SUPREME COURT OF QUEENSLAND

CITATION:	*Davis & Anor v Perry O'Brien Engineering Pty Ltd & Ors (No. 2)* [2023] QSC 281
PARTIES:	**ROY STEVEN DAVIS** (first plaintiff) AND **COLLEEN JOYCE DAVIS** (second plaintiff) **v** **PERRY O'BRIEN ENGINEERING PTY LTD** **ACN 077 375 207** (first defendant) AND **R.B. PERRY INVESTMENTS PTY LTD** **ACN 607 303 248 AS TRUSTEE FOR THE PERRY INVESTMENT TRUST** (second defendant) AND **M.G. O'BRIEN INVESTMENTS PTY LTD** **ACN 607 300 201 AS TRUSTEE FOR THE O'BRIEN INVESTMENT TRUST** (third defendant)
FILE NO:	5928 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	8 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2023
JUDGE:	Applegarth J
ORDER:	**Forms of judgment to be submitted upon the completion by the parties of interest calculations.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CROSS-CLAIMS: SET-OFF AND COUNTERCLAIM – SET-OFF – WHAT MAY BE SET-OFF – EQUITABLE SET-OFF – where the plaintiffs succeeded in claims against the first defendant, but not the second and third defendants - where the second and third defendants succeeded in a counterclaim against the plaintiffs - where the plaintiffs contend that the judgment sums on the claim should be set off against the judgment sum on the counterclaim - where the defendants submit there should be

no set-off because of a lack of mutuality - where the plaintiffs contend that there was an agreement between the parties that the outcome of the claim and the counterclaim would be set off, notwithstanding any lack of mutuality - where the plaintiffs further submit that the facts and the Court's findings satisfy the legal requirements for an equitable set-off, which do not require mutuality - whether there should be an equitable set-off despite the lack of mutuality

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – DEPRIVING SUCCESSFUL PARTY OF COSTS - where the plaintiffs contend that they should have 70 per cent of their costs of their partly-successful claims - where the defendants contend that the plaintiffs' success on some issues and their failure on others should result in no order as to the costs of the claim – where the plaintiffs submit that they should be ordered to pay 70 per cent of the defendants' costs of the counterclaim to account for the defendants' failure on some issues - where the defendants submit that their costs of the counterclaim should not be reduced, given their substantial success - what is the appropriate order for costs of the claim and counterclaim

Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors (No 2) [2017] QSC 266, cited
BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, cited
Davis & Anor v Perry O'Brien Engineering Pty Ltd & Ors [2023] QSC 243, cited
Davis v Perry O'Brien Engineering Pty Ltd [2016] QSC 202, cited
Drane v Aqualyng Holdings & Anor [2016] QSC 139, cited
Forsyth v Gibbs [2009] 1 Qd R 403; [2008] QCA 103, cited
Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd [2015] QSC 52, cited
Hamilton Ice Arena Ltd v Perry Developments Ltd [2002] 1 NZLR 309, cited
Hawes v Dean [2014] NSWCA 380, cited
HP Mercantile Pty Ltd v Dierickx [2013] NSWCA 479, cited
Mao v Bao [2023] NSWCA 278, cited
Murphy v Zamonex Pty Ltd (1993) 31 NSWLR 439, cited
Speets Investment Pty Ltd v Bencol Pty Ltd (No 2) [2021] QCA 39, cited
Spotless Group Ltd v Premier Building and Consulting Pty Ltd [2008] VSCA 115, cited
The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd & Ors [2009] QSC 84, cited
Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd & Ors (No 2) [2011] QSC 21, cited
Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (2019) 100 NSWLR 432, cited

Zeekap (No 47) Pty Ltd v Anitam Pty Ltd (1989) 14 Tas R 206, cited

COUNSEL: D Ananian-Cooper for the plaintiffs
D de Jersey KC for the defendants

SOLICITORS: Project Legal for the plaintiffs
Shand Taylor Lawyers for the defendants

[1] On 1 November 2023 I delivered my reasons[1] for concluding that the forms of judgments and orders should reflect:

(a) the Sellers' success upon:

(i) Mrs Davis' debt claim against Earthpro in respect of a loan of $120,000 pursuant to the 9 December 2015 Deed;

(ii) the Sellers' entitlement to an order for an account by Earthpro of the proceeds of sale of certain stock; and

(iii) the Sellers' damages claim against Earthpro for breach of the oral Sponsorship Agreement in the amount of $299,152; and

(b) the Buyers' success against the Sellers for contravention of statute and also for breach of contract, with compensation assessed at $1,646,798.

[2] I directed the parties to agree, if possible, or otherwise submit forms of order to reflect my findings and stood the matter over to hear submissions about the form of order, including orders as to costs. I heard those submissions on 27 November 2023.

Issues

1. The plaintiffs submit that the judgment sums on the claim should be set off against the judgment sum on the counterclaim, whereas the defendants contend there should be no set-off.

2. The appropriate costs order on the claim: the plaintiffs contend that they should have 70 per cent of their costs of their partly-successful claims, whereas the defendants contend that the plaintiffs' success on some issues and their failure on others should result in no order as to the costs of the claim.

3. The costs of the counterclaim: the plaintiffs submit they should be ordered to pay 70 per cent of the defendants' costs of the counterclaim, whereas the defendants submit that their costs should not be reduced, given their substantial success.

[3] Another issue relates to orders to release the funds held in Court, which have their origins in a retention amount under the Share Sale Agreement ("SSA"). During submissions at the end of the trial the plaintiffs accepted that the disposition of the retention amount should reflect the substantial outcome of the proceedings. However, they seek a temporary stay of any release to the defendants of the funds

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1 *Davis & Anor v Perry O'Brien Engineering Pty Ltd & Ors* [2023] QSC 243 ("Reasons").

held in Court, until the expiry of the period of any appeal from the judgment or some time after that, by which time they might seek a more general stay from the Court of Appeal if an appeal is brought.

[4] The plaintiffs also seek a stay on the enforcement of the Buyers' judgment to the extent of $350,000, being the amount of the "Stock Sale Proceeds Loan", plus interest. They seek such a stay until the proceeds of sale of certain stock are accounted for under the account I propose to order. Because the amount to be paid by Earthpro to the plaintiffs cannot presently be fixed, any such amount cannot be set off. Hence the request for a stay on enforcement rather than a reduction of the Buyers' judgment due to an equitable set-off in respect of the proceeds of the stock.

The set-off

[5] As noted, the second and third defendants (described in the Reasons as "the Buyers") were found to have suffered loss and damage in the amount of $1,646,798, as a result of the plaintiffs' (described in the Reasons as "the Sellers") misleading or deceptive conduct and breach of contractual warranties. On the claim:

(a) the first defendant (described in the Reasons as "the Company" or "Earthpro") was found liable to pay the second plaintiff (Mrs Davis) $120,000;

(b) Earthpro is obliged to account to the Sellers the net proceeds of the sale of certain stock; and

(c) Earthpro's breach of the Sponsorship Agreement renders it liable to pay the Sellers damages for breach of contract in the amount of $299,152.

