

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : CIVIC VIDEO PTY LTD -v- PATERSON
[No 3] [2014] WASC 321 (S)

CORAM : CHANEY J

HEARD : 13 OCTOBER 2014 & ON THE PAPERS

DELIVERED : 23 OCTOBER 2014

FILE NO/S : CIV 2144 of 2008

BETWEEN : CIVIC VIDEO PTY LTD
Plaintiff

AND

ROBERT HENRY PATERSON
First Defendant

MALCOLM THOMPSON
Second Defendant

BARBARA THOMPSON
Third Defendant

Catchwords:

Interest - Rate of interest - Whether pre-judgment interest should be calculated at contractual rate where that rate not pleaded at trial - Interest on judgment

Costs - Calderbank offer made by defendants - Whether unreasonable for plaintiff to reject Calderbank offer - Whether Magistrates Court or Supreme Court costs determination applies to award of costs - Whether there should be apportionment of costs where plaintiff successful against second and third defendants but failed against first defendant

Legislation:

Civil Judgments Enforcement Act 2004 (WA)

District Court of Western Australia Act 1969 (WA)

Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2008 (WA)

Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2010 (WA)

Rules of the Supreme Court 1971 (WA)

Supreme Court Act 1935 (WA)

Result:

Judgment entered and costs orders made

Category: B

Representation:

Counsel:

Plaintiff	:	Mr I R Pike SC
First Defendant	:	Mr A Metaxas
Second Defendant	:	Ms M-L Coulson
Third Defendant	:	Ms M-L Coulson

Solicitors:

Plaintiff	:	Marque Lawyers
First Defendant	:	Metaxas & Hager
Second Defendant	:	Coulson Legal
Third Defendant	:	Coulson Legal

Cases referred to in judgment:

Amaca Pty Ltd v Patricia Margaret Hannell [2007] WASCA 158 (S)

Calderbank v Calderbank [1975] 3 All ER 333

Civic Video Pty Ltd v Paterson [No 3] [2014] WASC 321

Fire & All Risks Insurance Co Ltd v Callinan (1978) 140 CLR 427

Ford Motor Co of Australia Ltd v Lo Presti [2009] WASCA 115

Haines v Bendall [1991] HCA 15; (1991) 172 CLR 60

McKay v Commissioner of Main Roads [No 7] [2011] WASC 223 (S)

Michael Kellaway International Pty Ltd v Shark Bay Airport Pty Ltd
(Unreported, Supreme Court of Western Australia, Library No 980302,
25 March 1998)

Vella v Ivanovski (1984) WAR 8

1 **CHANEY J:** On 15 September 2014, I delivered reasons for decision in
this matter following a five-day trial.¹ These reasons should be read in
conjunction with my earlier reasons.

2 Following the delivery of my earlier reasons, the matter was
adjourned to enable the parties to make submissions as to the terms of the
judgment to be entered, and in particular in relation to the matters of
interest and costs.

3 As between the plaintiff and the first defendant, there was agreement
as to the orders which should be made, namely that there should be orders
as follows:

1. The plaintiff's claim against the first defendant be dismissed.
2. The plaintiff to pay the first defendant's costs of the action,
including reserved costs, but excluding those costs reserved by
Master Sanderson in the order made on 13 September 2012 and
the costs reserved by Registrar Whitbread on 7 June 2012.
3. The first defendant pay the plaintiff 75% of the costs reserved by
Master Sanderson in the order made on 13 September 2012 and
the costs reserved by Registrar Whitbread on 7 June 2012.

4 Those orders will be made.

5 As between the plaintiff and the second and third defendants, several
issues arose which require determination. They are:

- i. Upon what basis should interest be awarded on the
damages assessed?
- ii. What order for costs is appropriate having regard to a
Calderbank offer made on 20 June 2010 which was
rejected by the plaintiff?
- iii. Should there be an apportionment of any costs payable by
the second and third defendants to the plaintiff?
- iv. What scale should apply to any costs payable by the
second and third defendants to the plaintiff?

