SUPREME COURT OF QUEENSLAND

CITATION:	*IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd & Ors* [2017] QSC 78
PARTIES:	**IW & CA PRICE CONSTRUCTIONS PTY LTD ABN 50301203933 A TRUSTEE FOR THE COASTAL BUILDING INSURANCE CLAIMS & REPAIRS TRUST** (plaintiff) **v** **AUSTRALIAN BUILDING INSURANCE SERVICES PTY LTD ACN 162 498 599** (first defendant) **BRUCE WILLIAM CARRIGAN** (second defendant) **IAN WINSTON PRICE** (third party)
FILE NO/S:	No 9993 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial – Orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	Submissions received on 4 April 2017, 4 May 2017
JUDGE:	A Lyons J

ORDER:

1. **The defendants pay to the plaintiff $550,000, together with interest at the agreed rate of 7% per annum of $122,250.69 from 1 February 2014 to the date of judgment;**

2. **The plaintiff pay to the first defendant $1,075,855.27 together with interest calculated as follows:**

    (a) **The sum of $382,180.27, together with interest**

under s 58 of the *Uniform Civil Procedure Rules* 1999 (Qld) of $80,528.74 from 7 November 2013 to the date of judgment;

(b) The sum of $598,675, together with interest under s 58 of the UCPR of $120,056.91 from 1 January 2014 to the date of judgment;

(c) The sum of $95,000, together with interest under s 58 of the UCPR of $19,999.77 from 8 November 2013.

3. The plaintiff pay the first defendant's costs of the proceedings, including all reserved costs (but excluding Third Party Proceeding costs), to be assessed on the standard basis up until 13 April 2016 and from 13 April 2016 on the indemnity basis.

4. There be no order as to costs that are solely attributable to the Third Party Proceeding.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – where the plaintiff abandoned its primary claim against the defendants on the first day of trial – where the defendants abandoned a third party claim on the second day of trial – where the defendants were successful at trial on a counterclaim against the plaintiff – where the plaintiff was successful at trial on an uncontroversial issue – where the plaintiff claims costs of proceedings up until date which defendants included successful aspect of counterclaim – where the defendants claim all costs of the proceedings – whether costs of the proceedings should be awarded to plaintiff or defendants

Uniform Civil Procedure Rules 1999, r 681

Arundel v Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation [2001] HCA 26
Calderbank v Calderbank [1975] 3 All ER 333
Cook's Constructions P/L v Stork Food Systems Aust P/L [2008] QSC 220
FPM Constructions v Council of the City of Blue Mountains [2005] NSWCA 340
Interchase Corporation Limited (in liq.) v Grosvenor Hill

(Queensland) Pty Ltd (No. 3) [2003] 1 Qd R 26
Knight v FP Special Assets Ltd (1992) 174 CLR 178
Plante & Anor v James [2011] QCA 109
Waterman v Gerling Australia Insurance Co Pty Ltd (No 2) [2005] NSWSC 1111

COUNSEL: D de Jersey and B A Vass for the plaintiff and third party
P A Travis for the first and second defendant

SOLICITORS: North Coast Law for the plaintiff and third party
AXIA Litigation Lawyers for the first and second defendant

Background

[2] On 21 March 2017 I published my reasons in this matter and made the following findings:

1. The amount owing to the plaintiff under the Contract is $550,000 plus interest on the unpaid balance Purchase Price at 7% (Special Condition 2) from 1 February 2014.

2. The amount owing to ABIS for WIP pursuant to the Contract is $382,180.27 plus interest under s 58 of the *Civil Proceedings Act* 2011.

3. The amount owing for damages for loss of profits relating to the November 2013 Storm Events is $598,675 plus interest under s 58 of the *Civil Proceedings Act* 2011 from 1 January 2013.

4. The amount of the diminution of Goodwill is $95,000 plus interest under s 58 of the *Civil Proceedings Act* 2011 from 8 November 2013.

5. I will hear the parties as to Costs and as to the form of the Orders.

[3] On 4 April 2017 submissions relating to costs were received from each of the parties. On 20 April 2017 I invited Counsel for the plaintiff and third party to provide submissions in response to the defendants' submissions as they related to a Third Party Order and Indemnity Costs. On 4 May 2017 those submissions were received.