[6] In my reasons, I indicated a lack of mutuality between the outcomes on the claim and on the counterclaim. I stated:[2]

> "The Sellers have succeeded in claims against Earthpro, not against the Buyers, and therefore no set-off would appear to arise as between the Buyers and the Sellers. The Sellers will be entitled to judgment against Earthpro and an order for an account against it."

[7] The Sellers seek, however, final orders that set off the outcomes on the claim and on the counterclaim. They give two reasons. First, they contend that at trial there was an agreement between the parties that the outcomes of the claim and the counterclaim would be set off, notwithstanding any lack of mutuality. Second, they submit that, in any event, the facts and the Court's findings satisfy the legal requirements for an equitable set-off, which do not require mutuality.

The position taken by the parties

[8] Before considering the factual underpinning of the contention that the parties agreed, in effect, that any and all claims and counterclaims should be set off against the other, it is useful to observe that the legal character of any such agreement is somewhat uncertain. I apprehend that is not said to be in the nature of a binding legal contract. Rather, it is that the setting off of claims was not an issue, and that it would be wrong to now permit the defendants to argue against a set-off, even if an

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2 At [550].

equitable set-off were not available. I turn to the facts and the positions taken by the parties earlier in the proceeding.

The 2016 hearing

[9] An issue of set-off arose in 2016 when the Sellers sought declarations about the operation of clause 2.2 of the 9 December 2015 Deed. One declaration concerned an allegation that certain moneys were held on trust for the Sellers. Alternatively, they sought a declaration concerning an obligation to account. Earthpro resisted the application and contended that no trust was created. It further contended that it had an equitable set-off in respect of that claim.

[10] Part of Earthpro's defence of that application was that certain clauses of the SSA contained promises that were made for its benefit, notwithstanding that they were cast in terms of keeping the Buyers indemnified. In my 2016 Reasons I remarked upon Earthpro's submission in relation to clauses 8.11, 8.12 and 8.13 in that regard. Earthpro argued, for example, that a claim in relation to outstanding employee entitlements would be made against Earthpro, rather than the Buyers, and that accordingly, the clause should be interpreted to operate commercially and sensibly as a promise in favour of Earthpro. The Sellers conceded that Earthpro's arguments in relation to some clauses were stronger than in relation to others. I considered that Earthpro had "a reasonable basis to contend that the promises which it relies upon in respect of some of the 'off-setting claims' are or appear to be intended for the benefit of the company".[3]

[11] I considered the principles governing equitable set-off before concluding that the Sellers' claim and Earthpro's off-setting claims were sufficiently connected that the off-setting claims could be said to impeach the claim, and to thereby make it unfair for the claim to be allowed without taking account of the off-setting claims. Ultimately, I declined to make the declarations sought because the application resembled one for the summary determination of a money claim, and also because I was not in a position to conclude that the Sellers' claim would exceed any off-setting claim of Earthpro.[4]

[12] I note that, as matters transpired at the trial, Earthpro did not establish any claim for breaches of the clauses that were under consideration in my 2016 judgment.

The parties' position in their pleadings and at trial

[13] In their defence, the defendants pleaded in response to "the Colleen Loan" and the claim under the 9 December Deed in that regard, that the 9 December Deed amended the SSA and formed part of the transaction for the sale of shares in Earthpro. The defendants pleaded that in the premises of the matters pleaded in paragraphs 15 to 119 of the counterclaim, it was entitled, and sought to set off in respect of any obligation that it had under the 9 December Deed its claims against the plaintiffs for breach of the SSA. Earthpro claimed against the Sellers for breach of the SSA any amount that exceeded the payments contemplated by clause 2.1 of the 9 December Deed in respect of the Colleen Loan.

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3 *Davis v Perry O'Brien Engineering Pty Ltd* [2016] QSC 202 at [71].

4 At [83].

[14] Paragraph 60(d) of the defence related to the Oral Sponsorship Agreement which was said to be collateral to the SSA and to be part of or ancillary to the sale of the shares. Paragraph 60(d) contended that Earthpro was entitled to set off in respect of any obligation it had under the Oral Sponsorship Agreement its claims against the Sellers for breach of the SSA, as pleaded in paragraphs 61 to 119 of the counterclaim. Those claims were said to exceed the monetary sums claimed by the Sellers in respect of the Oral Sponsorship Agreement.

[15] It is unnecessary to survey paragraphs 61 to 119 of the counterclaim in detail. The focus of attention should be upon the claims brought by Earthpro. In various places it was alleged that the Sellers were obliged by various clauses of the SSA to indemnify Earthpro and to pay it certain amounts. For example, paragraph 69 of the counterclaim sought an indemnity in the amount of $487,140.34. There are other claims for indemnity for matters such as unpaid wages and the cost of having Earthpro's financial records corrected at a cost of just over $5000.

[16] Paragraph 1 of the prayer for relief in the counterclaim sought a declaration that Earthpro is entitled to be indemnified by the Sellers in respect of any liability, claim or loss visited upon it in consequence of any breach of any warranty given by the Sellers under the SSA. Other paragraphs of the prayer for relief sought orders for the Sellers to indemnify and pay Earthpro in respect of any breach of warranty given by the plaintiffs under the SSA. Other prayers for relief related to remedies sought by the Buyers. Paragraph 11 of the prayer for relief sought an order that "the amount of any damages or compensation awarded to the Plaintiffs (including interest thereon) be set off against any amount awarded against the Plaintiffs pursuant to the Defendants' counterclaim".

[17] In their second amended reply and third amended answer the Sellers denied the allegations contained in paragraph 19(d) of the defence, and otherwise did not plead to the allegations contained therein "as they comprise allegations of law". By way of reminder, that related to Earthpro's claim to be able to set off any liability in respect of the Colleen Loan. There was a similar response in relation to paragraph 60(d) of the defence which asserted a set-off in relation to any liability under the Oral Sponsorship Agreement. In other words, the availability of set-off was not admitted, but said to be a question of law.

[18] The defendants' written opening submissions at [43] and their closing submissions at [140] and [141] addressed the issue of set-off. Paragraph [140] concerning Colleen's loan submitted that the 9 December Deed formed part of the transaction for the sale of shares. In reliance on their counterclaim, a set-off was claimed in respect of any obligation Earthpro had under the Deed for breach of the SSA pleaded in the counterclaim. Paragraph [141] quoted at length from my 2016 Judgment concerning the principles of set-off. As noted, these related to an alleged set-off by Earthpro in the context of the Sellers' claim for an account of the stock sale proceeds. The set-off was for claims that Earthpro had for indemnities given to the Buyers, which Earthpro claimed to have the benefit of, notwithstanding it not being a party to the SSA.