¹ *Civic Video Pty Ltd v Paterson [No 3]* [2014] WASC 321.

- 6 In relation to the third party proceedings brought by the first defendant against the second and third defendants, the second and third defendants did not oppose an order that they pay the first defendant's costs of the third party proceedings, including reserved costs, and the costs incurred by the first defendant for the fees charged by Hall Chadwick for expert reports, to be taxed. There should be an order in those terms.

The claim for interest

- 7 The plaintiff sought interest on the amount of damages assessed, namely \$36,300, calculated by reference to cl 5.5 of the franchise agreements which reads:

Any amounts owing by the Franchisee to the Franchisor or its Related Bodies Corporate (pursuant to this agreement or otherwise) which have been outstanding for 60 days or more or which were not invoiced or paid because the Franchisee failed to report or unstated the Total Turnover or Quarterly Turnover will bear interests accruing daily at a rate equal to 2% above the monthly corporate overdraft reference rate (or equivalent) then offered by the Commonwealth Bank in Sydney.

- 8 Clause 5.5 of the franchise agreements was not pleaded in the Statement of Claim. A claim for interest 'in accordance with s 32 of the *Supreme Court Act 1935* (WA)' was included in the prayer for relief. No evidence was led at trial as to the monthly corporate overdraft reference rate offered by the Commonwealth Bank in Sydney, nor was there any reference to cl 5.5 during the course of the hearing. In support of the claim for interest, the plaintiff filed an affidavit of Nathan Thomas Mattock, sworn 13 October 2014, who is a solicitor acting for the plaintiff in these proceedings, which attached a list of interest rates which he said were given to him by an employee of the business banking division of the Commonwealth Bank in response to his request for the bank's monthly corporate overdraft rate. The list is headed 'Commonwealth Bank of Australia Monthly Corporate Overdraft Reserve Rate'. Whether that is the same thing as 'the monthly corporate overdraft reference rate' is not explained.

- 9 An award of interest up to the date of judgment pursuant to s 32 of the *Supreme Court Act* is an award in the nature of damages.² Hence, the award of interest is compensatory in character.

- 10 There is no basis to conclude that interest calculated at a rate of 2% above the figures contained in Mr Mattock's affidavit (which ranged from

² *Haines v Bendall* [1991] HCA 15; (1991) 172 CLR 60, 66 (Mason CJ & Dawson, Toohey & Gaudron JJ citing *Fire & All Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427, 431).

8.89% to 11.67% before the 2% is added) represents fair compensation for the plaintiff having been held out of its damages since the date of the breach. I do not understand the plaintiff to contend that it has a contractual entitlement to interest on the damages, but rather only that the rate under cl 5.5 of the franchise agreements should be applied, as a matter of discretion, to interest awarded under s 32. In my view, to award interest at that rate would be to over compensate the plaintiff. If, contrary to my understanding, the plaintiff now asserts a contractual entitlement to interest at that rate, I would reject that contention because no claim of a contractual entitlement to interest was pleaded, nor, at any point, mentioned during the course of the trial.

11 In my view, interest should be allowed on the sum of \$36,300 assessed at the rate of 6% per annum pursuant to s 32 of the *Supreme Court Act* from 3 October 2006 up until the date of judgment. I calculate that interest at \$17,543.

12 The plaintiff also sought an order that the second and third defendants pay interest on the total judgment amount (including interest to the date of judgment) from the date of judgment until payment calculated in accordance with cl 5.5 of the franchise agreements. Interest on a judgment sum is required to be paid by s 8(1) of the *Civil Judgments Enforcement Act 2004* (WA). It is to be paid at the rate prescribed by the regulations or at the rate set by the Court in the judgment or by order after the judgment is given. For the reasons that I would not award interest at the rate provided for in cl 5.5 of the franchise agreements in relation to pre-judgment interest, I would not set that rate as the rate of interest payable on the judgment sum. It is sufficient that interest on the judgment sum be paid at the rate prescribed for the purposes of the *Civil Judgments Enforcement Act*.

