

SUPREME COURT OF QUEENSLAND

CITATION: *Pioneer Australia Pty Ltd & Anor v Quinn* [2019] QSC 82

PARTIES:

PIONEER AUSTRALIA PTY LTD (ACN 073 498 905)
AND SPA INVESTMENTS PTY LTD (ACN 134 314 631)

(plaintiffs/defendants by counterclaim) v

RORY ANN QUINN

(defendant/first plaintiff by counterclaim)

YIC INDUSTRIAL PTY LTD

(ACN 139 276 627)

(second plaintiff by counterclaim)

FILE NO/S: SC No 1550 of 2017

DIVISION: Trial Division

PROCEEDING: Claim

DELIVERED ON: 2 April 2019

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Bond J

ORDER: **The defendant and the second plaintiff by counterclaim must pay the plaintiffs' costs of the claim and the counterclaim, to be assessed on the indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS
– PARTICULAR CASES – OTHER PARTICULAR CASES
– where plaintiff lender entitled to costs order after successful claim to recover monies from guarantor of defaulting borrower - where the security deed governing the relationship between the parties created a contractual entitlement for the plaintiff lender to recover indemnity costs – whether indemnity costs should be awarded

COUNSEL: M Martin QC, with D Ferraro, for the plaintiffs and defendants by counterclaim
D Savage QC, with L Copley, for the defendant plaintiffs by counterclaim

SOLICITORS: Gall Standfield & Smith for the plaintiffs and defendants by counterclaim
 C I Legal Services for the defendant and the plaintiffs by counterclaim

[1] For the reasons set out in my principal judgment in this proceeding (*Pioneer Australia Pty Ltd & Anor v Quinn* [2019] QSC 72) I made the following orders:

- (a) The parties are directed to bring in minutes of an order dismissing the counterclaim and giving the plaintiffs judgment against the defendant in an amount together with interest consistent with the reasons for judgment.
- (b) I will hear the parties on the orders which should be made as to costs. [2]

The minutes of order which the parties brought in were –

- (a) judgment for the plaintiffs on the claim, in the sum of \$7,146,275.00, plus interest upon that amount at the rate of 20% per annum, compounding monthly until the date of payment; and
 - (b) the counterclaim is dismissed, and, accordingly, I made those orders.
- [3] I directed further submissions to be provided in respect of costs because there was a pleaded claim by the plaintiffs that costs should be awarded on the indemnity basis, on the grounds that the terms of the security deed between the parties so provided, and there had not been any submissions which responded to that claim.
- [4] Having now received the further submissions, these reasons express my decision on the question of costs. I will use the terminology which I used in my previous reasons.
- [5] The plaintiffs relied on the definition of “the moneys hereby secured” in clause 1 of the security deed and on the terms of clause D5 of the security deed to contend that, given that there was a contractual entitlement for the plaintiff to recover its costs on an indemnity basis, the court should exercise its discretion in that way. They contended that any such costs order should include the costs of defending the counterclaim because the counterclaim was, in effect, a defence to the plaintiffs’ claim for recovery of money owing pursuant to the guarantee provided by the defendant and could not be regarded as a separate proceeding divorced from the plaintiffs’ claim.
- [6] The defendant and YIC resisted that order. They asserted as follows:
1. Clause 3 of the Mortgage securing the debt provides : "All costs charges expenses and payments which may be made by the Mortgagee in or about the ... enforcement or attempted exercise or enforcement of any power right or remedy ... owing to the breach of or default in any covenant ... shall be payable by the Mortgagor ... such costs charges expenses and payments insofar as they are Solicitors fees shall be calculated as the case requires on the Queensland Law Society Incorporated Conveyancing Scale for the time being in force ... ";
 2. On this basis the costs order should be limited to costs on the standard basis;