[19] The Agreed List of Issues in Dispute (which was intended to be a working document for the preparation of submissions after the close of evidence, not a substitute for pleadings) included as the last issue:

> "As to the whole of the Plaintiffs' claims against the Defendants, whether the Plaintiffs are entitled to set off any amount payable to them under those claims against any amounts payable under the Defendants' claim, by the Plaintiffs to:
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> (a) the First Defendant and/or
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> (b) the Second and Third Defendants."

The resolution of these claims

[20] Earthpro did not develop an argument of the kind it made in 2016, namely that it had the benefit by virtue of s 55 of the *Property Law Act* 1974 (Qld) of the contractual promises made in the SSA to the Buyers. In any event, I declined for the reasons given to interpret the indemnity clauses to apply.[5] I accepted, because there was no argument to the contrary, that the relevant clauses provided the Buyers with a specific indemnity for liability to third parties that arose due to a breach of warranty.

[21] The Buyers succeeded upon a breach of warranty, and the damages that I assessed were principally in respect of a breach of the warranty given to them in respect of the statements listed at Schedule 1 of the SSA.

[22] In summary, Earthpro did not prove its claim for breach of contract. I did not find that it was entitled to be indemnified by the Sellers under the clauses considered in my 2016 judgment or otherwise. The views that I expressed in 2016 about the availability of an equitable set-off by Earthpro in respect of the Sellers' claim for the stock sale proceeds did not arise because Earthpro did not establish an entitlement to such an indemnity.

[23] At the hearing on 27 November 2023 counsel for the plaintiffs contended that the defendants had changed their position on whether or not a set-off should be ordered. Counsel for the defendants submitted that there had been no change in position. Their position in 2016 had been that the counterclaim should be set off against the claim because they had been induced to assume the relevant obligations by the misleading conduct and breach of warranty in respect of which they sought compensation under the counterclaim. They did not argue the point of whether the claim should be set off against the counterclaim. This was said to be an important difference.

[24] I conclude that had Earthpro succeeded in a claim against the Sellers, then in reliance on the submissions made at paragraphs [140] and [141] of their written submissions, Earthpro would have claimed to set off the Sellers' claims against it. However, in the circumstances that have developed, that does not arise because Earthpro did not succeed on its claim.

[25] The issue remains whether the Sellers should be entitled to set off their claims against Earthpro against their liabilities *to the Buyers*.

[26] I am not persuaded that the conduct of the proceedings, the pleadings, or the parties' trial submissions constitute an agreement by them that the amount of any claim in

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5 Reasons at [462]-[465].

favour of the Sellers would be set off against any and all amounts awarded on the counterclaim. The position is not so clear as to conclude that there was an agreement between the parties that any successful claim against Earthpro would be set off against claims upon which the Buyers, but not Earthpro, succeeded. The contingency of Earthpro failing upon its counterclaim and the Buyers succeeding upon their counterclaim was not addressed and agreed in the context of set-off. The position is not so clear as to conclude that there was a definite agreement for such a set-off to be allowed, notwithstanding a lack of mutuality.

Should there be an equitable set-off despite the lack of mutuality?

The parties' submissions

[27] The Sellers submit that the principles governing an equitable set-off are engaged because their successful claims against Earthpro are closely connected to the Buyers' successful claim against them, and directly impeach the Buyers' damages remedy.

[28] The loan liability of $120,000 and the obligation to account for the net proceeds of the sale of certain stock are submitted to directly impeach the Buyers' damages claim because those liabilities were reflected in the quantification of the Buyers' compensation.

[29] Earthpro's liability to pay damages under the Sponsorship Agreement is conceded to be different, not being reflected in the loss and damage assessed on the Buyers' counterclaim. Still, the Sellers submit that there is a sufficiently strong connection to satisfy the requirement that their claim for damages for breach of the Sponsorship Agreement impeaches the Buyers' claim. This is because, as found at [536], the Sellers were induced by the promise to enter the Sponsorship Agreement to settle the SSA, which is the source of the Buyers' claimed loss.

[30] The Sellers seek to set off the $120,000 sum owed to Mrs Davis over her loan, and the sum of $299,152 for breach of the Sponsorship Agreement, against the Buyers' claim.

[31] As to the Sellers' claim to recover the proceeds of the sale of certain stock, the Sellers submit it directly impeaches the Buyers' right to damages, as assessed. The amount of the proceeds due has yet to be quantified because an account has yet to be taken.

[32] The Sellers seek a declaration that the amount accounted for is to be set off against the judgment in favour of the Buyers, and that the enforcement of that judgment be stayed to the extent of the Stock Sale Proceeds Loan of $350,000 plus interest pending finalisation of the account.

[33] The Sellers also seek to stay any order releasing the funds held in Court in the sum of $202,208.07 plus accretions (which has its origins in the Retention Amount under the SSA) until the expiry of the period during which it might appeal.

[34] One aspect of the Sellers' case in support of an equitable set-off and other relief is that it would be unjust to permit the Buyers to recover damages on account of a liability, while leaving the Sellers exposed to the risk that they may not recover

amounts they are owed from Earthpro, notwithstanding that Earthpro is wholly owned by the Buyers.

[35] In response to the last point, the Buyers submit that there is no evidence to support the proposition that judgments for the Sellers will remain unsatisfied, with the evidence at trial being that Earthpro is still trading.

[36] More fundamentally, the Buyers submit that, as stated in [550] of my earlier Reasons, there is no mutuality. There is said to be no unfairness in the Sellers having a judgment entered in their favour and the Buyers having a judgment entered in their favour. The Sellers' claims are submitted to not impeach the Buyers' misleading and deceptive conduct claim.

[37] According to the Buyers, an equitable set-off does not arise simply on the basis of an argument about unfairness in some general sense and, in any event, there is nothing unfair in ordering separate judgments for the amounts assessed in favour of the Sellers against Earthpro, and the amount assessed in favour of the Buyers against the Sellers.

[38] The Buyers contend that there is nothing unconscionable in that outcome in circumstances in which the parties structured their contractual arrangements as they did, with the Sellers making the deliberate choice to not obtain guarantees from the Buyers in respect of Earthpro's obligations to the Sellers.

Principles governing equitable set-off

[39] The principles governing equitable set-off in Australia have been authoritatively stated, most recently by the New South Wales Court of Appeal in *Mao v Bao*.[6] In a 2016 judgment in this proceeding I surveyed the principles, including the frequently-cited statement of Keane JA in *Forsyth v Gibbs*.[7] I wrote:[8]

> "[73] It is common ground between the parties that an equitable set-off must "impeach" the plaintiff's claim. The "mere existence of cross demands is not sufficient of itself to give rise to set-off in equity".[9] It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim.[10] In *Forsyth v Gibbs*, Keane JA stated:
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> > "[9] Consistently with the technique of equity, which does not seek to define what an elephant is but knows one when it sees one, the principles governing the availability of equitable set-off of cross-claims are couched in open textured terms, such as "sufficient connection" and "unfairness". In some cases, it will be necessary to engage in an evaluation of a range of facts which might establish "sufficient connection" or "unfairness" of the

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6 [2023] NSWCA 278 ("*Mao v Bao*").
7 [2009] 1 Qd R 403; [2008] QCA 103 ("*Forsyth*").
8 *Davis v Perry O'Brien Engineering Pty Ltd* [2016] QSC 202 at [73].
9 *Drane v Aqualyng Holdings & Anor* [2016] QSC 139 at [51].
10 *Forsyth* at 406 [10].