The Calderbank offer

13 I assessed the damage suffered by the plaintiff as a result of the second and third defendants' breach of contract in the sum of \$36,300. On 28 June 2010, the first, second and third defendants made a joint offer, without prejudice save as to costs, to the plaintiff to settle the proceedings. The offer was that the defendants would pay the plaintiff \$50,000 in full and final settlement inclusive of costs between the plaintiff and all defendants. The offer specified that 'for the purposes of assessing the reasonableness of this offer, we estimate that your client's taxed costs to date in the action should it be successful may not exceed \$15,000'. The letter specified that it would be relied upon on the question of costs and

that indemnity costs would be sought from the date of the offer if the plaintiff was successful but did not recover an amount greater than the offer. The offer was expressly stated to be on the basis stated in *Calderbank v Calderbank*³ and was open for acceptance within 14 days, that is, until 12 July 2010.

14 The offer was not accepted. It is necessary now to consider whether the outcome of the action is less favourable to the plaintiff than the outcome had it accepted the offer.

15 According to Mr Mattock, between the time that his firm, Marque Lawyers, took over the conduct of the matter in September 2009, until the date of the Calderbank offer, the plaintiff had incurred \$53,309.78 in fees on a solicitor/client basis, including counsel's fees and disbursements. He asserts that the costs incurred by the plaintiff, if taxed, 'far exceeded the \$14,000 difference between the Calderbank offer and the judgment amount'. No breakdown of the fees is provided. In particular, it is not possible to ascertain the extent to which the fees relate to the claim against the second and third defendants as against the claim against the first defendant (who was the only defendant from the time that the writ was issued on 10 September 2008 until the second and third defendants were joined in the action on 14 October 2009).

16 In comparing the offer which was made as against the ultimate outcome of the proceedings, it must also be borne in mind that acceptance of the offer would have avoided a liability which the plaintiff now has for the costs of the first defendant against whom its claim failed. As previously mentioned, the first defendant had been the only defendant for the first 13 months of the action and the costs of the first defendant up until June 2010 might well have been substantial. If the benefit of avoiding liability to the first defendant (had the Calderbank offer been accepted) is brought to account, the value of the offer for comparison purposes might be seen to be significantly more than \$50,000. These considerations illustrate, however, the difficulty in assessing the comparative value of an offer where, like this one, the offer is inclusive of costs.

17 The outcome of the trial was that the plaintiff is entitled to \$36,300 together with interest at the rate of 6% from 3 October 2006. It is not entitled to recover any of its costs so far as they relate to the claim against the first defendant. It is liable to pay the first defendant's costs of the action.

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

18 Had it accepted the offer, it would have, in effect, received its damages of \$36,300 with interest at the rate of 6% from 3 October 2006 to 12 July 2010, which I calculate at \$8,228. It would also have received \$5,472 attributable to the second and third defendants' costs. It would not have had to pay the first defendant's costs between the issue of the writ on 10 September 2008 and 12 July 2010.

19 Whether or not, when looking at the position as at July 2010, in simple monetary terms the plaintiff would have achieved an outcome more favourable than it has achieved by judgment is difficult to discern. That is because there is no basis upon which I can reliably assess the net costs position under the offer. All that is known is that the plaintiff had incurred \$53,309 in costs of Mr Mattock's firm up to the date of the offer. How much of that would have been recoverable as against the second and third defendants on a taxed basis as at 12 July 2010 is impossible to say. How much would have been payable by the plaintiff to the first defendant for its costs up to 12 July 2010 is also impossible to say. It is, however, reasonable to conclude that the offer is very close to the figure which would have been payable if, as at July 2010, liability were determined in accordance with my findings in the action.

20 However, the position is clearer if regard is had to the consequences of the plaintiff's decision to reject the offer and take the matter to trial, a process which in the end involved a further four years of litigation which culminated in a five-day trial involving senior counsel flown from Sydney. It is reasonable to assume that the plaintiff incurred very substantial legal and other costs far in excess of the \$53,000 it had already spent by July 2010. Undoubtedly, a significant percentage of those costs would not be recoverable on a party/party basis, and none of those costs could be recoverable insofar as they relate to the claim against the first defendant. The first defendant undoubtedly incurred very substantial legal costs after July 2010, the recoverable portion of which the plaintiff will now have to pay. To the extent that interest is recoverable after 12 July 2010, that is interest which represents the inability of the plaintiff to utilise the funds and therefore has not put the plaintiff in a better position than had it accepted the offer and had the use of \$50,000 from July 2010.