3. In the event that clause D5 of the Security Deed is effective to enable the plaintiffs to recover costs of the Claim on an indemnity basis it is submitted that the costs of defending the counterclaim ought to be assessed on the standard basis.
- [7] The security deed was the principal instrument which governed the agreement by the plaintiffs (referred to as “the Lender”) to lend monies to YIC (referred to as “the Borrower”) and the terms on which YIC would repay those monies. It also expressed the terms of the guarantee pursuant to which the defendant (with her husband referred to as “the Guarantor”) became liable to the plaintiffs consequent upon YIC’s default.
- [8] By clause 3 of the security deed, YIC agreed to pay the plaintiffs “the moneys hereby secured”. By clause 6, the defendant and her husband guaranteed the due and punctual payment to the plaintiffs by YIC of “the moneys hereby secured” and undertook to pay “the moneys hereby secured” to the plaintiffs as if they were the principal debtor, principal contractor and/or principal obligee.
- [9] By clause 1(e) of the security deed “moneys hereby secured” was defined to include, amongst other things:
- (a) the totality of all moneys, obligations and liabilities which are now or may hereafter become owing or payable to the Lender by the Borrower or the Guarantor or any of them on any account whatsoever and howsoever arising;
 - (b) all costs and expenses incurred by the Lender in consequence of default in payment of any such moneys or a breach of any of the provisions of the security deed; and
 - (c) all moneys which the Lender shall be at liberty to debit or charge to the Borrower and/or the Guarantor or to the account of the Borrower and/or the Guarantor pursuant to any other provision of the security deed.
- [10] Clause D5 of the security deed was broadly stated and elaborated upon the last category mentioned in the previous paragraph. The clause provided (emphasis added):
- The Lender shall be at liberty and is hereby authorised from time to time without further authority than these presents, to debit and charge the Borrower with all costs (including legal costs incurred on a solicitor and own client basis by the lender), charges and expenses ... which the Lender shall pay, incur, sustain or be put to in connection with the account of the Borrower or the mortgaged premises or this security or the preparation or completion thereof or the exercise or attempted exercise of any right, power, authority or remedy conferred on the Lender ... under or by virtue of this security or by statute together, with interest on all such moneys at the rate per annum prescribed in clause 4 hereof, and the same shall be covered by this security and be portion of the moneys hereby secured.**
- [11] In my view the legal costs incurred on a solicitor and own client basis of pursuing the defendant as guarantor for the consequences of YIC’s default in payment should be regarded as costs incurred by the plaintiffs either –
- (a) in connection with the account of YIC;
 - (b) in connection with the security deed; or
 - (c) in connection with the exercise of rights and remedies conferred on the plaintiffs by the security deed.
- [12] The same may be said about the plaintiffs’ costs of defending the counterclaim.
- [13] Moreover, the plaintiffs are correct when they say that the counterclaim was relied on by the defendant as part of the defence to the plaintiffs’ claim. The costs of defending the

counterclaim were just as much part of the costs of pursuing the defendant as any other costs. And in any event, they are to be regarded as costs incurred “in connection with” the various matters referred to in clause D5.

- [14] The plaintiffs’ costs of the claim and of the counterclaim are regarded as covered by the security deed and part of “the moneys hereby secured”. The defendant promised to pay those costs. So did YIC. The promise in the security deed was plain and unambiguous. The defendant and YIC have not demonstrated that the clause in the mortgage to which the defendant and YIC point is inconsistent with that promise. But even if it was, I would attribute greater priority to the clause in the security deed.
- [15] The authorities suggest that the costs discretion should ordinarily be exercised in a way which corresponds with the plaintiffs’ contractual entitlement, unless there is some reason to take a different course: see *Kyabram Property Investments Pty Ltd v Murray* [2005] NSWCA 87 at [12]–[13]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 3)* [2010] NSWSC 1139 at [22], [39]; *Lee v Australia and New Zealand Banking Group Ltd* [2013] QCA 284 at [9]; and *HBU Properties Pty Ltd & Ors v Australia and New Zealand Banking Group Limited* [2015] QCA 95 at [26].
- [16] There is no reason to exercise the costs discretion other than in a way which corresponds with the plaintiffs’ contractual entitlement.
- [17] Accordingly I order that the defendant and YIC must pay the plaintiffs’ costs of the claim and the counterclaim, to be assessed on the indemnity basis.