takes such a course, to run the risk of an order for costs against it in some other proceedings[87]. I recognise that this consideration is not decisive, as is shown by the cases where one defendant has alleged that the plaintiff's loss was the result of the wrongful conduct of another; but it seems to me that this is not such a case; and it bears more resemblance to *Palmer* than it does to cases where a non-party order has been made.

[66] In summary, I accept that Grocon's conduct caused the issue of the validity of clause 35.7 to be raised in the Norton Rose proceeding. There is some connexion between the two proceedings. On the other hand, the connexion is not as strong as in many cases where a non-party order has been made. Grocon had not alleged that it was not liable for the loss claimed against it, because the loss was caused Norton Rose. The loss claimed in each proceeding is quite different in character; and this is not a case where Juniper might have "fallen between two stools" in respect of the loss it claims from Grocon. No wrongful conduct of Grocon caused the Norton Rose proceedings. While there were advantages to Norton Rose in having the joint hearing, there was none to Grocon.

[67] These considerations, on balance, do not seem to me to support making an order against Grocon for the costs occasioned by Norton Rose's participation in the proceedings. It follows that I would not make an order that Grocon pay Norton Rose's costs of its participation in the proceedings. It seems to me there is no reason in principle to

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82 JSC at [51].
83 See GCS at [15]-[17].
84 JSC at [3], [6](c).
85 NSC at [4]; Norton Rose Submissions in Reply on Costs (*NRSR)* at [2], [4].
86 See Dal Point at [11.5].
87 Compare *Australian Conservation Foundation v Forestry Commissioner Tasmania* (1988) 81 ALR 166 at 169; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16.

distinguish between the costs incurred by Norton Rose; and the costs incurred by Juniper beyond those which would have been incurred had the question been litigated only between Juniper and Grocon. Accordingly, I propose to make an order in Juniper's favour against Grocon, framed in a way to give effect to this view.

Should Juniper pay Norton Rose's costs?

[68] Norton Rose submitted that it was successful on the determination of the separate question, and accordingly the usual rule, that costs follow the event, should be applied.

[69] Juniper, as has been mentioned, submitted that Norton Rose did not need to participate actively in the hearing; and it also submitted that, as a successful party, it should not bear Norton Rose's costs[88]. It identified courses which Norton Rose could have taken, other than being represented by Senior and Junior Counsel in the separate hearing.

[70] I have already referred to some of Norton Rose's submissions in reply. It also submitted that it was appropriate, where questions arise about what an ordinary skilled and reasonably careful solicitor in the firm's position would have done, for Norton Rose independently to advance detailed submissions as to the state of the law in this area[89]. Moreover, it did not know in advance what submissions Juniper would make for the separate hearing[90].

[71] Neither party referred me to any authority for assistance on this question. Nor did either party submit that any question of costs as between them should be reserved, or be made costs in the cause.

[72] Notwithstanding Juniper's Statement of Claim in the Norton Rose proceedings, there was, as between Juniper and Norton Rose at the separate hearing, in substance no issue. They both contended for the same result.

[73] As Juniper pointed out, it was successful at the hearing. Other than its own success, Norton Rose did not identify any reason why another successful party should be ordered to pay its costs. It seems to me to be an unusual outcome that such an order should be made.

[74] Norton Rose's submission that it was appropriate to advance detailed submissions as to the state of the law, assuming that is intended to refer to the state of the law about the standards of skill expected of a solicitor, is irrelevant. Such a question did not arise at the separate hearing. On the question which did arise, it was not in a materially different position to advance a case than was Juniper.

[75] In addition to the benefit of a favourable determination in the Norton Rose proceedings, Norton Rose obtained the benefit, through its success on the separate question, of limiting damages which might otherwise be claimed against it as a result of the expense which would have been incurred by Juniper in preparing the claim for general damages for delay. It thus gained a benefit beyond mere success on the issue in the Norton Rose proceedings. It seems to me that for this reason also, it would not be appropriate to award it costs, against a party who helped in securing that benefit.

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88 JSC at [6](a).
89 NRSR at [5].
90 NRSR at [6].

[76] Notwithstanding Norton Rose's success, the unusual circumstances of this case seem to me to justify making no order for costs in its favour.

Conclusion

[77] Juniper's success against Grocon means that it should have an order for costs in its favour against Grocon. However, as indicated, I propose to limit that order. Subject to submissions, I would do that by limiting the order to two-thirds of Juniper's costs of the separate hearing.

[78] I would make no other orders as to costs.