21 Having regard to those factors, I am satisfied that, by not accepting the offer and choosing instead to prosecute the action to trial, the plaintiff has achieved a less favourable outcome than had it accepted the offer. Measured against the outcome which would have been available had it accepted the offer, the plaintiff cannot be regarded as a successful party.

22 The competing positions of the plaintiff and the second and third defendants are that the plaintiff seeks an order that the second and third defendant pay its costs of the action (in relation to its claim against the second and third defendants), whereas the second and third defendants seek an order that they pay a portion of the plaintiff's costs up until 12 July 2010, and thereafter the plaintiff their costs of the action on an indemnity basis, or alternatively on a party/party basis.

23 The principles governing the order of indemnity costs in relation to Calderbank offers were explained by Buss JA, with whom Wheeler JA agreed, in *Ford Motor Co of Australia Ltd v Lo Presti*,⁴ where his Honour said:

A Calderbank offer will not justify an award of indemnity costs unless its rejection was unreasonable. See *Jones v Bradley (No 2)* [2003] NSWCA 258 [7] - [9]; *Herning v GWS Machinery Pty Ltd (No 2)* [2005] NSWCA 375 [4]; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298; (2005) 13 VR 435 [23]; *Berrigan Shire Council v Ballerini (No 2)* [2006] VSCA 65 [10]; *Ofria v Cameron (No 2)* [2008] NSWCA 242 [20].

All of the relevant facts and circumstances must be considered in determining whether a party's rejection of a Calderbank offer was unreasonable. See *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 [37]; *Jones v Bradley (No 2)* [7] - [9]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 [46]; *Hazeldene's Chicken Farm* [23]; *Berrigan* [10]; *Ghunaim v Bart (No 2)* [2006] NSWCA 82 [23].

The mere fact that the recipient of a Calderbank offer is ultimately worse off than he or she would have been had the offer been accepted, does not mean that its rejection was unreasonable. See *SMEC* [37].

24 As the assessment of 'unreasonableness', Buss JA said:⁵

Australian intermediate courts of appeal have disapproved the view expressed by Rolfe J in *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425 that unreasonableness is, on the face of it, to be found in the rejection by an offeree of a Calderbank offer which is not bettered on judgment (451). It has been established that there is no presumption of an entitlement to an award of indemnity costs in this situation. The unreasonableness of the rejection of the offer is not determined by a presumption. Rather, it depends on the circumstances of the particular case. The decision in *Multicon* was overruled in *Jones v*

⁴ *Ford Motor Co of Australia Ltd v Lo Presti* [2009] WASC 115 [16] - [18].

⁵ *Ford Motor Co of Australia Ltd v Lo Presti* [2009] WASC 115 [31].

Bradley (No 2) [6] - [9]. See also the observations in *Leichhardt Municipal Council* [56].

25 I do not consider that rejection of the 28 June 2010 offer by the plaintiff can be said to be unreasonable. There are several reasons for that conclusion. They are:

- (i) I accept that the calculation of the amount of damages which I undertook in arriving at the figure of \$36,300 involved, necessarily, findings of fact, having regard to all of the evidence after a five-day trial, and the adoption of various figures for calculation purposes, such as a discount rate and the chance of earning franchise fees. It certainly could not be said to be unreasonable that the plaintiff failed to apply those factors in the assessment of its prospects of success in 2010. The assessment of unreasonableness must be made without the benefit of hindsight and without adopting the judgment sum ultimately awarded as a yardstick to measure reasonableness.⁶
- (ii) Although the plaintiff had not, as of June 2010, particularised its claim, it is apparent that the plaintiff saw its entitlement as being the full amount of franchise fees that would have been payable over the terms of the Franchise Agreements. It had not yet obtained expert advice as to the value of its claim.
- (iii) The offer was inclusive of costs. At the time of the offer, the plaintiff had incurred substantial costs which would have made the offer appear less attractive than, in the final event, it can now be seen to have been.