> relevant kind. But the principles to be applied are not so vague or subjective that it is never possible to determine, for the purposes of an application for summary judgment, that the facts alleged by a defendant simply fall short of what is required.
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> [10] It is important to emphasise that the availability of an equitable set-off between cross-claims does not depend upon an unfettered discretionary assessment of whether it would be "unfair" in a general sense for a plaintiff to insist on payment of the debt owed to it while the cross-claim remains unpaid. It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim."[11]

[40] On that occasion it was the Sellers who contended that there could not be a set-off of Earthpro's claims against their claim because there was said to be "a complete lack of mutuality". In that context, I stated:[12]

> "[74] The applicants submit that the company's claims cannot be set-off against their claim because there is "a complete lack of mutuality". The applicants acknowledge that mutuality is not the touchstone of equitable set-off, and that the test for equitable set-off has not been formulated in terms of a requirement of mutuality. Instead, if claims are not mutual then there has to be some other reason why a court of equity should permit a set-off.[13] In applying the "impeachment of title" test, the absence of mutuality and other factors which call into question the closeness of the connection between the two relevant claims will be important. For example, in *Hawes v Dean*,[14] mutuality was lacking because the parties were not the same and the respective liabilities and entitlements arose from different transactions entered into at different times."

[41] In *Mao v Bao* Ward ACJ restated the principles governing the doctrine of equitable set-off.[15] White JA did not disagree with those principles, but took a different view about the availability of equitable set-off in the circumstances of that case. Mitchelmore JA agreed with the reasons of Ward ACJ.

[42] Ward ACJ restated the classic test that the cross-demand must "impeach" the initial claim. This reflects the statement of Keane JA (with whom McMurdo P and Fraser JA agreed) in *Forsyth* at [10] quoted earlier that:

> "It is essential that there be such a connection between the claim and the cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim."

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11 At 406 [9] and [10] (footnotes omitted).

12 *Davis v Perry O'Brien Engineering Pty Ltd* [2016] QSC 202 at [74].

13 Rory Derham, *Derham on The Law of Set-Off* (Oxford University Press, 4th ed, 2010) at [4.68].

14 [2014] NSWCA 380 at [66] ("*Hawes v Dean*"). Barrett JA, with whom Bathurst CJ and McColl JA agreed, analysed the principles of equitable set-off at [60]-[65].

15 *Mao v Bao* at [54]-[66].

[43] Ward ACJ noted that the strictness of the "impeachment" requirement had been emphasised in decisions of the New South Wales Court of Appeal. For example, in *HP Mercantile Pty Ltd v Dierickx*,[16] Emmett JA (with whom Beazley P and Meagher JA agreed) stated:

> "Equitable set-off is available where the party seeking it can show a recognised equitable ground for being, to the relevant extent, protected from its adversary's demand. The mere existence of a cross-claim is not sufficient. There must be some ground for equitable intervention beyond the mere existence of a cross-claim, such that it can be said that the equity of the defendant impeaches the claimant's title to the legal demand being enforced."

[44] In *Hawes v Dean*[17] Barrett JA (with whom Bathurst CJ and McColl JA agreed) suggested that the two wrongs or defaults had to be so closely connected that a net position or result ought in equity to prevail between the parties because it would be "unconscionable" to allow one of them to insist on its legal right without first accommodating the other's countervailing legal right. In the later decision of *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd*[18] Leeming JA (with whom Bathurst CJ and McCallum JA agreed) doubted whether unconscionability qualified the concept of impeachment, but found it unnecessary to resolve that issue. Leeming JA observed that his reasons should not be regarded as authority for the proposition that in order for a debt to impeach another it is sufficient that it be found to be "unconscionable" to permit the enforcement of one without regard being had to the other.

[45] As I noted in my 2016 decision in this proceeding, *Hawes v Dean* was a case in which mutuality was lacking because the parties were not the same and their respective liabilities and entitlements arose from different transactions entered into at different dates.

[46] Before turning in some greater detail to the mutuality factor, it is appropriate to note, as Ward ACJ did in *Mao v Bao*,[19] that among the guiding principles governing equitable set-off are that:

(a) the mere existence of a cross-claim is not sufficient;

(b) it is not necessary that the claims arise from the same transaction, although if cross-demands arise out of separate transactions, they would not usually be regarded as sufficiently closely connected to justify equitable set-off;

(c) it is not necessarily sufficient to show that the cross-claim is in some way related to the transaction which gave rise to the claim, or turns on similar findings of fact;

(d) mutuality is not necessary, but is potentially relevant;

(e) it is necessary to look at all of the circumstances of the case; and

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16 [2013] NSWCA 479 at [136].
17 [2014] NSWCA 380 at [65].
18 (2019) 100 NSWLR 432 at 454 [113] ("*Wollongong Coal*").
19 *Mao v Bao* at [66].

(f) the notion of sufficient connection between the claims will ordinarily be satisfied if the claims are interdependent in the sense discussed in *Forsyth*.

Mutuality

[47] Set-off under statute and in insolvency requires mutuality.[20]

[48] Australian courts have emphasised that mutuality is not an indispensable requirement of equitable set-off.[21] In *Wollongong Coal* Leeming JA accepted the proposition that "a lack of mutuality in equity is not always fatal to a defence of equitable set-off".[22]

[49] The learned author of *Derham on The Law of Set-Off* stated:[23]

> "Ordinarily, it would not be just or equitable that cross-demands be set off in equity unless there is mutuality. In its simplest form, mutuality means that A can sue B and B can sue A. If the situation instead is that A can sue B and B can sue C, it would not usually be just that the demands be set off because this would mean that A's asset (the claim against B) would be used to pay C's liability. This would include a case where A and C are related entities. In equity, their relationship would not justify the use of A's claim to pay C's debt through a set-off.
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> …
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> Nevertheless, the test for equitable set-off traditionally has not been formulated in terms of a requirement of mutuality. Consistent with the inherent flexibility of equitable remedies, if in an exceptional case a set-off would be appropriate in all the circumstances notwithstanding that the claims in issue are not mutual, as a matter of principle there would seem to be no compelling reason why a court of equity should not have a discretion to permit a set-off despite the absence of mutuality, subject to compliance with the rule of practice of the Court of Chancery that all persons materially interested in the subject of a suit generally should be made parties to the suit."

[50] An example of lack of mutuality arising because of a lack of identity of parties is *Hamilton Ice Arena Ltd v Perry Developments Ltd*,[24] in which one company owed money for rent to another company, whereas the latter company owed money for wages not to the first company but to shareholders in it. The lack of identity of parties was held to be fatal to an equitable set-off.[25] In addition, the claims did not have such interdependence because one contract involved different premises in different cities, and had insufficient links to make it unjust to allow the party to have judgment without bringing the other claim to account.