The relevant provisions of the UCPR

[4] Rule 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) provides that 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. The relevant principles

are well known[1] and as *Cook's Constructions P/L v Stork Food Systems Aust P/L*[2] made clear if there is more than one issue to be decided in a case, then each issue can give rise to such an "event" for which separate costs orders can be made.

[5] Generally if a plaintiff has been successful then there would be an entitlement to costs and it is for the defendant to establish a basis for departing from that rule. However if a plaintiff has failed on some issues then it may be deprived of costs on those issues, particularly if there is a significant severable issue which can be clearly defined and which has occupied some time at trial.

The plaintiff and third party submissions

[6] The plaintiff and third party submit that in this case, a "global approach" to the costs of the plaintiff's Claim should be taken and that the defendants should be ordered to pay the plaintiff's costs of the Claim, the plaintiff's costs of the Counterclaim up until 27 September 2016 and the third party's costs of the Third Party Proceeding all on the standard basis. In relation to the costs of the Counterclaim, the plaintiff submits that it should pay the defendants' costs of the Counterclaim from 27 September 2016 on the standard basis.

[7] The plaintiff submits that while it abandoned part of its Claim on the first day of trial and did not succeed on its claim for the costs of the Telephone Lease, it did succeed on part of its claim for the balance of the purchase price. The plaintiff submits that there was nothing unreasonable in its conduct that would disentitle it from costs of the Claim.

[8] In relation to the Counterclaim, the plaintiff submits that it is entitled to its costs of the Counterclaim up until 27 September 2016, when the defendants amended their Counterclaim to include a claim for breach of an implied duty to cooperate.[3] The plaintiff argues that without the Counterclaim for breach of an implied duty to cooperate, the defendants would only have been successful in claiming a total of $477,180.27, which is less than the plaintiff's claim for balance of the purchase price. Accordingly, relying on the decision of the New South Wales Supreme Court in *Waterman v Gerling Australia Insurance Co Pty Ltd (No 2)*,[4] the plaintiff submits that it is entitled to the costs of the Counterclaim up until the date at which a claim for breach of the implied duty to cooperate was included. The plaintiff concedes that it should pay the defendants' costs of the Counterclaim after that date.

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1 *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at [84].

2 [2008] QSC 220.

3 Court Document 69.

4 [2005] NSWSC 1111 at [10]-[11].

[9] As the defendants abandoned their Claim against the third party on the second day of trial, the plaintiff submits that the defendants should be ordered to pay the costs of the third party on the standard basis.

What is the appropriate Order for the Costs of the Claim?

[10] In order to determine the appropriate orders it is necessary to consider the history of the proceedings. In my view a significant factor in this case is the fact that the proceedings were initially commenced by the plaintiff in October 2013 because of an erroneous view that the plaintiff was entitled to damages in the amount of $768,868.69 for breach of an alleged oral agreement for Work in Progress (WIP). It was claimed that in addition to the purchase price under the written contract, the defendants had agreed to pay further amounts to the plaintiff for insurance claims work that had been commenced by the plaintiff prior to 30 June 2013 but completed by the defendant. The defendants filed a Defence and Counterclaim on 25 November 2013 and denied from the outset the existence of the alleged oral agreement, and sought to recover amounts which were being withheld by the plaintiff under the alleged oral agreement. An Amended Statement of Claim was filed on 27 November 2013.

[11] On 16 December 2013 the defendants filed a Third Party Statement of Claim against Mr Price seeking the amounts which had not been paid to it for WIP as well as damages for loss of profits and diminution to the value of the goodwill of the business.

[12] On 5 February 2014 the plaintiff filed a Further Amended Statement of Claim and increased the amount claimed to an amount of $1,262,256.40. Separate proceedings in the District Court were then commenced by the plaintiff to include the balance purchase price of $550,000 which was due in February 2014. The plaintiff then filed a Further, Further Amended Statement of Claim on 28 February 2014. Ultimately in June 2014 the plaintiff filed an Amended Claim and Second Further Amended Statement of Claim which struck through the entirety of the earlier pleading and incorporated the District Court Claim. In February 2016 the plaintiff filed a Second Amended Claim and a Third Further Amended Statement of Claim. At all times the oral WIP Agreement was pleaded as a basis for the Claim.

