

SUPREME COURT OF QUEENSLAND

CITATION: *Tulloch Brae Pty Ltd v Environmental Protection Equipment Pty Ltd & Anor (No 2)* [2021] QSC 255

PARTIES: **TULLOCH BRAE PTY LTD**
ACN 114 599 585 (as trustee for the Sargood Family Trust)
(plaintiff)
v
ENVIRONMENTAL PROTECTION EQUIPMENT PTY LTD
ACN 155 238 047
(defendant)
CLAYTON CHARLES SARGOOD
(defendant by counterclaim)

FILE NO: 6074/17

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 October 2021

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Dalton J

ORDER: **1. Order that the plaintiff pay the defendant's costs of the claim and of the defendant's counterclaim against the plaintiff on the District Court scale on a standard basis to be assessed or agreed.**

2. Order that the defendant pay any costs incurred by the defendant by counterclaim, Mr Sargood, which are his separate costs, and which would not have been otherwise incurred by the plaintiff in defending the counterclaim.

3. Judgment in an amount of \$165,098.71 in favour of the defendant as interest on the counterclaim.

COUNSEL: G Coveney with S Philippou for the plaintiff and defendant by counterclaim
A Fernon SC for the defendant

SOLICITORS: Enso Legal for the plaintiff and defendant by counterclaim
Yates Beaggi Lawyers for the defendant

- [1] On 2 September 2021 I published reasons in this proceeding. I gave judgment for the defendant on the plaintiff's claim; judgment in an amount of \$611,734 for the defendant on its counterclaim against the plaintiff, and judgment for the defendant by counterclaim (Mr Sargood) on the defendant's counterclaim against him. The parties have made written submissions as to costs and I now give my costs decision.
- [2] I order that the plaintiff pay the defendant's costs of the claim and of the defendant's counterclaim against the plaintiff on the District Court scale on a standard basis to be assessed or agreed.
- [3] The plaintiff said that it succeeded on part of its claim. In my view it did not. The plaintiff claimed for unpaid invoices. The defendant relied upon a defence of set-off. It is true that a few minor parts of the claim sought to be set off by the defendant were abandoned at trial but they were minor, and so small in comparison to the part of the counterclaim which succeeded that they are irrelevant to my assessment of costs.
- [4] The plaintiff argued that I should make separate costs orders as to the part of the counterclaim which succeeded and the part which did not. I declined to do so. Costs should follow the event of judgment on the counterclaim. The counterclaim included a claim for loss of profits in contract. That was successful. It also included an unsuccessful claim based on allegations of false and misleading behaviour under the Australian Consumer Law. The difference between the claims was not great. The claim based on the allegedly false and misleading behaviour failed because the defendant did not prove causation. This was not a case where the plaintiff successfully responded to a factual case on causation but simply where it identified that no case on causation had been made by the defendant. Other than that, the claims were almost identical. There is no warrant for giving costs on separate issues.
- [5] Next the plaintiff argued that the defendant should not have any costs of the counterclaim before 1 October 2020. The matter had come on for trial on 1 October 2020 and there had been an adjournment granted on the basis that the defendant needed to amend its counterclaim. In fact, the pleader chose to simply start again with the counterclaim, rather than further amend what was by then a much amended document. It was contended that this amounted to the defendant abandoning its earlier pleading and that it ought not have its costs prior to 1 October 2020. The fifth further amended counterclaim pleaded the same grievance which had always been pleaded by the defendant in its counterclaim. I refuse to apportion costs in the way submitted for by the plaintiff.
- [6] The costs order I propose is in accordance with the submission of the plaintiff in that costs are awarded on the District Court scale. This proceeding began in the District Court because the plaintiff claimed an amount of around \$45,000 as damages for breach of contract. It was transferred to this Court because the defendant's counterclaim was in an amount of around \$1 million. As it turned out I assessed the defendant's counterclaim as being under the monetary limit for jurisdiction in the District Court. In my view the proceeding ought to have stayed in the District Court and that ought to have been reasonably obvious to any lawyer assessing the counterclaim which the defendant sought to make.

- [7] The defendant submitted that it ought to have its costs on an indemnity basis from the date upon which a *Calderbank* letter was delivered, 10 May 2021. I refuse to award costs on an indemnity basis from this date. The letter was an offer to end the entire proceeding. The terms it proposed were better for the plaintiff than the judgment it received, but worse for the defendant by counterclaim, Mr Sargood, than the judgment he received. The offer was not capable of acceptance except by both the plaintiff and the defendant by counterclaim. Further, the offer allowed three days for a response. I think it is correct to contrast the provision in r 355(1) which allows 14 days for response to an offer made under the rules.
- [8] Lastly as to costs, I turn to the position of the defendant by counterclaim, Mr Sargood. The issues in the proceeding against Mr Sargood were very similar to those on the counterclaim between the plaintiff and the defendant. Mr Sargood was a director of the defendant and he was the director of the defendant who had taken charge both of making the contract with the plaintiff and performing it. The plaintiff and the defendant by counterclaim were represented by one set of solicitors and barristers at trial. In those circumstances I will make an order that the defendant pay any costs incurred by the defendant by counterclaim, Mr Sargood, which are his separate costs, and which would not have been otherwise incurred by the plaintiff in defending the counterclaim. These costs are to be assessed or agreed on a standard basis on the District Court scale.
- [9] As to interest, the defendant is entitled to \$167,929.11 on its judgment of \$611,734 calculated at Court rates. The plaintiff submitted that it was also entitled to interest at those rates on its original claim and that that interest should be set off against the award of interest to the defendant. I accept that submission. The amount of interest to which the plaintiff is entitled is \$2,830.40. Accordingly I give judgment in an amount of \$165,098.71 in favour of the defendant as interest on the counterclaim.