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20 Derham at [4.67].
21 At [4.69].
22 *Wollongong Coal* at 458 [110].
23 Derham at [4.68] (footnotes omitted).
24 [2002] 1 NZLR 309.
25 At 313 [12].

[51] As already noted, a lack of mutuality was decisive to the decision in *Hawes v Dean*. Two factors called into question the closeness of the connection between the two relevant claims. First, the party entitled to receive one amount was not the party liable to pay another amount, and the party entitled to receive that amount was not the party (or even one of the parties) liable to pay the first amount. As Barrett JA observed, "[m]utuality is entirely lacking".[26] The second factor was the respective liabilities and entitlements arose from different transactions entered into at different times.

[52] Barrett JA discussed how in pursuing commercial opportunities together the controlling individuals, Mr Hawes and Mr Dean, erected business structures that were obviously intended by them to be real and to play defined roles. They adopted particular structures for sound, commercial reasons and each individual was content to see the other hold investments and incur liabilities in such a way as to reduce personal exposure. That militated against the notion that, in the context of the termination of the relationship, those aspects should be ignored or discounted as mere technicalities in favour of an approach based on economic reality.[27] Barrett JA concluded:

> "… **regard must be had primarily to the separateness of entities**. The primary judge was of the view that, as between the individuals, there were "two equal beneficial interests" and that a different position (involving separate entities and "a number of vehicles") pertained only "as against the rest of the world". I am not persuaded that that is a correct characterisation. The "vehicles" insulated particular assets and liabilities on one side of the enterprise not only from "the rest of the world" but also from the other side. **The "vehicles" cannot be ignored**; nor can it be said that the insulation they were obviously designed to achieve should somehow be overlooked when it came to ascertaining assets and liabilities. **While equity will sometimes countenance set-off otherwise than between the same parties, some particularly compelling factor making reliance on separate rights unconscionable must be found to justify set-off in circumstances of glaring lack of mutuality**." (Emphasis added).

[53] It is not particularly profitable to descend to detail about the facts of the cases in which a lack of identity between parties has precluded or permitted an equitable set-off. Each turns on its facts. For example, *Murphy v Zamonex Pty Ltd*[28] concerned new trustees. *Zeekap (No 47) Pty Ltd v Anitam Pty Ltd*[29] concerned a company that was nominated by a party to be the purchaser in his place. The commercial relationship between the parties in *Hawes v Dean* was different to the relationship between the parties in this case and, importantly, their respective liabilities and entitlements arose from different transactions entered into at different times.

[54] In this matter, the obligations that the Sellers have successfully enforced against Earthpro arose out of the 9 December Deed, which was inextricably linked to the

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26 *Hawes v Dean* at [66].
27 At [73].
28 (1993) 31 NSWLR 439.
29 (1989) 14 Tas R 206.

settlement of the SSA. The Buyers were induced to settle the SSA by misleading or deceptive conduct by the Sellers and their breaches of warranty.

[55] There is a close factual connection between the transactions. The issue, however, is whether there is a sufficient connection between one or more of the Sellers' successful claims against Earthpro and the Buyers' successful counterclaim that the claim can be said to impeach the counterclaim, so as to make it unfair to allow judgment for the whole of the Buyers' counterclaim without taking into account one or more of the Sellers' claims against Earthpro.

[56] The set-off that is sought is not a denial of the Sellers' liability in respect of the Buyers' successful counterclaim. Rather, it is a plea against enforcement of the counterclaim in full based on a ground for equitable intervention.

Is the connection such that the claim can be said to impeach the counterclaim so as to make it unfair for the counterclaim to be allowed in full, without taking into account the claim?

[57] The lack of mutuality that arises because of a lack of identity between the relevant parties is obvious. A set-off may be appropriate by virtue of the application of equitable principles, despite the absence of mutuality. As stated, a lack of mutuality in equity is not always fatal to a defence of equitable set-off. It remains, however, a notable feature.

[58] The counterclaim is by the Buyers, not Earthpro, against the Sellers. The Sellers' successful claims were against Earthpro, not against the Buyers. The fact that the Buyers became shareholders in Earthpro as a result of the completion of the SSA (which would not have been completed in the absence of the Sellers' misleading conduct) does not mean that they remain shareholders or shareholders to the same extent, or that the business structures and commercial arrangements agreed by the parties should be ignored. Earthpro and the Buyers cannot be equated with each other. The Buyers were not asked to guarantee, and did not guarantee, Earthpro's performance of its obligations to the Sellers under the 9 December Deed.

[59] The Sellers' case for a set-off does not depend upon the risk that, without a set-off, they may not be able to recover an award from Earthpro. Instead, it turns on the issue of whether each of the claims upon which the Sellers have succeeded impeaches the Buyers' right to damages.

[60] There was a close connection between the SSA, or at least its completion, and the assumption of rights and obligations under the 9 December Deed. The 9 December Deed, in effect, amended the SSA and was designed to ensure its completion.

[61] The mere fact that, in the absence of a set-off, the Sellers are exposed to the risk that they may not be able to recover a judgment sum from Earthpro, which I shall assume for the purpose of argument is still wholly owned by the Buyers, is not a sufficient reason to order a set-off. It is a risk which the Sellers assumed in entering into the 9 December Deed, without obtaining guarantees from the Buyers. Years after the sale transaction and after the expenditure of large amounts on legal and accounting fees in these proceedings, the Sellers face the risk that a judgment against Earthpro will not be satisfied. A set-off should not be used as a remedy to

alter the allocation of risk between parties or to belatedly achieve the same result as a personal guarantee.

[62] Applying the general principle stated in the first quoted part of Derham at [49] above, ordinarily it would not be just that the Buyers' asset (their award of damages against the Sellers) be used to pay Earthpro's liability. It would not be just to do so because of the way the parties structured their affairs. The legal separateness between the Buyers and Earthpro cannot be ignored.

[63] Is there a compelling factor that calls for equitable intervention because one or more of the Sellers' claims impeaches the Buyers' entitlement to enforce the damages award I have assessed?

The $120,000 loan

[64] There is a close connection between the $120,000 loan and the quantification of the Buyers' claim. The compensation that I assessed turned on the price that the Buyers paid and the actual value of the shares. I assessed their value at the time the transaction was completed and assumed that Earthpro owed Mrs Davis $120,000. The price that the Buyers agreed to pay took account of that $120,000 liability. Expressed differently, if Mrs Davis had agreed to forego the entirety of the money she had loaned to Earthpro rather than still being owed $120,000, then the price that the Sellers would have demanded as the value of Earthpro would have increased by $120,000.

[65] The damages for breach of warranty and compensation for misleading conduct that I assessed was on the basis that Earthpro had a liability of $120,000 to Mrs Davis, which reduced its value by $120,000. Yet, Earthpro still has not paid Mrs Davis that amount.