[13] On 6 June 2016 the defendant filed a Defence and Counterclaim to the Second Amended Claim and Third Further Amended Statement of Claim. On 27 September 2016 an Amended Defence and Counterclaim was filed. The Counterclaim now pleaded breach of implied terms as an additional basis for the amounts claimed. No additional facts were relied on.

[14] Despite that history the plaintiff essentially argues that it should have the costs of the Claim as it was successful in recovering the amount of $550,000 due as the balance purchase price pursuant to the written contract. In this regard it is significant in my view that the only issue in the entire proceeding that the plaintiff in fact had any success on was the undisputed entitlement to the balance purchase price, which occupied no time at trial. I also consider that the available inference is that the balance was not paid due to the escalating dispute with the plaintiff and its retention of funds to

which it had no entitlement. I also observe that the defendant succeeded on each of its claims against the plaintiff on the Counterclaim.

[15] In my view the plaintiff should pay the costs of the Claim and the Counterclaim because the entire dispute was one of the plaintiff's making in persisting, through Mr Price, in a claim for money due pursuant to an oral agreement and for retaining monies the plaintiff was not entitled to. Due to the erroneous views about the entitlement to WIP, not only were Supreme Court proceedings commenced but in addition an amount of $382,180.27 was wrongly withheld from the first defendant by the plaintiff. It is of significance that the alleged oral agreement in relation to the WIP was in direct contradiction to the terms of the written contract. The plaintiff's Claim for the WIP based on that oral agreement was ultimately abandoned, but not until the first day of trial. Furthermore the plaintiff conceded at trial that an amount of $382,180.27 was owing to the defendant.

[16] True it is that the plaintiff ultimately recovered an amount of $550,000 as the amount due pursuant to the written contract, but that money did not become payable until months after the plaintiff instituted the Claim and retained several hundreds of thousands of dollars it was not entitled to. Subject to its right to monies the subject of the Counterclaim there was never any issue as to the liability of ABIS as to the balance purchase price and the issue as to the actual non-payment of the balance purchase price was not controversial and occupied no real time at the trial.

[17] I also accept Counsel for the defendants' submission that the bulk of the work involved in the extensive forensic accountants' reports related to an analysis of the WIP claim and a reconciliation of an accounting system. As initially noted that aspect of the Claim was not proceeded with and the plaintiff's expert was not called to give evidence. I accept therefore that a significant proportion of the expenses prior to trial related to this aspect.

[18] Because of those factors I accept the force of the submission by Counsel for the defendants that the costs of the main proceeding, including the plaintiff's Statement of Claim, the defendants' Counterclaim, including reserved costs, should be the defendants' costs.

[19] Counsel for the defendants also argues however that this is an appropriate case for a Third Party order against Mr Price for the costs of the main proceeding. I shall deal first with the costs of the third party proceeding before dealing with this aspect of Counsel's submission.

The Costs of the Third Party Proceeding

[20] The defendants argue that despite the fact that the Third Party Claim against Mr Price was abandoned by the defendants at trial, the costs of that proceeding should not follow the event because that proceeding specifically related to alleged misrepresentations by Mr Price. Counsel for the defendants argues that the Third Party Proceeding was abandoned in the face of a denial by Mr Price that he had made the representations. At

trial however I made extensive findings in relation to Mr Price and the reliability of his evidence in this regard. At paragraph [86] of my reasons I stated that I did not accept Mr Price's evidence in relation to a conversation he had with the witness Mr Kyris on 7 November 2013 and concluded that "his responses during cross examination were not truthful".

[21] A substantial part of the substratum of the Third Party Claim and the Counterclaim, in which the defendant succeeded, had the same factual basis. The only substantive issue was whether Mr Price had made certain representations. Ultimately ABIS succeeded on that issue notwithstanding that the Third Party Claim had been abandoned at trial. It would be a strange outcome if Mr Price were to get the costs of the Third Party Proceeding in those circumstances.

[22] In light of that conclusion I consider that each party should bear their own costs that are exclusively attributable to the Third Party Proceedings.

Should there be a Third Party Order against Mr Price?