26 The observations made in *Lo Presti* were, of course, made in the context of a case where the successful party at trial, the plaintiff, was the offeror. Mr Lo Presti was awarded damages which exceeded the amount he had offered to accept as a settlement. Thus, the plaintiff was unarguably entitled to his costs on a party/party basis. The only question was whether, by reason of an unreasonable refusal to accept the plaintiff's offer, the defendant should be liable to pay costs from the date of the offer on an indemnity basis. That is different from the situation in this case. In this case, the offeree, that is, the plaintiff, was successful at trial in its claim against the second and third defendants, and, putting aside the Calderbank offer, would usually be entitled to its costs on a party/party

⁶ *Ford Motor Co of Australia Ltd v Lo Presti* [2009] WASCA 115 [89] (Buss JA).

basis as against the second and third defendants. There are, therefore, several possibilities in relation to costs. They are:

- i. The position advocated by the plaintiff, that the second and third defendants pay the plaintiff's costs to be taxed on a party/party basis.
- ii. The position advocated by the second and third defendants, that the second and third defendants pay the plaintiff's costs up until 12 July 2010 to be taxed on a party/party basis and the plaintiff pay the second and third defendant's costs on an indemnity basis as from 13 July 2010.
- iii. The alternative position advocated by the second and third defendants, that the second and third defendants pay the plaintiff's costs taxed on a party/party basis up until 12 July 2010, and the plaintiff pay the second and third defendants' costs taxed on a party/party basis as from 13 July 2010.
- iv. A further possible outcome, that the second and third defendants pay the plaintiff's costs to be taxed on a party/party basis up until 12 July 2010, and, thereafter, there be no order for costs.

27 In order to consider the appropriate exercise of the discretion to award costs, it is necessary to consider the relevance of the failure to accept the Calderbank offer on the exercise of that discretion.

28 The relevance of a failure to accept a Calderbank offer to the general discretion as to costs was discussed by Beech J in *McKay v Commissioner of Main Roads [No 7]*⁷ where his Honour said:

The breadth of the court's discretion ensures that the court retains the maximum flexibility to meet the justice of the case. The character of what animates the exercise of the exceptional power to award indemnity costs explains why the courts require a finding of unreasonable rejection before indemnity costs are available based on a Calderbank offer. Those considerations do not apply to using a Calderbank offer to order party-party costs. I do not think the breadth of the costs discretion should be or is constrained by a requirement of finding unreasonable rejection as a prerequisite to a party-party costs order based on a Calderbank offer.

⁷ *McKay v Commissioner of Main Roads [No 7]* [2011] WASC 223 (S) [127] (Buss JA).

29 His Honour also said at [96]:

On that view of things, I think it is clear that the power to use a Calderbank offer to sustain a party-party costs order is not conditioned on a finding that the rejection of the offer was unreasonable, as judged at the time of the offer. It would not seem to me to make sense that the offeror is, from the date of the offer, the successful party if and only if rejection of the offer were unreasonable.

30 In *McKay*, Beech J gave an example which he considered reflected a case where justice requires that a Calderbank offer should lead to party-party costs in favour of the offeror, but where indemnity costs would be wholly inappropriate and would be unavailable as a proper exercise of discretion. He said at [124]:

Imagine an action for damages where the defendant denies it is liable to the plaintiff and, in any event, there is a dispute between the parties about the amount of loss and damage. Both parties have a strongly arguable case based on apparently cogent evidence. The defendant makes a Calderbank offer in a sum substantially more than the amount recoverable on the defence case if it is liable to the plaintiff, and substantially less than the plaintiff's claim. At trial, the plaintiff establishes liability, but is only awarded damages based on the defendant's assessment of loss and damage. In such a case, the plaintiff would be the 'successful' party for the purposes of O 66 r 1(1), as it succeeded in recovering damages from the defendant. By refusing the Calderbank offer, the plaintiff put the defendant to the costs of a trial that did not result in the plaintiff obtaining a better outcome than was offered by the defendant. In those circumstances, a party-party costs order in favour of the defendant from the date of the offer may well be appropriate.