[66] There is a sufficient connection between the damages that have been assessed in respect of the counterclaim and Mrs Davis' claim for $120,000, that her claim can be said to impeach the counterclaim and to make it unfair for the counterclaim to be allowed in full, without taking into account her $120,000 claim. There is a sufficient ground for equitable intervention such that it can be said that the equity of Mrs Davis impeaches the Buyers' entitlement to obtaining a judgment for damages in an amount that reflects Earthpro's unpaid liability to her. Judgment on the counterclaim should therefore be reduced by the amount of $120,000 plus interest by way of equitable set-off.

The stock proceeds

[67] A similar analysis applies in this context. The Sellers advanced a $750,000 settlement loan, $400,000 of which was effectively forgiven at settlement by virtue of the operation of the 9 December Deed. The remaining $350,000 was to be repaid in the form of the proceeds of the sale of certain stock. The settlement loan of $750,000 formed part of the amount that the Buyers paid to acquire the shares. The settlement loan enabled them to pay the balance of the purchase price and the

amount payable to the CBA. Simply put, the Buyers were able to pay a purchase price totalling $4,136,315 because they obtained a settlement cheque for $750,000 by virtue of the settlement loan, $350,000 of which was repayable in the form of the sale proceeds of certain stock. The Sellers would have succeeded upon a money claim for the sale proceeds had the Buyers disclosed the amount of the sale proceeds. Instead, their remedy is an order for an account.

[68] The Buyers' claim was made on the basis that they paid $4.1 million for the shares, but they paid that amount because they had a vendor loan.

[69] The Buyers had the benefit of $350,000 that enabled them to purchase shares at a price of approximately $4.1 million, but the Sellers have yet to receive anything in return for advancing that part of the purchase price to the Buyers. Had the amount of the stock sale proceeds been quantified by the Buyers, it would have been the subject of an equitable set-off.

[70] The amount of the sale proceeds is uncertain. It would be unsatisfactory to set off an amount as high as $350,000 to later find that proceeds of only, say $200,000 were obtained for the relevant stock.

[71] In the circumstances, the Sellers cannot presently set off a certain amount, notwithstanding that their claim to be paid the proceeds of the sale of the stock impeaches the Buyers' damages claim, as assessed. Because the amount of the Sellers' entitlement to be paid the equivalent of the proceeds of sale (together with interest) has yet to be quantified and set off, the Sellers seek a declaration that the amount to be accounted for is to be set off against the judgment in favour of the Buyers and a stay on enforcement to the extent of $350,000 plus interest. That relief seems appropriate.

The Sponsorship Agreement

[72] Different considerations apply to the Sellers' claim for breach of the Oral Sponsorship Agreement, being a claim for damages that I have assessed in the amount of $299,152.

[73] This amount does not feature as part of the purchase price that was paid at settlement. It was not included in the Buyers' claim as an amount that was paid to acquire the shares. I need not repeat the observations I made at [515] and [544] of my reasons. It does not have the same claim to be the subject of an equitable set-off as amounts that are owed by Earthpro to the Sellers, and which were reflected in my assessment of the compensation to which the Buyers are entitled.

[74] The Sellers nevertheless press a claim for an equitable set-off, arguing on the basis of my finding at [536] that they were induced by the promise of the Sponsorship Agreement to settle the SSA, which is the source of the Buyers' claim. This is submitted to be a sufficiently strong connection to satisfy the requirements of an equitable set-off.

[75] It is true that an equitable set-off may be available in relation to a contract that is not directly in issue, but which is directly connected with it.[30] A claim for damages in

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30 *Davis v Perry O'Brien Engineering Pty Ltd* [2016] QSC 202 at [75].

respect of conduct which leads a party to enter into an agreement may be set off against a claim for money due under that contract.[31] A set-off may be allowed against a claim by a seller for the balance of the purchase price in respect of damages for breach of a contractual warranty.[32] However, the application of these general principles turns upon the facts of a particular case.

[76] An element of circularity arises in the Sellers' submission on this aspect. The Sellers may have agreed to complete the SSA because the Buyers made an oral agreement in respect of sponsorship and undertook to sign a written sponsorship agreement. However, the SSA was only on the brink of settlement because of the Sellers' misleading conduct and undisclosed breaches of warranty. Had the truth been disclosed to the Buyers, there would have been no settlement and no sponsorship agreement would have been concluded.

[77] Circularity arises because of the closeness of the transactions. One might say that the Buyers have a basis in equity to impeach the Sellers' claim for an equitable set-off.

[78] Importantly, the Buyers did not include in their claim for damages a further diminution in the value of Earthpro's shares because they were induced to commit it at settlement to enter into a sponsorship agreement for $350,000. The corporate entity that was taken to have entered into the Sponsorship Agreement at the time of settlement did not bring a claim against the Sellers on the basis that the Sellers' misleading conduct caused it to enter that contract and assume a liability that would not have been assumed in the absence of the contravening conduct.

[79] Simply put, the Buyers' counterclaim does not include any component in respect of Earthpro's liability under the Sponsorship Agreement. In the circumstances, the connection between Earthpro's liability under the Sponsorship Agreement and the Sellers' liability to pay damages to the Buyers is not sufficient to impeach the Buyers' counterclaim. I decline to find an equitable set-off that would have the effect of reducing judgment on the counterclaim by $299,152 on account of the Sellers' damages claim for breach of the Oral Sponsorship Agreement.

Stay on enforcement and moneys paid into Court

[80] The Sellers seek a stay of enforcement of judgment to the extent of $350,000 being the amount of the Stock Proceeds Loan plus interest, pending finalisation of the order for an account of the proceeds of sale of the stock. They also seek a stay of an order for the sum of $202,208.07 plus accretions that were paid into Court on 14 March 2017 to be paid out to the defendants.

[81] At the end of the trial the parties seemed to proceed on the basis that the amount paid into Court would be paid to the side whose monetary claim exceeded the opposing side's claim.

[82] If the proceeds of the sale of stock had been able to be determined and been the subject of a money judgment in the Sellers' favour, then, for the reasons given, there would have been an equitable set-off. In the circumstances, it seems

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31 Ibid and the cases cited therein, including *Drane v Aqualyng Holdings* [2016] QSC 139 at [59].

32 Ibid.

appropriate to order a stay on enforcement to the extent of $350,000 plus interest pending finalisation of the account.

[83] The defendants characterise the Sellers' position as seeking a stay on enforcement of the Judgment and seek to invoke principles governing the granting of a stay pending appeal. That is a different issue, and if the Sellers decide to appeal they may seek a stay pending any appeal if they can meet the requirements that are established by authorities about what must be shown to deny the Buyers the fruit of their judgment.

[84] The Sellers seek a stay of an order releasing the funds held in Court to the Buyers in addition to a stay on enforcement to give effect to their equitable set-off in respect of the amount of the stock sale proceeds.