[23] Counsel for the defendants argues that this is an appropriate case for a Third Party Order against Mr Price for the costs of the main proceeding, that is the plaintiff's Statement of Claim and the first defendant's Counterclaim, including all reserved costs.

[24] There is no doubt that that the Court has the power to make such an order pursuant to r 681 of the UCPR but that such an order should only be made in exceptional circumstances. In *Knight v FP Special Assets Ltd*[5] the High Court held that O 91 of the previous rules, which allowed costs of and incidental to the proceedings to be at the discretion of the Court, was wide enough to allow an order to be made against a non-party. Mason CJ and Deane J concluded:

> "The conclusion that the wide words of O 91, r 1 should not be read down so as to preclude jurisdiction to make an order for costs against a non-party does not, of course, mean that a judge has an unfettered discretion to make any order that he or she chooses. The wide jurisdiction conferred by the rule "must be exercised judicially and in accordance with general legal principles pertaining to the law of costs", to take up the words of Lambert JA in *Oasis Hotel Ltd v Zurich Insurance Co*[36].
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> Obviously, the prima facie general principle is that an order for costs is only made against a party to the litigation. As our discussion of the earlier authorities indicates, there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. Thus, for example, there are several long- established categories of case in which equity recognised that it may be appropriate for such an order to be made[37].

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5 (1992) 174 CLR 178.

> 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.
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> The conclusion that the jurisdiction conferred by O 91, r 1 is not limited to parties requires that the appeal be dismissed" (footnotes omitted).

[25] Is this a case therefore where an Order should be made that Mr Price should pay the costs of the main proceeding? A more recent analysis of the relevant principles is contained in the New South Wales Court of Appeal decision of *FPM Constructions v Council of the City of Blue Mountains*[6] where Basten JA (Beazley JA agreeing) held:

> "[210] There may be other cases where such an order is appropriate including the circumstances of *Knight v FP Special Assets* itself, in which the company was in receivership. Again, that is not the present case, the primary judge expressly finding:
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> There is nothing to indicate that FPM is in receivership.
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> It is also true that the principle established in *Knight v FP Special Assets* cannot be limited to the specific circumstances of the case, the joint judgment having expressed a conclusion in more general terms. A further example, not encompassed by those identified to date, is illustrated by *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429, a decision of the Full Court of the Federal Court in relation to an order sought against a litigation funder. The judgment contains an extensive analysis of the case law, including consideration of the judgment of Callinan J in *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406. It is clear that the categories of case which may attract the exercise of the power are by no means closed, nor should they be. Nevertheless, the requirements of justice should not be allowed to expand an exception to the general rule, so as to undermine the rule itself. 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:

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6 [2005] NSWCA 340.

(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."

[26] In terms therefore of the criteria which have been identified as pivotal to such an order there can be no doubt that Mr Price was the central figure who drove the litigation. Indeed it was Mr Price who insisted that there was an oral agreement about the WIP which was contrary to the terms of the written contract. It was also abundantly clear that it was at his direction that the payments belonging to the defendants were withheld.

[27] There can be no doubt that Mr Price had a substantial interest in the litigation given he was a director and shareholder of the plaintiff. Given Mr Price's evidence at trial he clearly exercised significant control over the company. Counsel for the defendants also argues that the plaintiff essentially became a straw company after it sold the business to the first defendant. There is no direct evidence before me in relation to that issue although there is some evidence which could give rise to such an inference. However I note in this regard that in *Arundel* Callinan J held that it was not necessary for a party to be insolvent before a third party costs order can be made.

[28] I also consider that Mr Price's conduct of the litigation was at times unreasonable. As I indicated in my reasons at [81] I took the view that he was unwilling to concede some propositions which had been conceded by his Counsel. I also concluded that he was untruthful in certain aspects of his evidence and that it seemed to me that his initial claim for amounts owing to him under an alleged oral agreement was without foundation. I also indicated in my reasons that not only had Mr Price adopted a bullying and threatening attitude in his dealings with the defendants[7] but that he was at times belligerent whilst giving evidence.