31 This case closely fits that example, save perhaps that, in this case, the damages assessed at trial were not based on the defendants' assessment (which was that the plaintiff had suffered no damages). Damages were assessed, however, on the basis that I accepted the defendants' contention that franchise fees would not have continued to be paid because the second and third defendants would have closed the businesses. The second and third defendants were thus substantially successful on that central issue with the result that the damages are far closer to the defendants' assessment than to the plaintiff's assessment, which was \$238,416.

32 An order for payment of costs is designed to meet the justice of the case. In this case, the plaintiff chose to reject an offer which, for the reasons outlined above, would have left it better off than it is following trial, and thereby subjected all the parties to significant cost. Its case at

best claimed damages of \$238,416. It was readily apparent that the damages would be reduced if any of the many challenges to the assessment were successful. There can be little doubt that the costs of all parties to the case would far exceed the amount in dispute. The need for proportionality between the costs of proceedings and the value and importance of the subject matter in dispute is now well accepted in this Court.⁸

- 33 While I accept that, when the offer was made, precise calculation of the damages that might be recovered was difficult, this is a case where the plaintiff has chosen to continue long and expensive litigation, thus putting the defendants to substantial expense and resulting in an outcome less favourable to it than had the Calderbank offer been accepted. In those circumstances, I consider that the justice of the case requires that there be an order that the plaintiff pay the second and third defendants' costs after 12 July 2010 to be taxed on a party/party basis. The second and third defendants should pay the plaintiff's costs up until 12 July 2010 on the basis discussed below.

The scale to be applied

- 34 The second and third defendants contend that, to the extent that they are required to pay the plaintiff's costs, those costs should be taxed on the basis of the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2008* and the *Legal Practitioners (Magistrates Court) (Civil Jurisdiction) Determination 2010*. The basis of that contention is the provisions of O 66 r 17(1) of the *Rules of the Supreme Court 1971* (WA). The rule provides:

17. Cases that Magistrates Court could have decided, costs in

- (1) If an action is brought in the Supreme Court which could have been brought in the Magistrates Court without the special consent of the defendant, the plaintiff shall recover no greater sum by way of costs than he could have recovered had the action been brought in the Magistrates Court, unless the Court certifies that by reason of some important principle of law being involved, or of the complexity of the issues or of the facts, the action was properly brought in the Supreme Court.

- 35 The civil jurisdiction of the Magistrates Court extends to claims up to \$75,000. The damages awarded to the plaintiff were \$36,300. Accordingly, the second and third defendants contend that this is an action

⁸ *Rules of Supreme Court 1971* (WA), O 1 r 4B(1)(e), 4B(2)

which could have been brought in the Magistrates Court without the special consent of the defendant, and O 66 r 17(1) should apply.

36 I do not accept that contention.

37 In *Michael Kellaway International Pty Ltd v Shark Bay Airport Pty Ltd* (Unreported, Supreme Court of Western Australia, Library No 980302, 25 March 1998), Kennedy J considered the provisions of s 74(2)(b) of the *District Court of Western Australia Act 1969*. That section was (prior to its amendment) drawn in terms which, relevantly, reflected the terms of O 66 r 17(1). Citing *Vella v Ivanovski* (1984) WAR 8, Kennedy J identified the central test as whether the plaintiff in the case, when instituting proceedings, might reasonably have been expected to recover an amount in excess of the maximum of the jurisdiction of the Local Court. Both the second and third defendants and the plaintiff accepted that that is the appropriate test.

38 The plaintiff in this case wished to pursue a claim for damages well in excess of the jurisdiction of the Magistrates Court. It could not have instituted its claim for that amount in the Magistrates Court. Although the damages ultimately awarded to the plaintiff are below the amount of the civil jurisdiction of the Magistrates Court, it was not unreasonable for the plaintiff not to have commenced and pursued its action in the Magistrates Court given the claim which it wished to pursue. Order 66 r 17(1) does not, therefore, apply in the present circumstances.