[85] It would be excessive to both deprive the Buyers access to the sum of $202,208.07 and also stay enforcement of the judgment to the extent of $350,000 in support of the Sellers' entitlement to set off the amount of the stock sale proceeds. The account cannot yield the Buyers more than $350,000. If I had ordered the $202,208.07 to remain in Court for possible use to meet the amount which will have to be accounted to the Sellers, I would have stayed enforcement to the extent of $150,000 plus interest. Instead, I will stay enforcement to the extent of $350,000 plus interest, pending the finalisation of the account I will order.

[86] No proper basis has been made out to stay the judgment pending an appeal which has yet to be instituted. The judgment should not be treated as provisional. Subject to the temporary stay that I will order to the extent of $350,000 plus interest, the Buyers are *prima facie* entitled to the fruits of the judgment. This includes the amount paid into Court.

[87] In summary, and subject to the calculation of interest, there will be:

1. Judgment for the first and second plaintiffs against the first defendant in the sum of $299,152, plus interest.

2. Judgment for the second and third defendants against the first and second plaintiffs in the sum of $1,646,798 plus interest, less the sum of $120,000 plus interest.

3. An order that the first defendant account to the plaintiffs for the net proceeds for which it is liable under clause 2.2 of the Deed dated 9 December 2015, being the proceeds that it received from the use or sale of the Stock particularised in paragraph 38 of the amended statement of claim filed 3 July 2018 (CFI 46), insofar as the Stock:

   (a) was at the Birkdale and German Church sites and used by the first defendant for specific projects or sold; and

   (b) had been purchased, and either paid by or invoiced to the first defendant prior to 26 November 2015.

4. A declaration that any amount ordered to be paid by the first defendant to the plaintiffs following the taking of the account referred to in paragraph 3 above, plus interest on that amount at the pre-judgment interest rates applicable from

time to time specified in Practice Direction 7 of 2013 from 23 December 2015, is to be set off against the Judgment in paragraph 2 above.

5. The enforcement of the Judgment in paragraph 2 above be stayed to the extent of the Stock Proceeds Loan of $350,000 plus interest, pending the finalisation of the account ordered in paragraph 3 above.

6. The sum of $202,208.07 paid into Court on 14 March 2017 plus any accretions be paid to the defendants.

Costs of the claim

[88] The plaintiffs' initial position in written submissions was that the defendants should be ordered to pay all the plaintiffs' costs of the claim because the plaintiffs enjoyed significant, even if not complete, success on the claim, such that the "event" favoured the plaintiffs. Their lack of success on some issues were submitted to not have occupied substantial evidence or much additional time in court.

[89] In oral submissions counsel for the plaintiffs favoured, instead, costs being ordered in respect of the claim in a distributive way, and for the same approach to be applied to costs of the counterclaim. A draft order proposed an order that the defendants pay 70 per cent of the plaintiffs' costs of and incidental to the claim assessed on the standard basis.

[90] The defendants submitted that costs on the claim should reflect the plaintiffs' success on certain issues, and the fact that certain claims were "dismissed". I have already noted that the plaintiffs succeeded on three major issues, namely the $120,000 owed to Mrs Davis as provided for in the 9 December Deed, an order for an account of the stock sale proceeds and their claim for damages for breach of the Sponsorship Agreement. The defendants' submission focused upon the plaintiffs' lack of success in relation to the claim for the settlement loan of $750,000 (which I take to mean the issue concerning the assignment of $400,000 of it), their claim for the "residual loan" of $130,000 (which related to the Lucy Compromise) and their claim for release of their retention amount of $200,000. The defendants argue that the plaintiffs advanced several distinct claims, some of which were successful and others which were unsuccessful. They contend that the plaintiffs would be entitled to costs on the successful parts and the defendants would be entitled to costs on the unsuccessful claims, such that the costs should balance each other out, with there being no order as to costs on the plaintiffs' claim.

Relevant principles

[91] The following relevant principles were conveniently summarised by Bond J in *Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (in liq) & Ors (No 2)*:[33]

> "(a) Costs of an application in a proceeding are in the discretion of the Court but follow the event unless the court orders otherwise: UCPR r 681.
>
> (b) The word "event" is to be approached distributively with the consequence that it refers to the event of an issue or of each separate issue, if there is more than one, in the proceeding.

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33 [2017] QSC 266 at [4].

(c) The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the Court considers that some other order is more appropriate.

(d) The circumstances which a Court might consider in determining whether some other order is more appropriate, and, if so, its form include:

(i) the preference to avoid the complicated form of assessment that would follow if different issues are determined in different directions as between the parties and costs were to be awarded in respect of issues in the technical sense;

(ii) the possibility of taking the approach of identifying heads of controversy or "units of litigation" (rather than what might technically be regarded as issues on the pleadings) as the criterion for awarding costs;

(iii) where a party has succeeded on one of two ways to the same outcome in a particular unit of litigation, a court might regard the costs of the second way on which that party failed as not so distinct conceptually or practically as to warrant making a costs order which reflected that party's failure on the second avenue of success; and

(iv) on the other hand, where, in a particular unit of litigation, there are multiple issues which are determined in different directions as between the parties, a court might form an overall impression having regard to the significance of the issues, the way they were determined, and the amount of time and cost spent on them, and order one party to pay a proportion of another party's costs as a way to reflect fairly the parties' comparative success or failure in the outcome which was obtained."

[92] It is appropriate to note that the separate nature of a proceeding on a claim on the one hand and on a counterclaim on the other is well-recognised. They are separate proceedings, but r 181(3) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") provides that a counterclaim must be tried at the trial of the plaintiff's claim, subject to an order for exclusion of the counterclaim under r 182. Jackson J observed in *Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd*:[34]

> "… in the context of a trial of a claim and counterclaim in a civil proceeding, where there may be a verdict and judgment in favour of one party on the claim and there may be a verdict and judgment in favour of the other party on the counterclaim, it has long been recognised that the judgment of the claim may be treated as one event and the judgment on the counterclaim may be treated as another event."

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34 [2015] QSC 52 at [12].

[93] This explains why neither party in this matter seeks a single order as to costs reflecting the relative success of the plaintiffs on their claim and the relative success of the second and third defendants on their counterclaim, and their overall success in both proceedings. Instead, there should be separate orders as to costs on the claim and on the counterclaim.

[94] Returning to the meaning of "event" and that it may refer to the event of an issue or of each separate issue, in *Speets Investment Pty Ltd v Bencol Pty Ltd (No 2)*[35] Bond J (with whom Sofronoff P and Callaghan J agreed) stated:

> "It is important to recognise, however, that it does not follow from the foregoing that the application of the general rule should usually lead to costs orders which reflect different results on separate events or issues. The Court is given a broad discretion and is specifically empowered to determine that some other order is more appropriate."

[95] *Speets* also confirmed[36] the general rule is that there must be "special or exceptional circumstances to warrant depriving a successful party of its costs and the mere fact that the successful party has been unsuccessful on some issues will ordinarily not be sufficient to do so".