[29] Counsel for Mr Price however argues that whilst it was ultimately not pursued, the claim for the WIP was not baseless and that his conduct in relying on such an agreement was not "unreasonable and improper" given the information contained in Exhibits 37 to 41. An examination of those emails in my view simply endorses the fact that Mr Price has long held views about an oral WIP agreement which cannot be reconciled with the terms of the written agreement. Furthermore Counsel for Mr Price indicated in the Costs Submissions dated 4 May that "The plaintiff abandoned its claim

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7 At [94] to [96].

for the WIP amounts because the only witness that could prove the formation of the WIP agreement, Mr Price, was unable to recall with enough precision, the specific events leading to the formation of the WIP agreement".[8] It would seem to me that there was clearly a lack of evidence to support his entrenched views. I accept however that his views were not in the category of those identified by Callinan J in *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation.*[9] In that case, a view that the Federal Government's scheme for the imposition and collection of tax was invalid was held to be stubborn and "totally unreasonable".[10]

[30] Ultimately however I am conscious that a Third Party Order was not foreshadowed beforehand by the defendants in any way and I must also bear in mind the exhortations by the Court of Appeal in *Plante & Anor v James*[11] that such orders are exceptional and should be treated with considerable caution. Accordingly despite the concerning factors which I have identified I am not satisfied that the interests of justice in this case require the making of a Third Party Order. Accordingly I am satisfied that the plaintiff should pay the first defendant's costs of the Statement of Claim and the Counterclaim.

Indemnity Costs?

[31] The first defendant also seeks an order that the costs directly attributable to the allegations of the WIP Agreement be awarded on the indemnity basis. Counsel submits that the plaintiff should have realised at a very early stage that it had no reasonable prospects of success in relation to the alleged oral WIP Agreement and that "the oft-revised allegations made no legal sense. Success on the WIP Agreement claim would have required the Court to reconcile the oral WIP Agreement with the wholly-written, expressly complete, Contract of Sale, which was drafted by the plaintiff's solicitors, and which expressly contradicted the allegedly earlier oral WIP Agreement. Success would have involved a fundamental rewrite of the written and executed bargain under a theory of restitution. Nowhere in the pleading was there any particulars of the rectification claim. The entire claim was always doomed to fail. Tellingly, shortly after counsel was retained for trial the long-standing WIP Agreement claim was abandoned."[12]

[32] Whilst I accept that there is some basis for that submission, I am not satisfied that this case possesses such unusual features so as to justify a departure from the usual rule that costs are to be awarded on a standard basis. This was not a case where false allegations of fraud were made or where there has been clear misconduct by the plaintiff from the commencement of proceedings.

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8 At [8].

9 [2001] HCA 26.

10 Ibid, at [30].

11 [2011] QCA 109.

12 Defendants' Submissions received 4 April 2017, at [44]-[45].

[33] I am satisfied however that costs should be awarded on an indemnity basis after the plaintiff's unreasonable refusal to accept the *Calderbank*[13] offer which was first made on 13 April 2016 and later repeated on 4 October 2016. It is significant that the first defendant offered to fully dispose of all claims relating to the proceedings in return for a payment of $150,000 from the plaintiff. In my view the rejection of that offer was unreasonable and the first defendant should therefore have the costs of the main proceeding on an indemnity basis from 13 April 2016.

[34] There should therefore be Orders in the following terms:

1. The defendants pay to the plaintiff $550,000, together with interest at the agreed rate of 7% per annum of $122,250.69 from 1 February 2014 to the date of judgment;

2. The plaintiff pay to the first defendant $1,075,855.27 together with interest calculated as follows:

(a) The sum of $382,180.27, together with interest under s 58 of the *Uniform Civil Procedure Rules* 1999 (Qld) of $80,528.74 from 7 November 2013 to the date of judgment;

(b) The sum of $598,675, together with interest under s 58 of the UCPR of $120,056.91 from 1 January 2014 to the date of judgment;

(c) The sum of $95,000, together with interest under s 58 of the UCPR of $19,999.77 from 8 November 2013.

3. The plaintiff pay the first defendant's costs of the proceedings, including all reserved costs (but excluding Third Party Proceeding costs), to be assessed on the standard basis up until 13 April 2016 and from 13 April 2016 on the indemnity basis.

4. There be no order as to costs that are solely attributable to the Third Party Proceeding.

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13 *Calderbank v Calderbank* [1975] 3 All ER 333.