39 The costs to be payable by the second and third defendants to the plaintiff should be taxed on the basis applicable in this Court.

40 I might observe in passing that this is clearly an action which should have been brought in the District Court rather than the Supreme Court. But since there is no distinction as to the costs determinations applicable in the Supreme Court and the District Court, that is not a matter of any significance for present purposes.

Apportionment

41 The second and third defendants contend that there should be an order that they pay 66% of the plaintiff's costs of the action up to and including 12 July 2010. That apportionment is suggested in order to take into account that portion of the plaintiff's costs to 12 July 2010 which relate to the claim against the first defendant. It is submitted that it is a more convenient approach to the assessment of costs to allocate a fixed proportion of the total costs in that way, rather than to engage in a process

of identification as to the extent to which individual items of costs are attributable to either the claim against the first defendant or the claim against the second and third defendants.

42 The plaintiff accepts that the second and third defendants should only be required to pay those costs which relate to the claim against them. The issue for determination is, therefore, whether adoption of a percentage reduction of total costs is preferable to a more precise calculation having regard to individual costs items.

43 The second and third defendants refer to *Amaca Pty Ltd v Patricia Margaret Hannell*⁹ where the Court of Appeal, dealing with the question of costs orders where the successful party has failed on certain issues which have increased the costs of action, suggested that the exercise of that power should be approached broadly, and as a matter of impression, and without an attempt at 'mathematical precision'.

44 Although that observation was made in a context of apportionment of costs in relation to issues, I accept that a similar approach might be appropriate in cases where apportionment of costs is occurring by reason of success against one party but failure against another. However, in this case, where the time period in respect of which costs are to be assessed is relatively short, and costs were incurred by the plaintiff for about half of that period when the second and third defendants had not been joined as defendants, it is preferable not to simply apportion some percentage of the plaintiff's total costs as representing costs in relation to the claim against the second and third defendants respectively. No justification for the figure of 66% was proffered and, in the circumstances of this case, I am satisfied that a fairer and more just outcome can be achieved by a more precise identification of the costs said to be incurred in relation to the claim against the second and third defendants. Accordingly, I prefer the approach suggested by the plaintiff, namely, that the order should make it clear that the costs up until 12 July 2010 to be recovered from the second and third defendants are only those costs which relate to the claim against those defendants.

The appropriate orders

45 For the foregoing reasons, the orders which should be made are as follows:

1. The plaintiff's claim against the first defendant be dismissed.

⁹ *Amaca Pty Ltd v Patricia Margaret Hannell* [2007] WASCA 158 (S) [6].

2. The plaintiff do pay the first defendant's costs of the action, including reserved costs, but excluding those reserved costs reserved by Master Sanderson on 13 September 2012 and the costs reserved by Registrar Whitbread on 7 June 2012.
3. The first defendant do pay the plaintiff 75% of the costs reserved by Master Sanderson on 13 September 2012 and the costs reserved by Registrar Whitbread on 7 June 2012.
4. There be judgment for the plaintiff against the second and third defendants in the sum of \$53,843, including the sum of \$17,543, being interest from the date of the termination of the second highway franchise agreement on 3 October 2006 to the date of judgment, calculated at the rate of 6% per annum.
5. The second and third defendants do pay the plaintiff's costs up to and including 12 July 2010 insofar as they relate to the claim against the second and third defendants, including reserved costs, to be taxed in accordance with determinations applicable to proceedings in the Supreme Court, if not agreed.
6. The plaintiff do pay the second and third defendants' costs of and incidental to the action as from and including 13 July 2010, to be taxed if not agreed.
7. The second and third defendants to pay the defendant's costs of the third party proceedings, including reserved costs, and the costs incurred by the first defendant for the fees charged by Hall Chadwick for expert reports, to be taken.
8. There be no order as to costs in relation to the applications for costs of the action.