[96] As Phillip McMurdo J stated in *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)*:[37]

> "… ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding **where that matter is definable and severable and has occupied a significant part of the trial**." (Emphasis added).

Application of these principles to the costs of the claim

[97] The plaintiffs' claim involved a number of elements, but the starting point should not be to default to an analysis of issues upon which they succeeded and issues upon which they did not. They enjoyed substantial success. Therefore, I do not accept that it is appropriate, as the defendants urge, to say that they succeeded upon three claims in respect of which they would be entitled to a costs order, and failed in respect of three issues in respect of which they should pay the defendants' costs, with a result that there be no order as to costs.

[98] The plaintiffs did not succeed in respect of the $400,000 component of the $750,000 settlement loan. This issue substantially involved questions of law, including the formalities of an assignment. The "residual loan" of $130,000 centred on whether Mr Lucy compromised his claim in that amount, and the plaintiffs succeeded on the facts on that issue in the face of the defendants' contention that there was no compromise. The residual loan issue therefore turned on whether the defendants, having not paid Mr Lucy the $130,000, should account for it to Mrs Davis. There were reasonable arguments both ways.

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35 [2021] QCA 39 at [14] ("*Speets*").
36 At [16].
37 [2009] QSC 64 at [8].

[99] As for the release of the retention amount that was paid into Court, the plaintiffs' claim for this amount was properly brought because they had viable claims. The defendants failed to account for the stock sale proceeds and still have not done so by the date of the trial. The retention amount might have been paid out to meet that amount. The plaintiffs had to pursue an order to obtain an account. That fact complicated these proceedings, including the recent argument about set-off and what ought to occur in relation to the moneys paid into Court.

[100] In all the circumstances, the costs order sought by the plaintiffs, that 70 per cent of their costs should be paid, is a reasonable one in a case in which issues could be defined.

Costs of the counterclaim

[101] The plaintiffs contend that they should be ordered to pay 70 per cent of the defendants' costs of and incidental to the counterclaim, rather than 100 per cent because of two matters.

[102] The first relates to allegations in relation to the 3 November Profit and Loss Statement and the allegation that there was a misleading overstatement of net profit by $1,452,372.23. For the reasons that the plaintiffs develop, this allegation was not proved. Instead, the defendants were principally misled because of the omission to disclose certain liabilities and invoices. The Court found that the defendants knew or ought to have known of the inclusion of certain draft invoices and the capitalisation of stock. The plaintiffs argue that these were matters within the power of the defendants to investigate, and that they did not adequately consider them before making the allegations which they did. The issue is submitted to have taken up substantial time at trial and, one might infer, in preparation for trial.

[103] The basis for reducing the defendants' costs on the counterclaim is that the relevant allegations should never have been advanced. The plaintiffs submit that the Court could order the defendants to pay the costs of that issue, but it would be simpler to discount the defendants' costs to 70 per cent. This would mean that the plaintiffs were not required to pay the defendants' costs of that issue, as well as account for a nominal further discount to set off the plaintiffs' own costs on that issue.

[104] The second matter advanced by the plaintiffs is that the defendants did not succeed on a claim for a *quantum meruit* for work done at the plaintiffs' property, which related to the Sponsorship Agreement. I find that matter inconsequential. The matter did not take up much time and it was, essentially, a defensive matter in the event no sponsorship agreement was found. However, I found there was an agreement and that works had been done under it.

[105] The defendants oppose a reduction to 70 per cent of their costs on the counterclaim. They invoke the principle that a party who is successful on a pleaded cause of action ordinarily is entitled to its costs.[38]

[106] As to the 3 November Profit and Loss Statement and the Buyers' knowledge of certain amendments to the MYOB accounts, these issues only arose early in the trial

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[38] Citing *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* [2008] VSCA 115 at [13]-[15].

as a result of my granting leave to amend. The leave argument occupied a large amount of time on the first day of the trial.

[107] According to the defendants, they were entitled to rely upon the differences between the MYOB files and infer that they had been misled to the extent disclosed. A further point is that there is a difference between someone like Mr O'Brien knowing things or being in a position to know them.

[108] Counsel for the defendants opposed any discount, but submitted in the alternative that any discount would be in the order of 10 per cent, not 30 per cent.

[109] In my view, there is force in the defendants' submissions concerning the late pleading and development of issues concerning the defendants' knowledge of respects in which the MYOB data had been altered by matters about which they knew or ought to have known. Nevertheless, the "helicopter view" on misleading conduct that was derived from the differences between two sets of MYOB records, and pleaded, tended to distract from a proper consideration of the various respects in which the 3 November Profit and Loss Statement was inaccurate and misleading. There should be some reflection of the substantial costs and time involved in the plaintiffs' preparation to meet these issues and their success upon them.

[110] That fact does not detract greatly, however, from the principle that the second and third defendants succeeded upon their cause of action for misleading conduct and breach of warranty and obtained substantial compensation for their successful claim on a "no transaction" basis. They additionally succeeded in proving that the 3 November Profit and Loss Statement was misleading.

[111] I should mention that the first defendant failed on its counterclaims. That should be reflected to some extent in the costs orders. However, it was a defendant in the original proceeding and its claims for an indemnity or breach of contract depended upon legal arguments concerning the meaning and scope of the indemnity clauses and the particular warranties which it might have claimed to have the benefit, despite not being a party to the SSA.

[112] In all the circumstances, I consider the most appropriate order for costs on the counterclaim is that the plaintiffs pay 90 per cent of the defendants' costs of and incidental to the counterclaim assessed on the standard basis.

Who should be ordered to pay the plaintiffs' costs of the claim?

[113] A final issue is whether (as the plaintiffs seek) all of the defendants should be ordered to pay 70 per cent of the plaintiffs' costs of the claim or (as the defendants submit) those costs should be ordered only against the first defendant against whom the claims were brought. The defendants argue that to order the second and third defendants to pay those costs resembles the making of a costs order against a non-party in circumstances that do not engage the principles discussed in *The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd & Ors*[39] and *Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd & Ors (No 2)*.[40]

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39 [2009] QSC 84 at [36]-[43].

40 [2011] QSC 21 at [14]-[15].

[114] The plaintiffs seek to deflect the characterisation as involving an order for costs against a non-party in circumstances in which all of the defendants were defending the claim.

[115] In my view, the proper approach is to order costs against the party against whom the claims were made, and not against other defendants. The only party against whom the successful claims (as well as the unsuccessful claims) were made was the first defendant. Therefore, the appropriate order for costs on the claim is that the first defendant pay 70 per cent of the plaintiffs' costs of and incidental to the claim to be assessed on the standard basis.

Formal orders

[116] I will allow the parties some time to make appropriate calculations of interest to reflect the date of judgment and to reflect my conclusions on the availability of set-off, and for a stay on execution of the judgment in favour of the second and third defendants to the extent of $350,000 plus interest pending the taking of an account of the stock sale proceeds which, if a monetary judgment for the amount to be accounted for, would have been the subject of an equitable set-off.

[117] A draft form of judgment is annexed to these reasons.